

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 516
5531572

BETWEEN STEPHEN TAUTUHI PHILLIPS
Applicant

A N D PORTS OF AUCKLAND
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell, Counsel for the Applicant
Richard McIlraith and Kylie Dunn, Counsel for the
Respondent

Investigation Meeting: 11 December 2014 at Auckland

Date of Determination: 16 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Phillips was employed by Ports of Auckland as an Access Ancillary Stevedore (also known as a P24) until his summary dismissal for serious misconduct on 25 November 2014.

[2] Mr Phillips was employed under an Individual Employment Agreement on the terms of the expired Collective Agreement between Ports of Auckland and the Maritime Union of New Zealand (the Collective Agreement). Since January 2014 Ports of Auckland has had a written Drug and Alcohol Policy (the Policy). Ports of Auckland claims that employees have been trained regarding this Policy, but the evidence presented to the Authority's investigation established that was not the case.

[3] Mr Phillips was rostered to work from 3pm until 11pm on 18 October 2014. Whilst at work he slipped while climbing down a ladder on a straddle and injured his shoulder. Mr Phillips reported the incident to the Supervisor on duty, Mr Arden, who

arranged for Mr Phillips to go to Ascot Hospital for assessment and treatment in accordance with the usual procedure in such circumstances.

[4] Mr Phillips and Mr Arden completed an incident/accident form and Mr Phillips was treated at Ascot Hospital and cleared for light duties. Mr Arden, in conjunction with Mr Jonathan Hulme (Manager – Stevedoring), decided that because Mr Phillips had been injured in an accident/incident he should undergo post accident/incident drug and alcohol testing.

[5] When Mr Phillips returned from Ascot Hospital Mr Arden told him he was required to undergo drug and alcohol testing. When Mr Phillips queried why, Mr Arden told him it was because he had been involved in an accident or incident. Mr Phillips did not say that he did not want to take the test or was not willing to do so. However Mr Phillips was unhappy about being tested and after talking to a union official formed the view that union members were being targeted for drug and alcohol testing by the company. Ports of Auckland deny it targets union members for testing.

[6] Mr Arden says he instructed Mr Phillips to undertake the drug and alcohol testing and to remain on the premises until that had occurred. Ports of Auckland also say that Mr Arden instructed Mr Phillips not to drive home and told him (Mr Phillips) he would be driven home after the drug and alcohol test. Mr Arden says he told Mr Phillips that arrangements would be made to have Mr Phillips' vehicle delivered to his home.

[7] Mr Arden said that because Mr Phillips had received medical attention and medication he (Mr Arden) did not want Mr Phillips to drive home. Mr Arden says it is common practice for Ports of Auckland to arrange transport to drop a person home if they have been injured or involved in an accident and that arrangements are also made to have an employee's car driven home at the same time.

[8] Shortly after this discussion Mr Phillips returned to Mr Arden's office. There is a conflict in the evidence about what was discussed at this time. Mr Phillips claims that he told Mr Arden that his (Mr Phillips') son was coming to pick him up from work and that his shoulder (which he had injured in the accident) was sore so he wanted to go home.

[9] Mr Phillips claims that Mr Arden said "*okay the van is on its way*". The reference to the van is to the drug detection agency van. Mr Phillips says that he took

the “*okay*” to mean that he had been given permission to leave work so he left for the day.

[10] Mr Phillips says he didn’t think about why Mr Arden had made reference to the van arriving soon. Mr Phillips says he just heard “*okay*” and took that to mean it was okay for him to leave. Mr Phillips says his son was unable to pick him up as planned because he got a flat battery so Mr Phillips drove himself home.

[11] Mr Arden disputes that Mr Phillips told him he wished to leave work or that Mr Arden had told him that was “*okay*”. Mr Arden says that Mr Phillips told him that his son was coming to pick up the car and he needed to go out to drop off the car keys to his son. Mr Arden says he told Mr Phillips that was okay, but not to be long because the testing van was on its way so would be here shortly. Mr Arden says Mr Phillips indicated he was just popping out and Mr Arden told Mr Phillips “*to be back soon*”. Mr Arden says he was expecting Mr Phillips to return in five minutes.

[12] Mr Phillips denies saying he wanted to give his son his car keys. Mr Phillips also denies that Mr Arden told him that he was not to drive home or that he was not to leave work.

[13] When the drug testing van arrived at approximately 8.50pm Mr Phillips could not be found. Mr Arden called Mr Phillips’ cellphone but got no answer. He left a message which was not responded to by Mr Phillips. Mr Arden also rang Mr Phillips’ home phone number and again there was no answer. Mr Phillips did not return Mr Arden’s call or return to the Port to take the drug test. The drug van left the Port at approximately 9.30pm.

[14] Mr Arden recorded what had occurred in an email he sent to Mr Hulme and Mike Kirwin at 9.34pm.

[15] Mr Arden’s email says that he informed Mr Phillips that he was required to take a drug and alcohol test and that he was to wait and the van was on the way. Mr Arden’s email says that Mr Phillips said his son was coming to pick up the car and that Mr Arden had told Mr Phillips that Ports of Auckland would make sure he was taken home as soon as the testing had been carried out.

[16] Mr Arden says that Mr Phillips went to the carpark to hand over his keys then never returned to work. Mr Arden says he had only given Mr Phillips permission to

take his car keys to his son and that Mr Arden expected Mr Phillips to return within five minutes.

[17] Mr Arden says he did not have any concerns that Mr Phillips had engaged in unsafe work practices, nor was there any suggestion that Mr Phillips had been affected by drugs or alcohol or that that had been a factor in the accident. Mr Arden's view was that it was normal practice to do a drug and alcohol test on anyone who had been to hospital as a result of an accident/incident.

[18] Mr Phillips says that the first he knew there was a problem was when he received the disciplinary letter dated 20 October 2014. This identified that Ports of Auckland was concerned that Mr Phillips had left the Port *“despite the duty shift manager giving you a clear directive not to do so. You were instructed that you were required to undergo a drug and alcohol test and you were not to drive your car. However, you did not undergo the test; you left the Terminal and proceeded to drive your car.”*

[19] After receiving the disciplinary letter Mr Phillips arranged for his own drug test to be taken which indicated he was drug free. This was provided to Ports of Auckland as part of the disciplinary process.

[20] In its disciplinary letter Ports of Auckland advised that it was considering whether Mr Phillips' conduct constituted serious misconduct and if so it indicated that it may result in instant dismissal. Ports of Auckland referred to alleged breaches of sub-clauses 4.2.7(a) (Refusal to carry out proper work instruction) and 4.2.7(h) (Leaving the workplace during working hours without the prior permission of an authorised representative of the company) of the expired Collective Agreement (which was at that time Mr Phillips' Individual Employment Agreement).

[21] The disciplinary letter also raised a potential breach of the Policy by not reporting to the collection site, leaving the scene of an accident before the test had been completed constituting refusal to test, which could result in disciplinary action up to and including dismissal.

[22] Disciplinary meetings were held on 07, 18 and 25 November. On 25 November Ports of Auckland advised that it had reached a finding of serious misconduct regarding the allegations that Mr Phillips had refused to carry out a proper

work instruction and had left the workplace during work hours without prior permission.

[23] Mr Phillips was summarily dismissed and he filed an interim reinstatement application on 26 November. The parties agreed that the Authority would hold an early substantive investigation so on that basis the interim reinstatement application did not proceed.

[24] Mr Phillips claims he was unjustifiably dismissed and he seeks reinstatement, lost remuneration and distress compensation.

[25] Ports of Auckland maintain that it has lost trust and confidence in Mr Phillips and that its dismissal of him was justified. Alternatively, it argues that it is neither reasonable nor practicable to reinstate Mr Phillips should his dismissal be found to be unjustified.

Issues

[26] The issues for determination include:

- (a) Was Mr Phillips' dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

Was Mr Phillips' dismissal justified?

Relevant law

[27] Justification is to be assessed in light of the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether how Ports of Auckland acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time it decided to dismiss Mr Phillips.¹

[28] A fair and reasonable employer is expected to comply with its statutory obligations and failure to do so is likely to undermine its ability to justify a dismissal or action.

¹ S.103A(2) of the Act.

[29] The full Employment Court in *Angus v Ports of Auckland* and *McKean v. Ports of Auckland Limited*² recognises that justification is not to be assessed in terms of a single standard of what a notional fair and reasonable employer would have done because there may be a range of responses that are open to a fair and reasonable employer on an objective basis.

[30] Serious misconduct is conduct which fundamentally impairs or is destructive of the basic trust and confidence which is an essential element of the employment relationship.³

Good Faith

[31] Mr Mitchell advised the Authority that there was no issue over Ports of Auckland's compliance with its good faith obligations.

Did Ports of Auckland sufficiently investigate its concerns?

[32] I find that Ports of Auckland did not sufficiently investigate its concerns so it is unable to establish compliance with the first procedural fairness test in s.103A(3) (a) of the Act.

[33] Mr Phillips made it clear during a disciplinary process that the application of the Policy was being challenged. I am not satisfied that the decision-maker, Mr Raoul Borley, General Manager Terminal Operations, properly considered whether or not the Policy had been properly applied. I consider that Mr Borely appears to have just assumed that it had.

[34] I find that a fair and reasonable employer would have specifically turned its mind to the arguments that Mr Phillips' made regarding the Policy and properly investigated the issues he was raising. I am not satisfied Ports of Auckland did so.

[35] Mr Burley incorrectly assumed that Mr Phillips had received training on the Policy and proceeded to make decisions based on that assumption. Mr Burley also incorrectly believed all managers had been trained on the Policy. Mr Arden's evidence was that he had not only not received any training on the Policy but that he had not even seen a copy of the Policy so was unaware of what was required before lawful drug and alcohol testing could occur.

² [2011] NZEmpC 160

³ *Northern Distribution Union v. BP Oil NZ Limited* [1992] 3 ERNZ 483

[36] Mr Borley appears to have closed his mind to the arguments Mr Phillips made challenging the application of the Policy in this case. He should have considered these arguments because such matters were relevant to the issue of whether the instruction to undertake drug and alcohol testing was lawful.

[37] There is also an issue as to whether or not Ports of Auckland complied with its own requirements under the Policy. The evidence indicates that it did not. Certain information had to be communicated to an employee before they underwent drug and alcohol testing. However that did not occur in Mr Phillips' case.

[38] Mr Arden candidly admitted that he did not intend to go through this pre drug testing information with Mr Phillips prior to the drug test. I accept Mr Mitchell's submission that the external drug testers would not have had all of the information to be able to give Mr Phillips before testing him.

[39] That means that even if Mr Phillips had remained on site and had undertaken the testing the Policy pre-requisites for that (in terms of the information that he should have been given prior to testing) would not have been complied with. Mr Burley did not investigate these issues despite being urged to do so by Mr Phillips' representative during the disciplinary process.

[40] I am also concerned that the interview notes show that leading questions were asked of witnesses. I consider this undermines the fairness of the investigation. Witnesses were presented with the answer that Ports of Auckland appeared to be looking for. I consider that was unfair to Mr Phillips because it led to specific responses being given rather than Ports of Auckland impartially eliciting information from a witness in their own words.

[41] I therefore find that Ports of Auckland did not sufficiently investigate its concerns in breach of s.103A(3)(a) of the Act.

Did Ports of Auckland raise its concerns with Mr Phillips before dismissing him?

[42] No issue was taken with Ports of Auckland's compliance with s.103A (3) (b) of the Act.

Was Mr Phillips given a reasonable opportunity to respond to Ports of Auckland's concerns?

[43] There is no dispute that during the third disciplinary meeting on 25 November Mr Phillips was summarily dismissed without being given an opportunity to give submissions on mitigation or address Ports of Auckland on the appropriate sanction.

[44] One of the matters that influenced Mr Borley's decision to dismiss Mr Phillips was the fact that Mr Phillips had not accepted responsibility, had not expressed remorse or apologised and had not given any undertakings about his future conduct. Those were all issues that would normally be raised in the mitigation stage, after an employer has concluded that serious misconduct had occurred.

[45] I find that Mr Phillips was unfairly deprived of the opportunity to address these matters because he was told that Ports of Auckland concluded that he had engaged in serious misconduct and was summarily dismissed at the same time. I consider that was unfair to Mr Phillips because it meant he was deprived of an opportunity of responding to the particular issues which lead Mr Borley to conclude that summary dismissal was appropriate.

[46] I am therefore not satisfied that Ports of Auckland has complied with the third procedural fairness test in s.103A(3)(c) of the Act.

Did Ports of Auckland genuinely consider Mr Phillips' explanation?

[47] I am not satisfied that Ports of Auckland has complied with the fourth procedural fairness test in s.103A(3)(d) of the Act.

[48] I consider Ports of Auckland did not genuinely consider Mr Phillips' explanation because it was unwilling to address the issues he raised regarding the application of the Policy and whether not nor its own actions were consistent with its obligations under that Policy. That should have occurred because Mr Phillips claimed that the instructions given to him were not reasonable or lawful.

