

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 107/09
5142891

BETWEEN TAI NGATAMA
 Applicant

AND ACROW LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: M Kyriazopoulos, advocate for applicant
 P Tremewan, advocate for respondent

Investigation Meeting: 16 March 2009

Determination: 3 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tai Ngatama says his former employer, Acrow Limited (“Acrow”) dismissed him unjustifiably. He seeks reinstatement.

[2] Acrow says the dismissal was justified on the ground of Mr Ngatama’s failure to follow a safety requirement.

Background

[3] Acrow is in the business of providing scaffolding, formwork, and falsework. At the material time it was a scaffolding subcontractor on a large construction site in central Auckland. The standard conditions of subcontract included various obligations regarding the maintenance of safe and healthy working practices and conditions. A further subcontract agreement addressing scaffolding referred again to safety obligations, and provided that the contractor reserved the right to refuse entry or remove any operative or personnel who failed to comply with these obligations.

[4] Further, safety requirements included the completion of ‘task analysis’ forms for the tasks carried out on-site. The form had a number of features, including a list of the basic job steps associated with a task, the identification of potential significant hazards, and the hazard control method. Their contents were discussed with staff during meetings.

[5] Most relevant for present purposes, one such form concerned scaffolding and was the subject of a re-induction meeting on or about 17 July 2008. The meeting itself was convened following an incident in which the Department of Labour had identified a scaffolder working at height without a safety harness. The contractor subsequently removed the person concerned from the site and required Acrow staff and subcontractors to go through the safety induction again. As for the relevant form, under the step ‘install handrails’ it identified ‘fall from heights’ as a significant hazard, and identified the control of the hazard as ‘... - always wear harness and clip on to stable point.’ Mr Ngatama attended the meeting.

[6] Mr Ngatama is a senior and experienced scaffolder, who had worked for Acrow and its predecessors for 15 years. At the relevant time he held a current national certificate of competence valid for advanced scaffolding, and had completed a Site Safe course in working safely at heights. He was a leading hand on-site.

[7] The terms and conditions of the parties’ employment relationship were contained in the Acrow Limited collective agreement (“the cea”). The cea included the following provisions:

“21.1 The employee is responsible for working in a safe manner that does not endanger him/herself or other employees or company property. The employee is required to follow all safety policy and procedural instructions.”

- and

“Appendix 3

Acrow Zero Tolerance Regulations

The following Zero Tolerance regulations have been developed to ensure that all staff are aware of the types of behaviour that are considered unacceptable.

Any occurrence of the following incidents will result in termination of employment.

1. ...

...

13. Wilful, deliberate or negligent acts which cause injury or damage, or adversely affects quality or productivity.

...

. The above list is not exclusive

Acrow Less Serious Misconduct

The following are the incidents considered to be less serious misconduct

Any occurrence of the following incidents may result in either a verbal, written or final written warning

1. ...

...

6. Failure to follow safety requirements. This includes failure to use safety guards, failure to use safety equipment and/or protective clothing where prescribed.

..."

Events leading to dismissal

1. The incident

[8] On 26 August 2008 Mr Ngatama had been working on a lower level of the building, having been placed on light duties because of an injury. He said his duties were to help people where necessary. At the relevant time he had completed his work on the lower level, and was assisting on level 5. Cantilevered scaffolding was being erected on the outside of the building. An internal handrail was in place next to the building, and planks were being put in place, but no handrail had yet been erected on the outer or external edge of the scaffolding between levels 5 and 6. Accordingly anyone walking on the planks was required to wear a safety harness, clipped onto the inner handrail. There was a substantial drop to the street below.

[9] Mr Ngatama was standing near the edge of a section of the building when he noticed a recently placed plank was not lying flat on a 'hop up' between the two levels. Although another scaffolder (Liongi Tangitau) was working at the other end of the planks on the hop up, Mr Ngatama decided he would correct the position of the plank. He climbed onto it to stamp it into place. That meant he was standing outside the building on the planks, where there was no external handrail, without wearing a safety harness or lanyard.

[10] A leading hand, Tony Gratwick, was standing nearby and smoking a cigarette. He took no action. All of this came to the attention of a supervisor.

[11] The supervisor reported the incident to Jodi Wright, Acrow's national health and safety manager. Ms Wright commenced an investigation.

[12] The supervisor had also reported the incident to David Lambourne, Acrow's Auckland branch manager. Mr Lambourne instructed the supervisor to remove Messrs Ngatama and Gratwick from the site, and have them call him.

2. The disciplinary procedure

[13] Mr Lambourne sent both men to work on another site. While there they were given letters dated 27 August 2008, requiring them to attend a disciplinary meeting on 29 August in respect of the incident. The letters cited the 'Zero Tolerance' and 'less serious misconduct' provisions from the cea, as set out above, and warned that disciplinary action up to and including summary dismissal was a real possibility.

[14] Although the disciplinary meetings were to be held separately, the men attended together, and with their union organiser. Ms Wright was also present.

[15] At the meeting the employer went over the contents of the 27 August letter, the recent re-induction, and the misconduct provisions in the cea. Mr Ngatama admitted he was not wearing a harness, saying he did not have his own harness with him that day as he did not expect he would need it. He explained that he had sought

to assist by replacing the plank. His representative said the incident was a 'one off' and Mr Ngatama was a safe worker.

