

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 497/10
5274535

BETWEEN JOSEPH SALEGA

AND WATTYL NEW ZEALAND
 LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Clare Abaffy for applicant
 Paul Tremewan for respondent

Investigation Meeting: 18 March, 14 April 2010

Submissions received: 6 May, 27 May 2010 from Applicant
 19 May 2010 from Respondent

Determination: 29 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 22 July 2009, after almost seven years service with the respondent (Wattyl) Mr Salega was dismissed from his job as a forklift driver. A letter from Wattyl's human resources manager, Chris Lund, later confirmed that the reason for the termination of his employment was "*gross misconduct based on a health and safety issue.*"

[2] The allegation that had been put to Mr Salega was that he had been "*driving a fork hoist*" with a co-worker "*standing on the forks in order to reach high stock.*" Mr Salega does not deny that he was at the controls of his forklift, tines raised, with someone standing on them. He says that he had lifted the forks off the ground, at the request of the other worker, for him to use as a step to reach unstable stock that needed to be secured. He says that this conduct was not enough to justify dismissal

[3] He also challenges the fairness of the disciplinary process that led to the dismissal, and the fairness of what he says was his suspension during part of that process.

[4] The respondent denies that Mr Salega was suspended at all. It also continues to assert that the dismissal was procedurally fair and substantively justified.

Issues

[5] The issues for determination are:

- i. whether the disciplinary inquiry was full and fair;
- ii. whether the respondent unfairly suspended Mr Salega;
- iii. whether in all the circumstances dismissal was fair and reasonable, and (depending on the answers to these questions),
- iv. what if any remedies should be awarded.

(i) The Respondent's inquiry

[6] On the morning of 7 July 2009 dispatch manager Don Arbon was walking through the warehouse when he came across Mr Salega and another worker, Mr Andrews, using the fork hoist as a step to make adjustments to stacked stock in the racking system. He said Mr Salega was in the driver's seat and Mr Andrews was standing on the tines, which were about knee height, or approximately 60 centimetres off the ground. Mr Arbon walked over to tell them to stop and make some brief comments about the danger of what they were doing. He then asked them to see him in his office.

[7] The exchange which followed in Mr Arbon's office was mainly between Mr Arbon and Mr Andrews. There is no dispute that it became somewhat heated, with Mr Andrews maintaining that Mr Arbon was making an unnecessary fuss about

something that had not involved any risk, and was necessary in order to reposition cartons which might otherwise have fallen causing injury and damage.

[8] Although Mr Andrews did not give evidence, there is no dispute between the parties that throughout the subsequent investigation, he maintained that what was being undertaken was a quick job that would have taken a few moments at most. His position was that the boxes were not far out of reach and simply needed to be pushed into place. He maintained there was no small stepladder or other suitable equipment available to complete the task, and in the time it would have taken to have retrieved and fitted a cage for him to be lifted in, the boxes might have fallen.

[9] There is no dispute that Mr Salega said very little during this discussion. His evidence is that it ended with Mr Arbon telling the two of them that he was thinking of giving them both a verbal warning. Mr Arbon disputes this. However his own diary notes of the discussion (which he says he wrote very soon after the meeting) record the following:

“I told Sam that I was not happy with his attitude to the situation and that I was of mind [sic] to issue both him and Joseph with a verbal warning about this event...”

[I] told them both that I was not happy with the outcome of this meeting and that I would discuss the outcome with my manager. I included Joseph in this proposal. He declined to comment except to say sorry.”

[10] The Authority was first appraised of the existence Mr Arbon’s diary part way through the Authority investigation meeting. It was tabled at that point, at the Authority’s request. Mr Salega’s evidence about the reference to a verbal warning had been contained in a witness statement provided well before the investigation meeting. Against this background I prefer Mr Salega’s evidence on the point to that of Mr Arbon.

[11] Mr Arbon talked the incident over with Operations Manager Phil Robinson. On 8 July, on Mr Robinson’s instructions, Mr Arbon commenced a formal disciplinary process by writing to each of the men and calling them to meetings. The

letter sent to Mr Salega referred to possible disciplinary action and the option of bringing a support person.

[12] Accompanied by his union delegate, Mr Fa'Aofo, Mr Salega met with Mr Arbon and Mr Robinson on 10 July. The meeting ended with Mr Robinson deciding that the incident raised safety issues which required further investigation. He told Mr Salega that the disciplinary process would continue and that there would be a further meeting with him.

[13] Mr Robinson went on leave from 13 July to 17 July. In his absence, the responsibility for proceeding with the disciplinary process fell to Mr Arbon. On 14 July he handed Mr Salega a further letter calling him to a second meeting.