[49] I also accept Mr Mitchell's submission that the questioning undertaken by Mr Arden of witnesses which consisted of leading questions was couched in such a way to obtain a result that was contrary to Mr Phillips' version of events. Mr Mitchell

submits this is not consistent with a genuine consideration of Mr Phillips' explanations and therefore breaches s.103A(3)(d) of the Act.

[50] I am not satisfied that Ports of Auckland genuinely considered Mr Phillips' explanation. The matters that he was putting forward around the application of the Policy, his lack of prior knowledge of the Policy, failure by Ports of Auckland to comply with the Policy and the inability of Ports of Auckland to direct an employee who had been injured and was in pain to stay at work after an accident and hospital visit do not appear to have been adequately or appropriately considered.

[51] I also consider that the failure to give Mr Phillips an opportunity to address Ports of Auckland on mitigation and sanction before he was dismissed meant his explanation was not genuinely considered. There was also no evidence that the matters Mr Phillips had put forward during the disciplinary process were considered at the sanction stage as they should have been.

Does s.103A(5) apply?

[52] Section 103A(5) of the Act precludes the Authority from determining that a dismissal is unjustified merely because of minor procedural defects that did not result in unfairness to an employee. I do not consider that the procedural defects I have identified were minor, and I do find that they resulted in unfairness to Mr Phillips.

[53] The Authority is therefore not precluded by s.103A(5) of the Act from determining that Mr Phillips' dismissal was unjustified.

Substantive justification

[54] I consider that the procedural defects I have identified fundamentally undermines Ports of Auckland's ability to substantively justify its dismissal.

[55] The failure to follow a fair and proper disciplinary process means that Ports of Auckland was not fully informed of all relevant information which a fair and reasonable employer would have considered before concluding that Mr Phillips had engaged in serious misconduct and that dismissal was an appropriate response to that.

[56] For Mr Phillips to have engaged in serious misconduct by failing to undertake a drug and alcohol test the direction to do so must have been lawful and reasonable. I

find that Ports of Auckland has been unable to discharge the onus of establishing that to the required standard of proof.

[57] I accept Mr Mitchell's submission that the instruction was not consistent with the requirements of the Policy because Mr Phillips had not been advised of the specific points required in the bullet points of clause 9 of the Policy and Mr Arden confirmed he was not aware of these requirements so would not have informed Mr Phillips of them before testing occurred.

[58] Furthermore Mr Phillips had been injured, had attended hospital, had received medication and everyone agreed that he would not be working out the remainder of his shift. Mr Arden's evidence was that he wanted to get Mr Phillips off home as quickly as he could. There is an issue about whether or not Ports of Auckland was legally entitled to compel Mr Phillips to stay at work for an unspecified period of time in these circumstances.

[59] I find that Mr Borley did not appropriately address that concern which Mr Phillips representative had raised during the disciplinary process. Mr Mitchell points out that Mr Phillips is entitled to take sick leave when sick or injured in accordance with s.65 of the Holidays Act 2008 so it was not reasonable or lawful for an employer to compel an employee to remain at work in those circumstances.

[60] Mr Mitchell also raised an argument as to whether or not the Policy allowed Ports of Auckland to test Mr Phillips in circumstances where there was no breach of safety and no reasonable basis to conclude that drugs or alcohol were involved in the accident.

[61] Those that had engaged with Mr Phillips on the night all agreed that there was no suggestion that he appeared to be under the influence of drugs or alcohol or had acted in an unsafe manner. Ports of Auckland only required Mr Phillips to be tested because it says it was standard procedure for anyone who had been involved in an accident/incident who had been referred for medical attention to be tested. Ports of Auckland did not address the Maritime Union of New Zealand's view that the Policy only allowed testing for reasonable cause or unsafe practices.

[62] I consider that these matters needed to be properly investigated and considered before a fair and reasonable employer could have concluded that serious misconduct had occurred. Because this did not happen I find that Ports of Auckland is unable to

substantively justify the finding that serious conduct had occurred. Ports of Auckland are therefore unable to substantively justify Mr Phillips' dismissal.

Outcome

[63] Ports of Auckland's dismissal of Mr Phillips was substantively and procedurally unjustified.

What if any remedies should be awarded?

[64] Mr Phillips seeks reinstatement, reimbursement of lost wages and distress compensation.