[16] The discussion with Mr Gratwick covered matters more directly relevant to his conduct, namely the fact that he was smoking and the question of why he had not reacted when he saw Mr Ngatama climb onto the hop up without a harness. However part of that discussion included an account of Mr Ngatama's actions. Additional relevant information concerned who else was in the vicinity. In addition to Messrs Ngatama and Gratwick, Mr Tangitau was working on the hop up as I have mentioned, a contract labourer was assisting Mr Tangitau from a hop up on level 6 - 7, and an Acrow labourer - who had been working with Mr Ngatama on the lower levels - had followed Mr Ngatama up to level 5 and was watching him.

[17] Mr Lambourne and Ms Wright adjourned the meeting pending further investigation and consideration. Ms Wright wanted to check on who was passing and installing the planks, and on Mr Ngatama's personnel file. She did not obtain an answer to the former, but the latter revealed the existence of expired warnings which contained an element of concern about safety issues.

[18] The meeting resumed on 2 September. Ms Wright had also ascertained that a spare harness was kept on-site, and had not been worn. The existence of the warnings was also raised. Mr Ngatama's advocate referred again to the one-off nature of the incident, as well as to Mr Ngatama's 15 years' service and generally safe conduct in the workplace.

[19] The meeting was adjourned.

3. The decision to dismiss

[20] Mr Lambourne and Ms Wright considered issuing a final written warning. However they took into account the training provided, and the emphasis on safety on-site, and concluded dismissal was appropriate.

[21] Accordingly when the meeting resumed, Mr Lambourne advised Mr Ngatama that he was to be dismissed with immediate effect.

[22] Mr Ngatama's representative asked Mr Lambourne to reconsider, raising a concern about the disproportionate nature of the dismissal, and about disparity of treatment. The disparity concerned the decision not to dismiss Mr Gratwick.

[23] These matters were discussed at a meeting on 11 September, but Mr Ngatama was not reinstated.

Whether the dismissal was justified

1. The test for justification

[24] Acrow says the dismissal was justified in that its actions were actions a fair and reasonable employer would have taken in all of the circumstances at the time.

[25] Mr Ngatama says the dismissal was unjustified because:

- a. it was out of proportion to his conduct, which should have been treated as misconduct warranting a warning;
- b. he was acting to assist inexperienced workers and attempting to address the hazard created by the ill-fitting plank;
- c. of the disparate treatment accorded to him compared with that accorded to Mr Gratwick.

[26] Since the fact of the conduct was not disputed, I assess the fairness and reasonableness of Acrow's actions in the light of the concerns Mr Ngatama has raised about them.

(a) whether the conduct warranted a warning rather than dismissal

[27] On its face the conduct complained of fell squarely within the wording of clause 6 of the 'less serious misconduct' provisions in the cea. I do not accept that it fell within clause 13 of the 'Zero Tolerance' provisions because - while arguably wilful, deliberate and negligent - it did not cause injury or damage and did not adversely affect quality or productivity.

[28] That is not necessarily fatal to the justification for the dismissal. The items listed in the 'Zero Tolerance' provisions were expressed not to amount to a closed category, and the following statement of principle regarding conduct amounting to serious misconduct remains applicable:

“... it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.”¹

[29] Accordingly it is appropriate to focus on whether Mr Ngatama's conduct, despite being on its face conduct falling within a definition of less serious misconduct in the cea, contained elements that meant a reasonable and fair employer would view it as serious misconduct justifying dismissal.

[30] In that respect Acrow pointed to the importance attached to observing safety requirements on the city site in particular and other sites in general, to the training provided in those matters, and to the very recent reinforcement of that training. It was relevant, too, that the company had obligations to the contractor in respect of safety on-site, and there could be consequences for it and for Mr Ngatama for breach of those obligations. It found Mr Ngatama's seniority and length of service increased the seriousness of the conduct in that Mr Ngatama knew better than to act as he did. Last, but not determinatively, the consequences for Mr Ngatama if he had fallen could have been extreme.

[31] I conclude that those elements are such that a fair and reasonable employer would conclude the conduct warranted more than a warning.

(b) whether Mr Ngatama was assisting other workers to avoid a hazard

[32] Even if Mr Ngatama was seeking to correct a possible hazard, that did not excuse his actions in climbing onto the hop-up without a safety harness. In doing so he exposed himself to the very hazard he purported to be addressing. There were others present who could have addressed the problem provided it was drawn to their

¹ **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483, 487

attention. When that proposition was put to him at the investigation meeting, Mr Ngatama did not have a satisfactory answer.

(c) whether disparity of treatment vitiated any justification for the dismissal

[33] Mr Ngatama says it was unfair to dismiss him, but not Mr Gratwick, when Mr Gratwick had observed his actions and made no attempt to intervene. Mr Gratwick received a warning in respect of his conduct. However I accept that the nature and quality of Mr Ngatama's conduct was different from Mr Gratwick's. Mr Gratwick's conduct could reasonably be regarded as less serious.

[34] A different form of disparity was raised in a questioning of the decision to send Mr Ngatama to do scaffolding work on another site. Mr Kyriazopoulos submitted that, if it was not safe for Mr Ngatama to do scaffolding work on the city site, then the same must be true of his doing that work on another site. However Mr Ngatama had been sent to work elsewhere pending an investigation of his actions. There was nothing inappropriate about sending him off-site while that process was completed, particularly as no decision had yet been made about his culpability.

2. Conclusion

[35] For these reasons I conclude that Acrow acted fairly and reasonably, and the decision to dismiss was one a fair and reasonable employer would have made. The dismissal was justified.

Costs

[36] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority