

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 65/09  
5131461

BETWEEN

MURRAY MORGAN  
Applicant

AND

DOUG HOOD MINING  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Tony Wilton, Counsel for Applicant  
Peter Macdonald, Advocate for Respondent

Investigation Meeting: 26 March 2009

Submissions received: 6 April 2009 from Applicant  
20 April 2009 from Respondent

Determination: 20 May 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Murray Morgan was employed as a plant operator by Doug Hood Mining Limited (Doug Hood) at its Stockton coalmine near Westport from where it provides mine operation services to Solid Energy for four and a half years.

[2] At or about 3.50am on the morning of 17 June 2008, Mr Morgan was operating an EX1900 excavator when the excavator over-balanced and rolled over, coming to rest on the pit floor. Mr Morgan was not seriously hurt. The incident resulted in substantial damage to the EX1900 excavator with repairs required costing approximately \$1m and a loss of revenue to Doug Hood while the excavator was under repair.

[3] An accident investigation was undertaken into the incident by Doug Hood. On 1 July 2008, Mr Morgan's employment was terminated for driver error in relation to the incident.

[4] Mr Morgan says that his dismissal was unjustified because the procedure adopted by Doug Hood in investigating his actions was flawed and because a fair and reasonable employer would not have reached a conclusion in the circumstances that he was guilty of serious misconduct that justified summary dismissal. Mr Morgan seeks reinstatement to his position with Doug Hood, reimbursement of lost wages, payment of compensation and costs.

[5] Doug Hood does not accept that the dismissal of Mr Morgan was unjustified. It says that the dismissal was justified because the extent and scope of the damage was as a direct result of Mr Morgan's own actions and/or inactions and that its disciplinary investigation was not unfair and was thorough in nature.

### **Section 103A of the Employment Relations Act 2000**

[6] The statutory test of justification set out in s.103A of the Employment Relations Act 2000 requires that the Authority determine, on an objective basis, from the viewpoint of a neutral observer, the actions of Doug Hood and consider at all stages of the dismissal process whether they were what a fair and reasonable employer would have done in all the circumstances. (*Air New Zealand Ltd v. Andrea Hudson* [2006] ERNZ 401 applied.)

### **The issues**

[7] The issues for the Authority in determining this matter are:

- Was there a full and fair investigation undertaken by Doug Hood that disclosed conduct that was capable of being considered serious misconduct?
- Was the decision to dismiss justifiable in all the circumstances?
- If it is found that the decision to dismiss was not justifiable, then what remedies should be provided, is reinstatement practicable and are there issues of mitigation and contribution?

**Was there a full and fair investigation undertaken by Doug Hood that disclosed conduct that was capable of being serious misconduct?**

[8] After the roll-over of the EX1900 on 17 June 2008, Doug Hood asked the Health Safety and Training Manager, Brian Davies, to lead a team to investigate the incident. The other team members appointed to investigate the accident were Paul McBreen, the Technical Services Manager at Doug Hood, Cary Collins, the Health and Safety Superintendent at Doug Hood, and Charlie Wanoa, the Production Superintendent. I shall refer to this team as the accident investigation team.

[9] The role of the accident investigation team was to establish contributing factors and required remedial action in respect of the EX1900 incident. The accident investigation team was not specifically required to make any recommendations regarding disciplinary action in respect of Mr Morgan.

[10] Although Mr Morgan did not sustain serious injury following the roll-over of the excavator, he was initially unable to exit the cab because his right hand was trapped between the armrest and the control lever. With the assistance of other employees he was able to be released from the cab. Mr Morgan was then taken to the Solid Energy site health nurse where he was checked for injuries and underwent a drug and alcohol test. The result of the drug and alcohol test was negative.

[11] At 6.15am on 17 June 2008, the accident investigation team conducted an initial interview with Mr Morgan. Mr Morgan was represented by Neville Royal, the NZ Engineering Printing and Manufacturing Union (the Union) delegate. There were two other interviews undertaken by the accident investigation team with Mr Morgan on 18 June 2008 at 8am and 19 June 2008 at 12.55pm. These interviews were relied on by Doug Hood as the process by which Mr Morgan was able to give explanations with respect to his conduct. From the date of the incident, Mr Morgan was on paid leave and he did not return to work before his employment was terminated on 1 July 2008.

[12] Mr Morgan was consistent in his answers to the accident investigation team about what he believed had occurred just before the excavator rolled over. Mr Morgan said that whilst he was having a crib break at 2.30am, his acting supervisor, John Murray, set the excavator up on a new working bench. After his break, Mr Morgan walked around the new bench with Mr Murray who explained what was required to finish the job. Mr Morgan considered the new bench to be a

reasonable set up although in his second interview with the accident investigation team he did refer to some concern about the shale base from which he was loading. Mr Morgan is recorded as saying in the second interview that he *assumed the supervisor knew, through his experience, that the set up was okay* and that *You just go with the instructions.*

[13] Mr Morgan worked on the bench from between about 3.10am until the incident. He was preparing to walk off the bench, having just loaded the last truck. He said in preparation for doing that he slewed (turned the body of the digger) to the left in order to put the bucket down for walking off the bench. Mr Morgan said in his second interview with respect to walking off the bench that he stopped to ascertain the position of the tracks but that the tracks were still moving and seemed to be sliding to the left. Mr Morgan said that he attempted to slew right to try and counter-balance the movement and regain control. He tried to put the bucket down although could not recall if he actually got it down. The excavator continued to lean to the left and Mr Morgan realised that he had lost control and was going over. Mr Morgan believed that the bench had collapsed from under the excavator.

[14] On 25 June 2008, an interim report was provided by the accident investigation team to the general manager of Doug Hood, Kevin Davies, the chairman of the company, John Rowell, and the owner and director of Doug Hood, Mary Hood. As well as being provided with the report all three also attended at the Stockton mine site on 17 June 2008 where they viewed the accident site and were advised with respect to the incident and the investigation that was to take place. I accept that their attendance at the site on the day of the incident was because of the seriousness with which the incident was viewed by them. Mr Kevin Davies, Mr Rowell and Ms Hood were the decision-makers in terms of the decision to terminate Mr Morgan's employment.

[15] The accident investigation team, relying on a surveyor's plan, measurements taken on 17 and 18 June 2008 and photographs, concluded that the right hand track of the excavator was not overhanging the southern end of the remainder of the bench and was seated on firm ground. They also concluded, based on the surveyor's plan and photographs taken at the scene of the incident, that a significant majority of the left hand track was unsupported (overhanging) at the time of the incident. The accident investigation team concluded that immediately prior to the incident, the excavator maintained its position on the bench due only to the fact that the boom and the bucket

were in a position where they acted as a counter-balance to maintain a semblance of stability. When the position of the boom and bucket was changed by Mr Morgan, the team concluded that the centre of balance of the excavator changed to the extent that it lost stability and rolled over. The accident investigation team concluded that once stability was lost, the outcome was inevitable, irrespective of operator action.

[16] Mr Morgan and his representatives did not see a copy of the interim report prior to the dismissal. Mr Kevin Davies said in his evidence that after he received the interim report he telephoned the Union organiser, Matt Winter, on Friday, 27 June 2008 and advised him on the basis of the report a decision had been made to terminate Mr Morgan's employment with Doug Hood for serious misconduct. Mr Winter, although having only a vague recollection of the telephone discussion, in all probability asked if the decision could be placed on hold while he tried to contact Mr Morgan.

[17] Mr Kevin Davies said that on Monday, 30 June 2008 at approximately 9am he telephoned Mr Winter to advise him that Doug Hood wished to proceed with the termination of Mr Morgan's employment. Mr Winter was given until 6pm to provide any further information after which time, if there was nothing to persuade the decision makers otherwise, he was advised by Mr Kevin Davies that Doug Hood would be proceeding with Mr Morgan's termination. Mr Winter again was vague in his evidence in respect of the exact date or dates on which he spoke to Mr Kevin Davies or what was said. He did recall a discussion with Mr Kevin Davies which seemed to have, in all probability taken place on 30 June 2008 during which he referred to other incidents that had happened at Stockton mine and had not resulted in dismissal. Mr Winter said that during the day on 30 June 2008 he tried to contact Mr Morgan but could not do so. He said that he did not know what the outcome of the investigation was and whether Mr Morgan had actually done anything that would justify dismissal.

[18] Mr Royal was given a copy of Mr Morgan's dismissal letter by Doug Hood's mine manager, Rangī Hicks. Mr Royal said in his evidence, which I accept, that he asked at that time for a copy of the report and was advised that it was his [Mr Hick's] instructions not to give a copy of the report to Mr Royal.

[19] The letter of termination provided, amongst other matters:

*On the basis of the investigation undertaken, and having assessed all the information that we have gathered, and having taken into account*

*the comments/explanations which you have put forward at interviews, we believe that we have no option but to terminate your contract of employment with Doug Hood Mining Limited for serious misconduct effective from 6.00pm 1st July 2008.*

*The termination of your employment is for driver error with the resultant potential for serious harm and/or injury, which has directly resulted in substantial damage to the EX 1900 excavator and what will be a considerable loss of revenue for this item of plant while under repair.*

*An incident such as the one referred to is unacceptable to us.*

[20] A final report titled *Major Accident Investigation Questionnaire and Report* was not available until after Mr Morgan's employment was terminated. The interim report was only provided at the start of the Authority's investigation meeting to the Authority and to Mr Wilton. The Authority and the Union had been provided earlier with the final report. The two reports are not identical in nature, although both concluded that the cause of the incident was operator error.

***Conclusion with respect to the process***

[21] Mr Wilton submits that the process adopted by Doug Hood in reaching a decision to dismiss Mr Morgan was fatally flawed and that the minimum requirements, as set out in *NZ Food Processing Union v. Unilever* [1990] NZILR were not met.

[22] Mr Macdonald does not accept Mr Wilton's submissions. He submits that the process, considered in its totality, was fair and reasonable in all the circumstances. He submits that Mr Morgan had an opportunity to respond, explain and ask questions during the accident investigation team's investigation. He further submits that there was an established practice in terms of the relationship with the Union that provision of the interim report had not been recognised as a requirement. He submits that Doug Hood essentially complied with clause 27.4.2 of the Stockton DHML Schedule to the National Mining Multi Employer Collective Employment Agreement (the MECA) that covered Mr Morgan's work. Mr Macdonald submits that Mr Royal did not object to the process when he accompanied Mr Morgan in the interviews conducted by the accident investigation team and this supported that therefore the usual practice in these circumstances was being followed.

[23] Mr Macdonald further submitted that, by implication, the nature of the interviews, particularly given that Mr Morgan was an experienced operator, centred

on driver behaviour and the extent to which that contributed to the accident. Mr Macdonald submits that there was no objection raised at the time about the process by the union and relies on Employment Court judgment of Chief Judge Colgan in *Chief Executive of Unitech of Technology v. Henderson* (2007) 8 NZELC 98, 783.

[24] I accept the submissions of Mr Macdonald that consideration under the test in s.103A of the Employment Relations Act 2000 requires a balanced assessment of both procedure and substance and it is not appropriate to scrutinise that process minutely, pedantically and without sufficient regard to overall fairness and reasonableness.

[25] Mr Morgan's representative, Mr Royal, said in his evidence that he considered the accident investigation team's process to be of a preliminary nature and that the only time there was any discussion about serious misconduct was at the start of the second interview. There is a recorded statement at the start of that interview by Paul McBreen:

*I have been instructed by Kevin Davies to inform you that we are investigating an incident, the result of which could be a charge of serious misconduct and you could be liable for dismissal.*

Following that statement however the accident investigation team agreed to an approach that if, following the preliminary investigation they established evidence to support the contention that Mr Morgan had carried out an act that constituted serious misconduct, then they would advise him accordingly and of his rights to representation and he would be suspended on pay pending the outcome of such an investigation. Mr Royal understood that was the approach therefore of the accident investigation team in terms of that and the subsequent interview. He also said in his evidence that Mr Morgan was on paid leave at that time and not on suspension. I find that during the accident investigation process Mr Morgan was not advised that he had committed an action that was considered to be serious misconduct and/or the nature of such action.

[26] There are cases where the decision-maker makes a decision on disciplinary action relying on some aspects of an investigation undertaken by others. That does not necessarily make it unfair. In this case Mr Morgan did not have any opportunity to be heard at all by the decision-makers before his employment was terminated and that was not what a fair and reasonable employer would have done.

[27] I am not satisfied that Mr Morgan knew his explanation had been rejected by the accident investigation team before his employment was terminated. He did not, therefore, have a proper opportunity to provide an explanation with the benefit of the conclusion in the accident investigation team's interim report. Section 4(1)(1A)(c) of the Employment Relations Act 2000 requires employers who are proposing to make a decision that is likely to have an adverse effect on the continuation of employment to provide access to information which is relevant and an opportunity to comment on that to the employee before a decision is made.

[28] Mr Macdonald places reliance on the fact that Mr Winter never asked for a copy of the report. It was incumbent on Doug Hood to act fairly in terms of the disciplinary process it followed in this case. In the circumstances, a fair and reasonable employer would have wanted to, and would have, provided a copy of the interim report to Mr Morgan so that he could fairly make comment on its contents.

[29] I am not satisfied, from the evidence, that there is a practice whereby such reports are not provided to the Union in circumstances where there may be a disciplinary outcome for an employee. Even if there was such a practice, for the reasons outlined above, objectively considered, it would not have been fair or in accordance with the requirements of good faith for the report not to have been made available.

[30] The procedure adopted by Doug Hood was not in accordance with the process set out in the applicable schedule to the MECA. I do not intend to set that process out in full, but it does require importantly an employee to be advised that they are considered to have committed an action warranting summary dismissal.

[31] Mr Morgan obviously knew there had been an incident which had resulted in serious damage to the excavator when he was operating it. Mr Morgan was not advised by the accident investigation team that it was considered he had committed an action as part of that incident warranting summary dismissal. He did not have any opportunity to give any explanation or make any submission in mitigation with that knowledge. That is the process required under the relevant schedule to the MECA in cases where the employer considers there is serious misconduct.

[32] A fair and reasonable employer, in the circumstances of this case, would have provided Mr Morgan or his representative with a copy of the interim report and

advised Mr Morgan that it considered he had committed an action of serious misconduct warranting summary dismissal. A meeting should then have been held with Mr Morgan and his representative and the decision-makers to enable Mr Morgan to explain, refute or mitigate his actions. The calls between Mr Kevin Davies and Mr Winter cannot be relied on as a proper opportunity for Mr Morgan to explain, refute or mitigate the allegations, particularly given the absence of the provision of the report.

[33] In conclusion for these reasons I do not find that there was a full and fair investigation into the actions of Mr Morgan on 17 June 2008 before his dismissal. Mr Macdonald submits in the event that this finding is reached by the Authority that the gravity of potential danger and ramifications of Mr Morgan's error were such that even if the report had been provided, the outcome in any fair-minded employer's mind would have been the same, dismissal.

***Would a fair and reasonable employer have concluded Mr Morgan's conduct was serious misconduct?***

[34] Mr Wilton submits that whilst the preliminary report concludes that the incident under investigation is the direct result of operator error, the report does not appear to detail what the error was supposed to be. The final report completed after the dismissal sets out the error as Mr Morgan losing his awareness of the position of the excavator tracks in relation to the bench from which he was operating and that this resulted in a loss of stability, an associated loss of operator control and resulted in subsequent roll-over of the excavator. To put it simply the conclusion of the accident investigation team was that the left track of the EX1900 was largely overhanging the bench and not on firm ground. Although it is not specifically set out in the interim report, I am satisfied that the decision-makers, with their knowledge, would have been able to conclude from the body of the report what the accident investigation team considered the operator error to be. That is a loss of awareness of the excavator tracks in relation to the bench.

[35] I have considered whether a fair and reasonable employer would conclude that a driver error with serious consequences was misconduct of the nature that would justify summary dismissal. In *Hudson* at para.[136], Judge Shaw stated:

*In Oram, the Court of Appeal said that the burden on the employer was to show that a full and fair investigation disclosed conduct capable of*

*being regarded as serious misconduct. To the extent that this could be interpreted to mean that the employer was required to prove that the conduct was capable of being regarded as serious by that employer, s.103A has altered the law by requiring objective determination of what a fair and reasonable employer would have done or, in this case, concluded in all the circumstances. The action of the employer in deciding that serious misconduct has occurred is to be judged not solely on the employer's own subjective terms but in terms of what a fair and reasonable employer would have concluded.*

[36] The Doug Hood schedule to the MECA sets out a correction and discipline policy and procedure at clause 27. There are two categories of misconduct. Clause 27.3 refers to minor misconduct and clause 27.4 to serious misconduct. Serious misconduct may result in summary dismissal and minor misconduct follows a progressive warning system. Actions which constitute minor misconduct are set out in a non-exhaustive list. Actions which constitute serious misconduct are not set out in such a list.

[37] Mr Wilton accepts in his submission that a single act of negligence which is sufficiently serious could be viewed as misconduct. In *W&H Newspapers v. Oram* [2000] 2 ERNZ 448, the Court of Appeal expressly approved a finding to that effect in *Click Clack International Ltd v. James* [1994] 1 ERNZ 15. Mr Wilton goes on in his submission to refer to the facts in *Click Clack, Ballylaw Holdings v. Ward* (unreported, WC45/01, Shaw J) and *Health Waikato v. Tebbutt* [2003] 2 ERNZ 398. He refers to these cases to support that a feature of the factual background for these cases was that there was an extra element over and above a mistake simpliciter. In *Click Clack* there was an action which could properly be considered as recklessness; in *Ballylaw* there was a further action of falsification and in *Tebbutt* there was a continuing course of events.

[38] Mr Wilton submitted Mr Morgan was not dismissed for negligence but for driver error. Mr Kevin Davies, in his evidence at the Authority investigation meeting, said that he would like to think that the action by Mr Morgan was not negligence. There was no evidence to the effect that it was considered by Doug Hood in terms of the driver error, that Mr Morgan had been reckless or that he had acted deliberately. It was further accepted that he had probably told the accident investigation team what he genuinely believed had occurred leading up to the roll-over of the excavator.

[39] I have placed less emphasis in this matter on how the conduct was described and I have focused on an objective assessment as to what a fair and reasonable employer would have concluded in terms of the conduct in all the circumstances.

[40] Objectively assessed a fair and reasonable employer, in considering whether a single error was serious misconduct in these circumstances, would take into account the conduct itself and related events, the consequences of that conduct, the employee's role, seniority and experience and the nature of the employer's business. These circumstances in this case overlap.

[41] I turn firstly to the driver error. It was reasonable for the decision-makers given the interim report findings to conclude that there was no subsidence or collapse event in terms of the bench. Mr Morgan never had an opportunity to comment to the decision-makers about the allegation that he had lost an awareness of the tracks of the excavator in relation to the bench and I have considered whether had he been able to be heard the conclusion about his conduct would have been the same.

[42] In his second interview to the accident investigation team in para.14, Mr Morgan was specifically asked by the accident investigation team to comment on visibility in terms of his ability to check the position of the tracks of the excavator. Mr Morgan's answer was to the effect that he had stopped to ascertain the position of the tracks but that they seemed to be sliding to the left. A fair and reasonable employer would have wanted to have heard from Mr Morgan about that matter. Mr Morgan's explanation to the interview team seemed to support that he was attempting to check where his tracks were and a fair and reasonable employer would have taken this into account in terms of what was acceptable practice about checking track awareness. Mr Morgan's explanation that the tracks were slipping may have led to further investigation by the decision-makers in terms of where the left hand track was and whether there was any possibility of locking up or sliding just before the incident. I do note in this regard however Mr Brian Davies' evidence at the Authority investigation meeting, that there was no sign of slip or drag at the scene.

[43] One of the matters Mr Kevin Davies said was taken into account in reaching a conclusion that the conduct was serious, and this overlaps with the driver error, was Mr Morgan's experience. Mr Morgan is an experienced heavy plant operator with extensive experience in the operation of large excavators.

[44] Mr Morgan had only had limited experience in operating the EX1900. It was described in the interim report as minimal and he has never been passed out as competent in the operation of the EX1900 as he has been in the operation of other heavy plant. Mr Morgan's experience on the EX1900 is set out in detail in the interim report that was available to the decision makers. Mr Morgan had undertaken a period of familiarisation with another operator of about 30-40 minutes some months prior to the incident on the EX1900. Mr Morgan's first EX1900 experience in a working environment was on 8 June 2008 when he accumulated 2.8 hours during the day shift. On 10 June 2008, Mr Morgan accumulated another 6.8 hours on a day shift working on the EX1900. Mr Morgan was absent due to sickness on 15 June 2008 for the first night shift of the roster and then on 16 June 2008 he commenced working at 5.45pm on the EX1900 until the occurrence of the incident at 3.50am on 17 June 2008. It was Mr Morgan's first night shift operating the EX1900. Mr Kevin Davies said that this was taken into account in making the decision as to the seriousness of the conduct. He said the decision-makers considered Mr Morgan's experience should still have prevented the accident and the conduct was more serious because of Mr Morgan's experience.

[45] Mr Morgan said in his evidence at the Authority's investigation meeting that when he felt the bench giving way he attempted to correct the situation the same way he would have as if he was driving the EX1800 on which he had extensive experience of 380 hours. The difficulty, however, in placing reliance on that to support, as Mr Kevin Davies said in his evidence, that the type of excavator played no part in the incident, is that Mr Morgan was never told that the bench collapse was not considered to be the cause of the accident. A fair and reasonable employer would have wanted to put the cause of the accident to Mr Morgan as contained in the report before being able to properly and fairly consider whether the inexperience with the EX1900 played a part in the incident.

[46] The interim report also sets out in some detail the difference between the EX1900 and the other excavators on which Mr Morgan had accumulated the majority of his experience. The accident investigation team concluded that the response to operator control on the EX1900 (electrics over hydraulics), is somewhat quicker than the corresponding response on hydraulics over hydraulics excavators. There were also statements provided by experienced operators of the EX1900 to the accident investigation team that supported a period of training and supervised familiarisation is

required in order to reach the level of competence (personal confidence) necessary to operate the EX1900 safely.

[47] One employee, Ian, had had extensive experience in the operation of the EX1900 of about 500 hours approximately equally divided between day and night shifts. He advised the team that track movement during slewing is not uncommon when operating the EX1900 in coal or shale. Ian advised the accident investigation team that it took him at least four full shifts of operating experience on the EX1900 on day shift before he became sufficiently familiar with the different techniques required to competently operate the EX1900. He also informed the accident investigation team that during the four day period he made several operating errors and went through quite a learning curve before he was satisfied he was competent to operate the EX1900 safely. There were also some questions asked about the effectiveness of the cameras in the cab of the EX1900. Ian said he never used the cameras because they were not mounted properly and he described them as totally useless on both day shift and night shift.

[48] Another employee was questioned by the accident investigation team and agreed that the EX1900 responds more quickly to operator action than other diggers. In terms of track awareness he said that an operator still needs to do what is necessary to ensure you know where your tracks are in relation to the bench just like other diggers. He described getting out of his seat and walking to the back and checking the machine is on good ground. The acting supervisor, Mr Murray, had accumulated 309.5 hours' experience in the operation of the EX1900. He responded to the accident investigation team that it was at least two full days on day shift before he became confident in his ability to operate the EX1900 in a safe and efficient manner. Mr Murray also agreed that the cameras were not much use.

[49] Mr Morgan's limited experience with the EX1900 would also I find be relevant in terms of how Mr Morgan assessed the handover, setup of the bench and whether he was comfortable with that and a fair and reasonable employer would take that into account. Mr Kevin Davies said the decision-makers took these matters into account in concluding the conduct was serious.

[50] The consequences for Doug Hood were serious. Although insurance covered the majority of the cost of the repairs to the excavator, the company did not have the use of the excavator for some months. Mr Kevin Davies said that an incident of this

nature is viewed in the mining industry as one of the most serious incidents. There were potentially serious health and safety issues with an excavator rolling over. A fair and reasonable employer would take the consequences into account in assessing the seriousness of the conduct but would also carefully need to weigh the other matters as well in making a conclusion about the conduct. I do not agree with Mr Macdonald's submission that notwithstanding the process was not that which a fair and reasonable employer would have used, the outcome would have been the same. Had Mr Morgan seen the interim report and had an opportunity to talk to the decision-makers then his explanation or matters put forward in mitigation may very well have altered the conclusion about the seriousness of his conduct.

[51] The accident investigation team concluded that the incident was caused by an operating error. This was not a situation where there was a conclusion that in making the error there had been any element of recklessness, deliberateness or gross negligence. There were no aggravating features such as the presence of alcohol or drugs in Mr Morgan's system.

[52] Although Mr Morgan was an experienced heavy machinery operator, there was evidence that he had only had limited experience on the excavator he was operating and it was the first time he had operated it in night time conditions. A fair and reasonable employer would have taken those matters into account.

[53] The consequences of the error were significant for Doug Hood. Mr Morgan cooperated fully with the investigation into the incident and it was accepted, at least by the accident investigation team, that he was genuine in terms of his explanation, even if that explanation was not the final conclusion of the accident investigation team.

[54] There may be circumstances where there is an error by an employee and the consequences of that error together with other factors in terms of the conduct, the nature of the employer's business and the employee's experience and seniority are such to justify a conclusion of serious misconduct. I am not satisfied, in all the circumstances of this case, when the matter is considered objectively, that a fair and reasonable employer would conclude that Mr Morgan's conduct leading to the incident was serious misconduct.

**Was the decision to dismiss justifiable in all the circumstances?**

[55] I have found that the conduct on the part of Mr Morgan was not conduct that a fair and reasonable employer would regard as serious misconduct. I do not find, therefore, that the foundation of trust and confidence that is essential in an employment relationship was undermined to such a significant degree to mean that Mr Morgan could not be trusted to carry on any further work at all with Doug Hood. I do not find that Mr Morgan's dismissal was justified. Mr Morgan has a personal grievance that he was unjustifiably dismissed from his employment with Doug Hood and he is entitled to remedies.

**Remedies*****Contribution***

[56] I am required to consider under s.124 of the Employment Relations Act 2000 whether Mr Morgan's actions contributed to the situation that gave rise to the personal grievance and, if so, to what extent.

[57] Mr Wilton submits that Mr Morgan cannot be held to have contributed in any culpable sense to the situation which led to his dismissal. He submits that Mr Morgan was not responsible for the process which culminated in his dismissal and if there is any culpability it should be laid at the door of Doug Hood given the conclusions and recommendations of the accident investigation team. Mr Macdonald, on the other hand, submits that Mr Morgan's contribution to his dismissal was significant.

[58] Mr Morgan said at the Authority investigation meeting that he was hoping that he may get a written warning for the conduct. He was asked why he would expect a written warning and he responded because the incident was being investigated, he was on paid leave and there was a squashed excavator.

[59] I find that Mr Morgan's conduct was capable as being seen as operator error/mistake. I accept he genuinely believed that he was not at fault. There was no opportunity for Mr Morgan to give a proper explanation to the conclusion of the accident investigation team but there were serious consequences as a result of Mr Morgan's operator error for Doug Hood.

[60] It is the type of conduct for which I find a fair and reasonable employer would have issued a written warning in all the circumstances. In these circumstances I assess an appropriate award for contribution at 25%.

### ***Reinstatement***

[61] Mr Morgan wants to be reinstated back to his position with Doug Hood. Section 125 of the Employment Relations Act 2000 provides that reinstatement is the primary remedy wherever practicable.

[62] Mr Kevin Davies was asked about the practicality of reinstatement. He said in his evidence that he thought it would be very difficult. He said there were confidence issues and that the majority of other employees consider there was driver error on the part of Mr Morgan. Mr Kevin Davies also thought the same thing would happen again even with another excavator.

[63] Mr Wilton submitted that there was no rational basis for the loss of trust and confidence and that Mr Morgan, properly trained in the operation of the EX1900, would be able to deliver the same efficient and trouble-free service as he had on many other types of heavy equipment over several years.

[64] Mr Morgan had not, prior to the incident on 17 June 2008, given Doug Hood cause for concern as to his operating ability. There were no previous issues that resulted in warnings being imposed. Mr Morgan made an operator error that had serious consequences and I do accept that an error of this nature can impact on the future confidence that Doug Hood may have in him.

[65] I am not, however, persuaded that reinstatement would not be practical. Mr Morgan had a blemish-free record before his dismissal and he was described by acting supervisor John Murray in an interview given by Mr Murray on the day of the incident as an experienced operator who was considered to be careful by Mr Murray and who always communicated potential problems in his attempt to have them rectified. Mr Murray told the accident investigation team that he considered Mr Morgan to be a safe operator.

[66] I have referred to the operating error by Mr Morgan as the sort of conduct for which a fair and reasonable employer would have issued a written warning. Such a warning can sit on Mr Morgan's work record in relation to the incident on 17 June

2008 and that warning will emphasise the seriousness with which the incident was regarded by Doug Hood both to Mr Morgan and other employees in terms of the cost of such an incident and the health and safety issues.

[67] Mr Morgan is an experienced plant operator but he has been away from the workplace for several months. I have considered that and the concerns that Mr Kevin Davies expressed. For the first month after reinstatement there is to be a focus on training, particularly in terms of operating the EX1900 excavator. I expect the Union to work closely with management before reinstatement takes place to discuss both training and what Mr Morgan will be doing during that initial one month period. There should be a plan which increases the prospect of a good renewed relationship between Mr Morgan and Doug Hood. Some flexibility and good will on both sides will be required. To enable some discussion and preparation and the need to prepare rosters reinstatement will commence during the week of 1 June 2009 on a date during that week that is agreed to by both parties.

[68] I order Murray Morgan to be reinstated to his previous position as plant operator with Doug Hood Mining Limited during the week commencing 1 June 2009 on a date to be agreed to by both parties under s. 123 (1) (a) of the Employment Relations Act 2000.

### ***Lost wages***

[69] Mr Morgan attempted quickly after his dismissal on 1 July 2008 to look for another position. He secured another position on 4 August 2008 and was in that position until shortly before the Authority's investigation meeting when he explained that he was, as I understand it, made redundant.

[70] Mr Wilton submits that Mr Morgan is entitled to lost wages from the date of dismissal until reinstatement less the amount he has earned during that period.

[71] I find that Mr Morgan is entitled to lost wages from 1 July 2008 until the date of his reinstatement, less wages earned during that period and the contribution which has been assessed at 25%. I agree with Mr Wilton's submission that, in the first instance, the amount should be left to be agreed between the parties. In the event that there are difficulties in that regard, I reserve leave for either party to return to the Authority.

### ***Compensation***

[72] Mr Morgan says that he was shocked by his dismissal and that word quickly got around the small community in which he lived. He was hurt by what had happened. Mr Morgan seeks \$10,000 compensation.

[73] I accept that Mr Morgan was both hurt and shocked by his dismissal which was sudden and unexpected. I do take into account that reinstatement will reduce some of the humiliation and embarrassment and will help in terms of any community opinion. In the circumstances, I consider a suitable starting point for compensation is \$8,000 less the contribution assessed at 25%.

[74] I order Doug Hood Mining Limited to pay to Murray Morgan the sum of \$6,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[75] I reserve the issue of costs and encourage the parties to attempt to reach agreement. In the absence of such agreement, Mr Wilton has until 10 June 2009 to lodge and serve submissions as to costs and Mr Macdonald has until 1 July 2009 to lodge and serve submissions in reply.

### **Summary of findings and orders made**

- I have found that Mr Morgan was unjustifiably dismissed from his employment with Doug Hood.
- I have assessed Mr Morgan's contribution to the personal grievance at 25%.
- I have ordered that Mr Morgan be reinstated to his position as plant operator with Doug Hood on a date during the week commencing 1 June 2009 as agreed to by both parties. The first month of that reinstatement should focus on training and the Union should work with management to put a plan in place.
- I have found that Mr Morgan is entitled to lost wages from 1 July 2008 until the date of reinstatement less his earnings during that period and the contribution assessed. I have left it to the parties in the first instance to

calculate what is owing but have reserved leave for either party to return to the Authority if necessary.

- I have ordered Doug Hood to pay to Murry Morgan the sum of \$6000 compensation without deduction under s 123 (1)(c)(i) of the Employment Relations Act 2000.
- I have reserved the issue of costs and encouraged the parties to reach agreement failing which I have timetabled for an exchange of submissions.

Helen Doyle  
Member of the Employment Relations Authority