[14] In the end, this meeting was deferred until 21 July so that Mr Salega's union organiser, Mr Hetherington, could attend to support him. In the meantime, Mr Hetherington had already raised a concern that as the main witness to the incident, Mr Arbon should not be part of the decision making process. In response to this concern it was agreed that Mr Arbon would not participate in the meeting of 21 July. Mr Robinson took over the disciplinary process on his return from leave and another manager, Andy Douglas, attended the 21 July meeting to assist him.

[15] At the meeting of 21 July Mr Robinson told Mr Salega that he had concluded that he had acted intentionally knowing the rules and risks involved. Mr Hetherington put forward a number of mitigating factors including Mr Salega's long and previously satisfactory service and his personal circumstances (he was a family man with four dependent children.) He also noted that Mr Salega had felt compelled to do as Mr Andrews asked because Mr Andrews was his senior both in work experience and in the context of their shared Pacific culture.

[16] Mr Hetherington also suggested alternatives to disciplinary action, such as retraining or a stand down period. The meeting was then adjourned until the next day, while a similar meeting was held with Mr Andrews.

[17] On 22 July, in Mr Robinson's evidence, he told Mr Salega and Mr Hetherington that:

“we reviewed the information from the previous day and observed that no relevant changes to that information had arisen as a result of completing the investigation with Sam.”

[18] After Mr Hetherington had reiterated some of the points he had made the day before, Mr Robinson adjourned with Mr Douglas to consult with the human resources department and consider what outcome would be appropriate.

[19] Mr Robinson told me that before reaching a decision he took into consideration information he had obtained from interviews with Mr Salega, Mr Andrews, Mr Arbon and two other staff members: Mr Fa’Afoe and a worker who was only identified to the Authority by his first name, Moye. The latter two workers were interviewed to check an assertion by Mr Andrews that what he had done was common practice. Mr Robinson did not keep any notes of his interviews with Mr Fa’Afoe or Moye (notes were taken of the meetings with Mr Salega and Mr Andrews only) but stated in evidence that neither of the two believed that what Mr Salega and Mr Andrews had done was common practice.

[20] Mr Robinson also took into consideration this unsolicited written statement from Sam Andrews:

“I stepped onto the fork while it was flat on the ground. I placed one hand on the safety guard rail of the fork and grip [sic] the pallet on the rack with the other hand to ensure I was safe and minimise any chance of any undue mishap occurring...

asked Joseph to operate the lift lever on the reach truck control panel to raise the fork off the ground...

he did what I asked...”

[21] Mr Andrews provided this statement, unasked, in the interval between the 10 July and 21 July meetings.

[22] Mr Robinson told the Authority that he also reviewed the site of the incident. He assessed the height of the shelving Mr Andrews was reaching for, and checked what other equipment that was available to enable Mr Andrews to do the task in question. He noted that signs warning against the conduct in question were clearly visible in the work area. One example provided to the Authority read:

“Don’t ride on or allow anyone to ride on forks”

[23] Finally he said he had regard to the respondent’s safety policies, all of which provided that it was unacceptable to ride on a forklift and had been drawn to Mr Salega’s attention. The forklift drivers hand book, for example, contained the following:

“Don’t carry passengers...there is no safe place on a forklift truck for a passenger to ride...”

Don’t use your forklift truck as a personnel lift. This is extremely dangerous. Your forklift truck was designed for smooth safe handling of things – not for elevating people, unless a work platform ...has been fitted.”

[24] Mr Arbon had not seen the tines moving, and Mr Salega’s position has consistently been that at no time while Mr Andrews was standing on them did he operate the reach truck, or move the forks. Mr Robinson concluded nonetheless that the tines must have been moved, with Mr Andrews on them, prior to Mr Arbon catching sight of what the two men were doing. He said this conclusion was supported by the content of Mr Andrews’s unsolicited statement. He also concluded that with the tines at approximately knee level (as both parties agreed they were) Mr Andrews would not have been able to reach the boxes in question. This conclusion was based on his assessment of where the boxes had been. He thus inferred that it was intended, not just to use the tines as a stationary stepping stone, but to raise the tines still further.

[25] Although Mr Salega had told Mr Robinson that the incident would not be repeated, Mr Robinson thought it likely that something like this could happen again. After hearing what Mr Hetherington had to say about why Mr Salega had complied

with Mr Andrews's request (that for cultural reasons, he found it difficult to refuse an elder) Mr Robinson formed the view that in a similar situation Mr Salega could again be susceptible to the same sort of pressure. He told the Authority that the risk of Mr Salega re-offending was an important factor in deciding to dismiss him.