Contribution

[65] Having determined that Mr Phillips has a dismissal grievance, s.124 of the Act requires the Authority to assess the extent to which Mr Phillips contributed to the situation that gave rise to his personal grievance. I find that he did contribute to the situation that led to his unjustified dismissal and that remedies should be reduced to reflect that contribution.

[66] It is clear that Mr Phillips left the worksite. I consider that the circumstances in which he did are blameworthy. It was not reasonable for him to believe he had Mr Arden's permission to leave.

[67] Whilst I do not consider Mr Phillips' actions can fairly or reasonably be viewed as serious misconduct in the circumstances I do consider it establishes blameworthy conduct to the required standard of the balance of probabilities.

[68] This appears to be a situation where Mr Phillips was unhappy and annoyed that he had to be drug tested so decided to go home in circumstances where he should have properly raised his concerns about the legitimacy of being required to undertake drug testing instead of leaving work.

[69] I consider also that Mr Phillips made the surprising and potentially dangerous decision to drive home whilst injured in a manner (based on what he told the Authority) which appears to have been unsafe. This is also contributory conduct that needs to be reflected by a reduction in remedies.

[70] I consider that these factors all contributed to the situation that gave rise to Mr Phillips' dismissal grievance. I find that this contribution can be appropriately reflected by not awarding him any distress compensation. Mr Phillips' lost remuneration is not to be reduced and it does not affect the remedy of reinstatement, although it was a factor I considered when assessing whether to award reinstatement as a remedy.

Reinstatement

[71] An assessment of reinstatement as a remedy requires a broad inquiry into the equity of the parties' cases, with practicality and reasonableness to be weighed in light of the particular circumstances of each case.

[72] Reinstatement is discretionary and may be ordered under s.125 of the Act if it is practicable and reasonable. Ports of Auckland's main objection to reinstatement is because it believes trust and confidence has been fundamentally undermined. I have found that that is not a conclusion that was open to a fair and reasonable employer in all of the circumstances, so I consider that view does not weigh against reinstatement.

[73] I consider that reinstatement is a particularly valuable remedy for Mr Phillips due to the personal circumstances he outlined in his evidence. Mr Phillips and his wife require his income in order to meet their fixed outgoings and their day to day living expenses. Mr Phillips does not have savings. He has Credit Union and car loan debt, which together amount to almost \$10,000.

[74] Mr Phillips and his wife care for his parents who are in their 80s and are living with them. Mr Phillips' mother has Alzheimers which puts additional financial strain on the family unit.

[75] I consider that reinstatement to Mr Phillips' job is practicable and reasonable in the circumstances. Mr Phillips returned a clean drug test when he received the disciplinary letter. There was no suggestion that he had been under the influence of drugs or alcohol on the day of the accident. There was also no suggestion that he was at fault with the accident, having merely slipped on a wet step.

[76] I do not accept the Ports of Auckland's submissions that Mr Phillips' contribution should rule out reinstatement as a remedy. I order Ports of Auckland to reinstate Mr Phillips to the payroll from the date of dismissal and the parties are to discuss his return to normal duties which is to occur by no later than 22 December 2014 unless the parties agree otherwise.

Lost remuneration

[77] Mr Phillips was dismissed on 25 November 2014. I am satisfied that he has lost remuneration which he is entitled to be compensated for under s.123(1)(b) of the Act.

[78] I also accept Ports of Auckland's submission that Mr Phillips should be compensated based on his current average weekly earnings, not his entitlement to work three shifts. This is because availability issues on his part means that he may not work three shifts every week, despite him being contractually entitled to be offered that number of hours from Ports of Auckland.

[79] The parties have 14 days within which to agree on the amount of lost remuneration to be paid. If agreement is not reached then either party has a further seven (7) days within which to apply to the Authority to fix this amount.

Distress Compensation

[80] I consider that it is not appropriate to award distress compensation to reflect contribution (see below).

Costs

[81] Mr Phillips as the successful party is entitled to a contribution towards his costs. The parties are encouraged to resolve costs by agreement. If that does not occur then Mr Phillips has fourteen (14) days within which to file costs submissions, the Ports of Auckland has seven (7) days within which to reply and Mr Phillips subsequently has three (3) working days within which to file any reply cost memoranda.

[82] The Authority is likely to adopt its usual notional daily tariff base approach to costs so the parties are invited to identify any factors that warrant adjustments being made to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority