

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 189/10  
5162892

BETWEEN                      JONITO VILLEGAS  
   Applicant  
  
AND                                VISYPET (NZ) LIMITED  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Greg Lloyd, Counsel for Applicant  
   Tanya Cotton, Advocate for Respondent  
  
Investigation Meeting:        9 March 2010  
  
Submissions received:        11 and 23 March 2010  
  
Determination:                26 April 2010

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**DETERMINATION OF THE AUTHORITY**

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[1]     Mr Villegas worked for Visypet as a production operator for 12 years in its plastics manufacturing plant. At the time of his dismissal on 5 May 2009 he worked as a forklift driver in the injection moulding department.

[2]     Mr Villegas says his dismissal was unjustified because the conduct which was found to amount to serious misconduct, would not, on an objective assessment and in all the circumstances, amount to serious misconduct. The conduct in question concerned purposefully collapsing a stack of cardboard boxes. Mr Villegas seeks reinstatement to the position from which he was dismissed and awards to compensate contingent losses.

[3]     Visypet says Mr Villegas' dismissal was justified because he failed to report an incident (the collapse of the boxes), he was aware all incidents had to be reported and had received warnings, training and counselling previously about on site health and safety practises.

[4] The issues for the Authority to determine are:

- (i) did the box collapse amount to a reportable incident?
- (ii) if so, did the failure to report the incident amount to serious misconduct? and
- (iii) if so, was the decision to dismiss justifiable in all the circumstances?

[5] In considering these issues the applicable test for justification is that set out in section 103A of the Employment Relations Act 2000. This test requires that the Authority make an objective assessment of the justifiability of the (in this case) dismissal given all the relevant circumstances at the time the decision to dismiss was made<sup>1</sup>.

### **Box collapsing – a reportable incident?**

[6] At Visypet a normal part of a fork hoist driver's duties is the assembly of boxes. Mr Villegas said that the boxes are usually neatly stacked up to 3 metres high and are able to be safely retrieved by fork hoist.

[7] However, on the day in question, the boxes were not neatly stacked and Mr Villegas made an assessment that they could not be safely retrieved by fork hoist. I note Visypet does not challenge this assessment. Mr Villegas then conducted a controlled collapse of the stack – he checked there was no one present and then pushed the stack over using the fork hoist. Unknown to Mr Villegas the collapse was observed by another employee who reported the incident.

[8] Mr Villegas says it did not occur to him to complete a incident form about this event because in his view it did not amount to a reportable incident - it was a controlled collapse and he had checked there was no one present at the time.

[9] Clause 23.6 of the relevant collective agreement sets out the requirement to report incidents:

All work related injuries and any damage to plant or equipment must be reported to the appropriate supervisor/manager immediately and recorded in the appropriate Register.

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<sup>1</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415

[10] Mr Lloyd submits the box collapse is not a reportable incident for the purposes of clause 23.6 because there was no injury to plant or equipment. I accept that submission.

[11] Visypet has health and safety policies. These sit outside the collective agreement and should be read along side that agreement. Part of those health and safety policies are presented to all staff (including Mr Villegas) in a power point presentation entitled *Toolbox Talk*. In that document incidents are defined and employee reporting obligations for such incidents are outlined:

Incident Types

...

Near Miss – Any unplanned incident that occurred at the workplace which although not resulting in any injury, disease or property damage has the potential to do so

Reporting Incidents

All Incidents and Near Misses must be reported to your supervisor or 2ic, no matter how slight.

...

[12] This definition of reportable incident (including near misses) does not conflict with the provision in the collective agreement.

[13] Visypet says the box collapse was a near miss incident (ie, unplanned with the potential for injury or property damage) which was required to be reported. Mr Villegas says it was not a near miss incident because the box collapse was not unplanned.

[14] I find the box collapse was a near miss incident for the purposes of incident reporting – the event arose from unusual circumstances (the untidy box stack) to which Mr Villegas improvised a response. Such a situation is why the incident reporting exists; to bring visibility to unknown and unanticipated events in the business.

**Did the failure to report amount to serious misconduct?**

[15] As a one off incident, no.

[16] However, Visypet says this incident was not a one off and points to the two similar incidents Mr Villegas had been involved in over the preceding 8 months for which disciplinary warnings were issued:

- (i) On 5 September 2008 Mr Villegas was issued with a written warning concerning a near miss incident whilst driving a fork hoist. One of the concerns expressed in the letter by the manager, Mr Phil Lloyd, is Mr Villegas' failure to report the incident. Mr Villegas was put on notice that he must report all incidents; and
- (ii) On 16 February 2009 Mr Villegas was issued with a final written warning for driving a fork hoist unsafely and failing to report the incident. The letter notes that all incidents must be reported including near misses and puts Mr Villegas on notice his employment could be in jeopardy if a repetition occurred.

[17] Mr Villegas, through his Union, raised detailed concerns about both these warnings. These concerns were not pursued and no personal grievance was raised on his behalf in relation to those warnings.

[18] Mr Lloyd raises three objections to the cumulative justification for characterising the box collapse incident as serious misconduct warranting dismissal; first the events are not sufficiently proximate (including the expiry of the first warning), the incidents were unfairly categorised as misconduct, the express provisions of the collective agreement were not complied with and Visypet did not provide sufficient performance management to Mr Villegas.

- (i) Proximity

[19] In relation to the first argument I do not accept the issue – Mr Villegas failing to report incidents – was so distant as to be a stale issue. A final written warning was

extant at the time of the box collapse incident and the period in question spanned no more than 8 months.

(ii) Categorisation of incidents

[20] I accept there is inconsistency in the categorisation of the incidents – the first is expressed as failure to report, the second poor performance and the third failure to follow specific instructions. Mr Lloyd submits this inconsistency coupled with proximity undermines the cumulative effect of the incidents amounts to serious misconduct.

[21] This argument might stand if it is accepted some unfairness arose from this inconsistency ie, that the incidents were treated so differently by Visypet in the disciplinary context that Mr Villegas could not reasonably be said to have understood there may be a cumulative effect.

[22] I do not accept any such unfairness arose. Mr Villegas was aware of Visypet's concerns about his conduct, he was given a fair opportunity to respond to those concerns, his Union then raised detailed concerns about the disciplinary investigations and outcome and, notwithstanding, has not pursued a personal grievance.

(iii) Application of collective employment agreement

[23] The collective agreement provides the following disciplinary process:

20.1 In cases of misconduct which fall short of serious misconduct the Employer will give the Employee three warnings prior to termination of the Employee's employment:

- a) Verbal warning
- b) First written warning (6 months standing)
- c) Final written warning (12 months standing)

...

20.2 In cases of misconduct which fall short of serious misconduct, but which the Employer still considers to be sufficiently serious, the Employer may give a final written warning in the first instance.

[24] Mr Lloyd submits Visypet has failed to follow the agreed warning process and this undermines the escalation of the box collapse to serious misconduct.

[25] Visypet says clause 20.1 of the collective agreement allows the process followed. This is not correct – clause 20.1 allows a final written warning to be issued in the first instance. Mr Villegas was first issued with a first written warning.

[26] Notwithstanding, the collective agreement does not prohibit the approach adopted by Visypet. The conduct giving rise to Mr Villegas' dismissal amounted to serious misconduct because of the cumulative effect of earlier misconduct.

(iv) Performance management

[27] Performance management processes can be difficult to tease out from disciplinary processes. In this case there are indications that Visypet adopted a performance management approach to Mr Villegas' conduct. I am satisfied Visypet provided sufficient support to Mr Villegas to ensure he knew what amounted to a reportable incident.

**Was dismissal justified?**

[28] The reasons for Mr Villegas' dismissal are set out in a letter dated 5 May:

...

The reason for your dismissal is failure to follow specific instructions. You have been counselled, received warnings – with very specific instructions, and been told in tool box talks and team meetings about your obligations around health & safety at work.

As a result of your continued failure to carry out these tasks I have lost confidence in your ability to carry out the responsibilities of your role in an acceptable and safe manner.

As I said at our meeting Jonito I am sorry it has come to this, but I have given you plenty of time and training in respect of these obligations and still I have seen no change in your behaviour.

We will pay your final pay on Tuesday 12<sup>th</sup> May. This will include an extra two weeks pay in lieu of notice and any annual leave you have accrued.

[29] I have found, for the reasons set out above, the cumulative effect of the incidents amount to serious misconduct.

[30] Mr Villegas was on notice repeated failure to report incidents may result in dismissal. He failed to report the box collapse. Taking into account the relevant circumstances including the history of failing to report and the extant warning I am

satisfied that a fair and reasonable employer would have dismissed in all the circumstances.

### **Costs**

[31] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then costs memoranda should be filed within 21 days of the date of this determination with a further 7 days for reply.

Marija Urlich

Member of the Employment Relations Authority