[26] Taking all this into consideration Mr Robinson concluded that there had been an intentional and serious breach of Health and Safety rules which could be repeated. The meeting resumed with Mr Robinson telling Mr Salega that the incident was considered serious misconduct and that he was summarily dismissed. Mr Salega packed up his things and was seen off the premises.

[27] Mr Hetherington and Mr Salega both told the Authority that they were not clear (even by the meetings of 21 and 22 July) precisely what the factual findings were. Although Mr Robinson told Mr Salega that he did not accept that "*no operating was done*" by him he did not tell Mr Salega the basis of this conclusion and, as he acknowledged in his evidence, some of the information that was taken into consideration had not been put to Mr Salega for comment. This included the following:

- i. Neither Mr Salega nor Mr Hetherington had Mr Andrews's unsolicited handwritten statement at any time prior to the meeting of 21 July. During the course of those meetings Mr Hetherington asked for, and was given, a copy of the notes Mr Robinson had taken at the meetings of 10 July (which Mr Hetherington had not attended.) A copy of Mr Andrews's statement was attached to these notes but Mr Robinson did not draw Mr Hetherington's attention to the statement, make any reference to its contents or ask for Mr Salega's response to it.
- ii. Mr Robinson did not tell Mr Salega that he had checked the dimensions of the area where the incident occurred, nor did he tell him what he had concluded about the height of the boxes he understood Mr Andrews to have been trying to reach. Subsequently, the union has challenged Mr Robinson's assessment of how high they were saying that the boxes which

needed straightening were lower than alleged and Mr Andrews was already within reach of them;

- iii. Mr Robinson did not disclose anything about having spoken to Mr Fa'Afoe and to Moye, and
- iv. Mr Robinson never told Mr Salega or his representative that he thought it likely that he might re-offend or why he had come to this conclusion.

Determination

[28] Mr Robinson should have given Mr Salega an opportunity to comment on all the information he took into consideration in making the decision to dismiss. His failure to do so undermined the fairness of the investigation and the reliability of the conclusions he reached. The finding that the tines must have been moved with Mr Andrews on them, the finding that the intention was to raise them further, and the finding that Mr Salega was likely to reoffend are all rendered unreliable by the fact that Mr Salega was not told what these specific allegations or what they were based on.

[29] Without this information Mr Salega could not give a full and informed response, and without the benefit of his response the respondent could not be sure it had come to the right conclusion. It cannot be said, in these circumstances, that the respondent conducted a fair and reasonable process.

(ii) Suspension

[30] As set out above, on 14 July Mr Arbon gave Mr Salega a letter calling him to a second formal disciplinary meeting. The letter concluded:

“You are not required to carry on working but you should take the time between now and [the meeting] to arrange representation. You will be paid during this absence.”

[31] Mr Salega's evidence is that upon handing him the letter, Mr Arbon told him to go home and get representation. Mr Salega construed this to mean that he was suspended. Watty1 disputes this interpretation and says that the intention was simply to give Mr Salega an opportunity to prepare for the meeting.

[32] On 13 July Mr Robinson emailed Don Arbon and Human Resources Manager Chris Lund as follows:

“Martin¹ has spoken to me advising that the two employees have been suspended and will be requested to attend a further investigation meeting later this week.”

[33] Mr Robinson was on holiday by this time and had no first hand knowledge of what was happening back at work. He told the Authority he used the word “suspended” because that was the word Mr Robb had used. I was also provided with Mr Lund's response to this email. In it he makes no comment on the reference to a suspension. Mr Lund's evidence was that he had not (at that stage) discussed suspension with Mr Arbon or Mr Robinson at all.

[34] On or about 15 July Mr Hetherington challenged Mr Lund about the alleged suspension. Mr Lund responded that as far as he was concerned, Mr Salega was not suspended, and could return to work if he wanted to. Mr Salega went back to full duties, including operating the forklift, on 16 July.

Determination

[35] Given the alacrity with which Mr Lund authorised Mr Salaga's return to normal duties, I accept that he never saw any necessity for Mr Salega to be suspended, and did not authorise this step. Nonetheless it was reasonable for Mr Salega to construe Mr Arbon's instruction to go home as a suspension. It is not considered unreasonable for him to think he was suspended when even Mr Robinson thought the same. Whatever the mix up from the respondent's side, the consequence was that Mr Salega was effectively suspended.

¹ Martin Robb, Group Operations Manager.

[36] Since there is no evidence that any kind of process was followed beforehand it follows that the suspension has not been justified.

(iii) Whether dismissal was fair and reasonable

[37] As set out already, the inadequacies in the respondent's inquiry render unreliable key findings on which the justification for the dismissal rests. These include the conclusion that Mr Salega had raised the tines with Mr Andrews on them and intended to raise them even further and the conclusion that he was likely to re-offend in the future.

[38] It was not fair and reasonable for the respondent to come to firm conclusions on these matters when it had not first put them, with the information on which they were based, to Mr Salega for comment.

[39] If Mr Andrews had merely stepped on to stationary tines to gain an extra 60 centimetres of height Mr Salega's misconduct would clearly have been at a much lower level. The union has argued (with reference to the respondent's own policies) that dismissal would be unwarranted in relation to misconduct at that level. This submission is accepted.

[40] The union argues also that if could not be established that Mr Salega was at risk of reoffending, dismissal could not be justified as a sanction in preference to a warning. Given that Mr Robinson himself saw this issue as relevant to the question whether to dismiss, I am prepared to accept this submission also.

[41] Finally (although less critically) I accept that it was misleading for Mr Arbon to have told Mr Salega that he might be warned. In a full and fair process he would have been aware, from the outset, of the seriousness of the situation.

[42] For all these reasons it cannot be said that the employer's actions were what a fair and reasonable employer would have done. The dismissal has not been shown to be justified in all the circumstances.

(iv) Remedies

Suspension

[43] I accept that the disadvantage to Mr Salega arising out of the suspension was minimal in all the circumstances. He was suspended for only one full day during which he did take advantage of the opportunity to seek help from his union. Once the company's actions had been drawn to Mr Lund's attention he immediately rectified the matter. In these circumstances no separate award of compensation is warranted.

Contributory conduct

[44] Turning to remedies for the dismissal, I record that the core of agreed facts between the parties establishes that there is an element of contributory conduct in this case. The issue has been to assess the degree.

[45] Were I able to accept that Mr Salega did not move the tines with Mr Robinson on them the level of contributory conduct in this case would be at the lower end. Simply stepping on stationary tines would not have been a serious breach of health and safety protocols. Like Mr Robinson, however, I find this proposition difficult to accept. There is no dispute that another worker refused to help Mr Andrews when he asked for help, as did Mr Salega until Mr Andrews prevailed upon him. On 7 July, when confronted over the incident, and again on 10 July, Mr Salega apologised, appearing to accept that what he did was both wrong and serious. Mr Andrews's unsolicited statement was also clear and specific about the fact that the tines were moved, and there is no apparent reason why he should make up such an assertion.

[46] All of these points support Mr Robinson's conclusion, and no additional information has come out since the dismissal to overturn it.

[47] The respondent has not established however that Mr Salega was about to raise the tines still higher. The evidence of where the boxes were positioned is not sufficient to support Mr Robinson's conclusion on that issue.

[48] Nonetheless, moving the tines with someone on them, even to the height of 60 centimetres, was unsafe practice and Mr Salega knew this. It follows that there is a high degree of contributory conduct. I set this at 40%.

Reinstatement

[49] Given the high level of contribution and given that the misconduct related to health and safety issues, I accept that it is not practicable to reinstate Mr Salega.

Compensation for hurt and humiliation

[50] Mr Salega told the Authority that the dismissal put him, his relationship and his family under great stress. I accept that the dismissal has had a severe impact on every aspect of Mr Salega's life. Although the direct financial loss is remedied under the head of lost earnings, a further award for the additional stress is warranted. In the absence of contributory conduct I accept that an award of \$12,000.00 would have been appropriate. After deduction for contributory conduct this is reduced to \$7,200.00.

Lost earnings

[51] Before his dismissal Mr Salega was earning \$18.28 per hour and worked a 40 hour week. Afterwards, with the recession having hit, he was unable to find work. He has suffered extreme financial pressure as a result of his dismissal. After a previously steady work history he has been forced on to the unemployment benefit to survive, and at the time of the Authority investigation meeting he still had not found work.

[52] In these circumstances I am satisfied that lost wages should be paid for a period of six months. I do not extend it further as I do not consider it reasonable (in a recessionary environment) for the employer to bear indefinite responsibility for Mr Salega's joblessness.

[53] Without reduction for contributory conduct, Mr Salega's losses over six months are \$19,011.20. With 40% contribution the award of lost earnings is reduced to \$11,406.72.

(v) Costs

[54] The issue of costs is reserved. Any application for costs must be supported by submissions and must be made within 28 days of the date of this determination. Upon receipt of any such application the other party will have 14 days to respond.

(vi) Summary of orders

[55] The respondent, Watty1 New Zealand Limited is ordered to pay to Mr Salega:

- i. Compensation for hurt and humiliation pursuant to s. 123 (c)(i) of the Employment Relations Act 2000 in the sum of \$7,200.00, and
- ii. Lost earnings pursuant to s.128 of the Employment Relations Act 2000 in the sum of \$11, 406.72.

Yvonne Oldfield

Member of the Employment Relations Authority