New Zealand Employment Relations Authority Decisions

Muaulama v United Civil Construction Limited (Auckland) [2016] NZERA 667; [2016] NZERA Auckland 417 (21 December 2016)

Last Updated: 12 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 417
5613535

BETWEEN ANDREW MUAULAMA Applicant

A N D UNITED CIVIL CONSTRUCTION LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: M Moncur, Advocate for Applicant

F Cebalo, Advocate for Respondent

Investigation Meeting: 15 December 2016 at Auckland

Submissions Received: 15 December 2016

Date of Oral

Determination:

15 December 2016

Date of Written

Determination:

21 December 2016

ORAL DETERMINATION OF THE AUTHORITY

A. A reasonable employer could have found Andrew Muaulama's conduct was serious misconduct. However the process leading to dismissal was defective because United Civil Construction Limited did not provide him with all of the information and decisions it had made prior to dismissal. These defects were not minor and did create unfairness. It also retained another worker whom had undertaken similar if not worse acts.

B. Andrew Muaulama was unjustifiably dismissed by United Civil

Construction Limited.

C. I decline to award any lost remuneration.

D. There is an order that United Civil Construction Limited pay compensation of $5,000 to Andrew Muaulama, inclusive of a reduction of 50% for his

contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the

Employment Relations Act 2000.

E. United Civil Construction Limited is ordered to pay Andrew Muaulama the sum of $2,250 towards his legal costs.

Employment relationship problem

[1] Andrew Muaulama alleges he was unjustifiably dismissed by United Civil Construction Limited (United) following an incident where a co-worker was electrocuted.

Relevant Facts

[2] Mr Muaulama was employed as a construction worker by United on or about

30 April 2015.

[3] He worked without incident until 2 December 2015. On that day, Mr Muaulama and another subcontractor Tim Tairi were instructed to locate and expose five service ducts at the base of an electricity transformer on Edmond Road.

[4] Both Mr Muaulama and Mr Tairi were present when a decision to cut into a service duct surrounded by water using a handsaw near an electricity transformer where live electricity was flowing was made. As a result, another work colleague who was asked to assist was shocked but uninjured when using the handsaw. Both Mr Muaulama and Mr Tairi were removed from the worksite. Mr Muaulama continued working as a general labourer elsewhere.

[5] The United worksite was shut down while an investigation into the incident was undertaken. Mr Muaulama and the other three workers involved were required to complete an incident report form (IRF). Each worker filled in and signed the IRF setting out their account of the incident.

[6] It is accepted that Mr Muaulama did not view anyone else's IRF. This became influential in terms of the information he gave and the decision that was made by United.

[7] On 9 December 2015, Neil McLoughlin, United General Manager gave

Mr Muaulama a letter inviting him to attend a disciplinary meeting.

[8] Mr Muaulama attended a meeting on 11 December 2015 with Mr McLoughlin and United's HR manager, Frances Cebalo. He was asked to reply to the allegations about his conduct on 2 December 2015. Following a short adjournment, the decision was made that he was to be dismissed.

[9] A dismissal letter was sent to Mr Muaulama on 14 December 2015 confirming the decision to dismiss based on serious misconduct. The serious misconduct alleged was that there had been behaviour that impacted badly on the company, failure to observe safety rules and procedures and a failure to display a level of competence and performance required of his position.

[10] Mr Muaulama raised a personal grievance and made an application to the

Authority which is to be resolved today.

Law

[11] The fact Mr Muaulama's employment was terminated is accepted. Therefore the onus falls upon the United to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances.1

[12] In applying this test I must consider having regard to the resources available, whether an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and generally considered the employee's explanation prior to dismissal.2 Failure to meet any of the above matters is likely to result in a dismissal being found to be unjustified.3

However the dismissal is not unjustifiable if the procedural defects were minor and did not result in the employee being treated unfairly.4

[13] My role is to assess on an objective basis whether the decision to dismiss and the conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. Context is

the key.5

1 Section 103A of the Employment Relations Act 2000.

2 Section 103A(3) of the Employment Relations Act 2000.

3 *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

4 Section 103A(5) of the Employment Relations Act 2000.

5 *Patel v. OCS Ltd* [2014] NZEmpC 49 at [30]

Was there serious misconduct?

[14] Serious misconduct will generally involve deliberate action harmful to an employer's interests. It will not generally consist of mere inadvertence, oversight or negligence. It is conduct that deeply impairs and/or is destructive of that basic confidence or trust that is an essential of an employment relationship.6

[15] The primary reason for dismissal was the finding of fact that Mr Muaulama made the unauthorised decision to cut the duct pipes leading to the electrocution of his co-worker. That in itself would have been serious misconduct. However, that finding cannot have been reasonably made because it rested upon a body of information that Mr Muaulama had not been given. I deal with this further in terms of the procedural issues below.

[16] The evidence from Mr Muaulama did support certain findings of fact. First, he accepted he was aware of the hazard of live electricity at this worksite. There is a dispute about his knowledge that he was only to hand dig and hydrovac the water to locate the service ducts. It is unclear to me from the evidence of the notes of the meeting on 11 December 2015 and his evidence what his exact knowledge was. However, even if he did know that he was to hand dig and hydrovac only, that did not lead to the reasonable conclusion he made the decision to cut the service duct pipe.

[17] The notes from the 11 December 2015 meeting, indicated that he accepted he should have known there was a hazard of using a handsaw to cut a pipe near a transformer. The words he used in the interview were *hello?* - meaning who would not have known that was a stupid act to undertake.

[18] In contrast after receiving the IRF reports, Mr Muaulama's explanation at hearing for his conduct was his inexperience and reliance upon a co-worker Mr Tairi's directions. He recalled Mr Tairi speaking to his supervisor prior to cutting the pipe. He was unaware of the hazards of this act despite but accepted he had never been instructed by his supervisor to cut the duct pipe. His IRF does suggest that the decision to cut the duct pipe was a group decision, not his alone. The respondent's IRF also acknowledges that there is some conflict between Mr Muaulama's account

and Mr Tairi's account as to who was responsible for the decision to cut.

6 *Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483

[19] Based on the evidence I have seen, heard and read, there was no reasonable basis for this employer to have concluded it was Mr Muaulama alone who made the decision to cut the service duct in the circumstances. However, that does not mean that this was not serious misconduct.

[20] Mr Muaulama cannot rely upon his inexperience to justify his involvement in this incident. There is no reasonable basis for him to allow Mr Tairi to undertake a health and safety assessment on his behalf. It is a well-known requirement in law today every employee must take all practicable steps to ensure no action or inaction

while at work causes harm to any other person.7 Otherwise the potential hazards that

could have occurred in today's fact scenario could be repeated in worksites

throughout New Zealand without any censure.

[21] There was no basis for Mr Muaulama to fail to familiarise himself with any of the hazards or the work requirements for the site or to stop the act occurring. His interview indicated his own common sense should have dictated he stop the unauthorised cutting of the service duct. He admitted he should have known this was dangerous. It is only by luck that none of these workers were hurt in a more dangerous and possibly permanent way.

[22] He could have phoned his supervisor to check. His evidence today that he thought Mr Tairi did so was unconvincing. It also was not raised during the investigation and is also at odds with his IRF report. This does not refer to his supervisor at all and accepts "we" made the decision to cut.

[23] In my view, there was serious misconduct. The serious misconduct was that Mr Muaulama failure to make himself aware of the potential hazards of the worksite and to take reasonable steps to stop the cutting of the service duct.

Was the process leading to dismissal defective?

[24] There is a statutory duty of good faith that requires employers to provide an affected employee with access to all relevant information about any adverse decision

regarding their continued employment.8

7 Section 19 Health and Safety in Employment Act 1992; see also s45 Health and Safety at

Work 2015.

8 Section 4(1A)(c) of the Employment Relations Act 2000.

[25] The decision-maker, Mr McLoughlin, had the IRF reports from all of the workers and had interviewed them prior to his decision to dismiss. One of IRF was a four page detailed statement from Mr Tairi. He had been interviewed twice. He was not an employee but a sub-contractor. The importance of that statement was that it attributed the primary blame for this incident to Mr Muaulama. There is also another report from a worker who also said Mr Muaulama authorised the cutting.

[26] Mr McLoughlin had also made a decision to excuse the other workers with the exception of Mr Tairi and Mr Muaulama from primary blame for the situation. None of this information was provided to Mr Muaulama prior to the decision to dismiss. This was a breach of the statutory duty of good faith.

[27] There is no application for penalty before me so I do not deal with it in that manner. Nor is that the end of the matter. I must now determine whether this breach was minor and if it created unfairness for Mr Muaulama. In my view it possibly is minor because of the finding of serious misconduct. However, there was unfairness to Mr Muaulama.

[28] The unfairness arises because Mr Muaulama was not given any opportunity to properly respond to this incident. He never sighted any of the IRF's completed by his fellow workers nor the report completed by the respondent itself. Whilst the respondent submitted Mr McLoughlin had approached the interview with Mr Muaulama with an open mind, this cannot be so given the decisions made prior. There was also no evidence Mr Muaulama admitted responsibility for the decision, although were submissions today that he had.

[29] The IRF signed by Mr McLoughlin also indicated the respondent had not in fact attributed responsibility for the decision at that time to Mr Muaulama. It acknowledged instead that there had been conflicting accounts about who was responsible for the decision to cut.

[30] There was further unfairness created by the disparate treatment between Mr Muaulama and another worker. This employee was the one who was electrocuted. He had also made a decision to cut the service duct pipe. He would have had the same information as Mr Muaulama. However, unlike Mr Muaulama, his employment was retained and he was given a written warning. In my view there is no basis for disparity of treatment between the two of them.

[31] A reasonable employer could have found Andrew Muaulama's conduct was serious misconduct. However the process leading to dismissal was defective because United Civil Construction Limited did not provide him with all of the information and decisions it had made prior to dismissal. These defects were not minor and did create unfairness. It also retained another worker whom had undertaken similar if not worse acts.

[32] Therefore Andrew Muaulama was unjustifiably dismissed by United Civil

Construction Limited.

Remedies

[33] Because Mr Muaulama has proven he has a personal grievance, he is entitled to claim lost remuneration and compensation for hurt and humiliation.

[34] The evidence has shown little mitigation. Before any award of lost remuneration can be made, an employee must show that they have mitigated their loss by looking for jobs and employment. Mr Muaulama accepted he did not start looking for employment until 24 February 2016. Although I accept jobs may have been scarce, it does not set aside an employee's responsibility to look for work.

[35] In the circumstances, I decline to award any lost remuneration.

[36] One of the reasons why Mr Muaulama was not looking for work during Christmas was in part due to his hurt and humiliation. He gave some compelling evidence of the humiliation he suffered as a result of losing this job including mental health issues, the financial hardship for his family and the personal hardship he has suffered as a result today. In similar cases in the Authority, a starting award would be

$10,000.

[37] I must now take into account whether there has been contributory conduct. I must consider the extent to which his actions contributed to the situation that arose and consider reducing any remedies awarded.9 Contributing behaviour is behaviour which is causative of the outcome and blameworthy.10

[38] There is no doubt based on my finding of serious misconduct that this conduct was both causative and blameworthy. However, not all the blame should be laid at

9 Section 124 of the Employment Relations Act 2000.

10 *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

Mr Muaulama's feet. There were three other workers present including one employed by the respondent who also took no action to stop the cutting that day. They would have had the same knowledge as Mr Muaulama. Accordingly I will reduce his remedies but only by 50%

[39] There is an order that United Civil Construction Limited pay compensation of

$5,000 to Andrew Muaulama, inclusive of a reduction of 50% for his contributory behaviour pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

Costs

[40] Because this matter was filed after 1 August 2016 the new Practice Note on costs applies. The Authority determines costs by using its notional daily tariff. The applicable notional daily tariff is $4,500 for the first hearing day reduced to $3,500 per hearing day thereafter. This matter took the space of half a day and therefore the starting point will be $2,250.

[41] Neither party has made submissions which would compel me to increase or decrease that amount. Therefore United Civil Construction Limited is ordered to pay Andrew Muaulama the sum of $2,250 towards his legal costs.

T G Tetitaha

Member of the Employment Relations Authority
