IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 114A/08
File Number: 5133392

	BETWEEN	Hoera Ripohau Applicant
	AND	Bridgeman Concrete (Hawkes Bay) Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Peter Cranney for Mr Ripohau Gary Tayler for the Company
Investigation Meeting	Napier, 18 September 2008
Further Information By	26 September 2008
Determination:	3 October 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Ripohau was recently reinstated to his driving position on an interim basis (WA 114/08, 26 August 2008).

[2] According to the applicant's emailed advice of 2 October 2008 efforts by the parties following the Authority's substantive investigation to settle this matter on their own terms have been unsuccessful.

Background

[3] The background to this problem is set out in the interim determination.

Discussion

[4] On 18 July, and as confirmed in writing the same day, Mr Ripohau was summarily dismissed for serious misconduct for driving a company vehicle in a dangerous manner. That finding was significantly different from the allegations of another driver.

[5] The complainant driver originally described Mr Ripohau's behaviour as *"physical acts of intimidation* (that were) *not acceptable and dangerous and could result in accident or injury"* (complaint of 11 July 2008 attached to statement of problem). He also said he was being intimidated and harassed for not joining a union.

[6] The company says, in reaching its decision to dismiss the applicant, it *"preferred"* the evidence of others - in particular that of the complainant driver – to Mr Ripohau's explanations (letter of dismissal dated 18 July 2008, attached to statement of problem).

[7] While never put in writing, but as it emerged during the company's investigation, the first allegation was that – some time in June – Mr Ripohau deliberately accelerated and pulled out in front of the other driver, forcing the latter to take evasive action to avoid being hit.

[8] Another company employee said in a written statement (dated 11 July; attachment to statement of problem) that he was an eye witness to the first incident. That person did not give evidence at my investigation and despite his position did not report the matter to the company or take any action about it.

[9] The second allegation (which also was not put in writing but emerged from the company's investigation) was that, on 11 July, Mr Ripohau cut in front of the complainant driver, while he was parked on the corner of the company's drive.

[10] Mr Ripohau told his employer he was not sure of the date of the first allegation but that he recalled an incident in June when, because of poor visibility at the entrance to the plant and the other driver's speed, that driver – the complainant – had to apply

his brakes to avoid a collision; the applicant provided photographs to his employer at their investigation and to the Authority at it's, to support his explanation. Mr Ripohau told his employer that a large concrete wall put up by the company about a year ago was the reason for the poor visibility; he described the wall as a hazard.

[11] Despite Mr Ripohau's explanation of hazard and the company receiving – after its decision to dismiss the applicant – a *"to whom it may concern"* advice from a number of drivers (attachment to statement of problem and as supplied by the respondent), it elected then and later not to undertake a safety and health investigation with the assistance of the Department of Labour, but relied instead on its own assessment.

[12] Mr Ripohau denied the second allegation and said it was a question of whether the company accepted his denial or not.

[13] During the Authority's investigation, and in respect of the second incident, the complainant driver said Mr Ripohau passed unnecessarily close to his parked vehicle. A diagram was drawn on a whiteboard, so as to illustrate his vehicle's position and Mr Ripohau's. The complainant said Mr Ripohau past him at no more than *"three/four feet"* (oral evidence). I asked the complainant to pace off the distance: by common agreement of those present during the Authority's investigation the complainant then walked off a greater distance, of at least two metres, possibly as many as four.

[14] That anomaly did not emerge in the company's investigation.

[15] Mr Ripohau confirmed the separation: he said he was 2/3 metres outside of yellow lines that were, in turn, outside of the complainant's vehicle.

[16] He accounted for the relative proximity of his and the other driver's vehicles by the fact that he was turning into the company's driveway from the adjoining street, the complainant was parked at the corner of the drive and adjoining street and Mr Ripohau was crossing from the complainant's left to right.

Findings

[17] For the same reason the company was unable to substantiate the claim of physical intimidation and harassment of the complainant not joining a union it did not find Mr

Ripohau had deliberately driven his vehicle – as originally alleged – so as to physically intimidate the complainant: that is because there was no evidence to support those allegations. But it did summarily dismiss him for driving in a dangerous manner.

[18] I am satisfied there is a similar lack of evidence to support that amended finding.

[19] In reaching this conclusion I rely on s. 103A of the Act, by determining the matter on an objective basis. I am satisfied a fair and reasonable employer would not have dismissed the applicant after taking proper account of the following:

- The uncertainty as to the date of the alleged first incident;
- The assistant plant manager was an eye witness to an incident in June but took no action about it at that time;
- The allegations could only be determined by taking employee's word against another;
- The original allegations were serious and required the company to find evidence as convincing as the charges were grave: *NZ (with exceptions) Shipwrights etc Union* v *Honda NZ Ltd* [1989] 3 NZILR 82;
- The company properly found that there was no or insufficient evidence of physical intimidation to support the original allegations;
- For the same reasons the company should also have concluded that there was similarly no or insufficient evidence to support its amended finding, that Mr Ripohau had driven dangerously on two occasions;
- The company could not explain why it preferred the evidence of others in finding Mr Ripohau drove dangerously when it could not explain how that preferred evidence was incapable of supporting the original allegations;
- The significance of Mr Ripohau's 8-year unblemished driving record;
- The applicant's health and safety defence: a fair and reasonable employer may well have involved a 3rd party, the Department of Labour, so as to promptly and

efficiently assess that defence, rather than dismissing it as having – in its view – no merit;

- The company's investigation failed to establish the actual distances between the vehicles, thus it was in no position to fully and fairly assess the original claim of Mr Ripohau cutting *"right in front"* of the complainant (see complaint of 11 July, above); and

- The company unfairly relied on Mr Ripohau's evidence that, when he passed the complainant at the time of the second incident, the applicant could see the other filling out his logbook, as evidence of his being too close. Again, an adequate but not exhaustive investigation by the company would have disclosed the complainant's evidence to the Authority that he was filing out an entirely different document. The mistake by Mr Ripohau as to just what document was being completed is evidence he was not as close to the other vehicle as the company assumed.

Remedies

[20] Mr Ripohau seeks permanent reinstatement. I accept that claim notwithstanding the company's claim that it is not practicable because of an economic downturn reducing demand. I am satisfied reinstatement remains practicable because the company accepts that, in the event of a surplus staffing situation and in respect of its unionised staff, there is a collective agreement redundancy provision; and because it cannot explain the use of casual drivers during the period of Mr Ripohau's interim reinstatement.

[21] There is some issue as to recovery of wages for Mr Ripohau. That is because, despite my clear direction in the interim determination and subsequently, the applicant was returned to non-driving duties and paid less than what he normally received and appears entitled to receive per his employment agreement. The company undertook to address the Authority's concerns: leave is reserved to the parties to return this matter if resolution is not promptly achieved.

[22] Mr Ripohau seeks compensation for humiliation. The effect of his unjustifiable dismissal is clearly set out in his various witness statements, and in that of his wife, Mrs Trasemina Ripohau. This evidence was contested in part by the company by way of a point accepted by the applicant.

[23] I am also satisfied that much of the impact of the dismissal has been – and will be – righted by Mr Ripohau's interim and now permanent reinstatement. I therefore find that compensation of $9,000 is appropriate in respect of the applicant's outstanding hurt.

Comment

[24] Because of recent strains in their working relationships the company, Mr Ripohau and his union in particular could be well served by seeking third party counselling in how they might restore good faith to those relationships.

Determination

[25] The company is to forthwith permanently reinstate Mr Ripohau to his driving position and to cease engaging him in labouring tasks (tasks he has never previously undertaken for the respondent), pay any monies lost as a consequence of its unjustified dismissal including wages differences resulting from his return to non-driving duties for shorter working days than those normally worked, and pay to him the sum of $9,000 (nine thousand dollars) compensation for humiliation.

[26] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority