

Mr Wasson is also required to provide emergency repairs and out of hours fault restoration. Mr Wasson is on Top Energy's on-call roster to respond to emergencies.

[3] Top Energy is a local electricity generation and lines network company supplying electricity to its approximately 30,000 customers. Top Energy is owned by its power consumers and accordingly has a community focus.

[4] Mr Wasson has been and continues to be an active member of the Kerikeri volunteer fire brigade. Mr Wasson has been involved with the fire brigade for approximately 18 years and since 2005 has held the position of Chief Fire Officer.

[5] In his role as Chief Fire Officer, Mr Wasson attends to Fire Service call-outs. During his period of employment by Top Energy and its predecessor companies, Mr Wasson has responded to Fire Service call-outs during normal working hours and while on the stand-by roster for Top Energy. There were no rules or policies in place concerning such community activities by Top Energy staff.

[6] In 2010, Top Energy decided that it was necessary to introduce rules in respect of its employees engaged in emergency community service work. A draft policy, the Emergency Community Service Policy ("the draft emergency policy"), was circulated by Top Energy to affected employees who were asked to provide feedback. The draft emergency policy included a prohibition ("the prohibition") on employees rostered on stand-by for Top Energy from making themselves available for any other emergency community service work, as a conflict with their employment by Top Energy could arise.

[7] Mr Wasson was consulted and provided feedback on the draft emergency policy. In April 2011, the draft emergency community service work policy was finalised and introduced as one of its policies ("the emergency policy") by Top Energy.

[8] On 13 December 2012, Mr Wasson responded to an emergency Fire Service call-out while being on call for Top Energy. Mr Wasson drove a Top Energy car and, while responding to the call-out, exceeded the speed limit. Top Energy became aware that Mr Wasson had been speeding in one of its cars and undertook a disciplinary investigation.

[9] During the course of its investigation, Mr Wasson explained to Top Energy that he was speeding because he was attending an emergency call out for the Fire Service. Top Energy concluded that Mr Wasson had been speeding in a Top Energy car and was in breach of the Top Energy vehicle policy. Mr Wasson was issued with a warning in respect of the speeding. Mr Wasson accepted the warning.

[10] During the investigation, Mr Wasson denied being aware of the prohibition and denied being aware the emergency policy had been finalised. Top Energy investigated Mr Wasson's claims he did not have knowledge of the prohibition or that the emergency policy had been finalised and introduced. As a result of its investigations, Top Energy did not accept Mr Wasson's claims and concluded that Mr Wasson, in attending the Fire Service call out while being on standby for Top Energy, was in breach of its emergency policy and this amounted to serious misconduct. Top Energy took disciplinary action against Mr Wasson which was to withdraw his "*privilege to attend community service during work hours for a period of 12 months*". The sanction applied from 31 January 2013. Mr Wasson was also informed that he was "*not to attend community service calls while you are on standby*" in accordance with Top Energy's Emergency Community Services policy.

[11] Mr Wasson claims that the prohibition in the emergency policy is unlawful and he challenges it. Mr Wasson also says the disciplinary sanction imposed by Top Energy is not the action of a fair and reasonable employer in the circumstances. Top Energy denies the prohibition in the emergency policy is unlawful and claims the disciplinary action to be justified in the circumstances.

Issues

[12] The issues for determination by the Authority are as follows:

- (a) Is the Emergency Community Services policy unlawful?
- (b) Was the "*withdrawal*" by Top Energy of Mr Wasson's "*privilege*" to attend emergency community service work during work hours for a period of 12 months the withdrawal of a discretionary benefit or the removal of a condition of employment?

- (c) If the privilege is a discretionary benefit can its withdrawal constitute a disadvantage under s103(1)(b) of the Employment Relations Act (“the Act”).
- (d) If the privilege is not a discretionary benefit but a condition of employment was its withdrawal an unjustified disadvantage?

First issue

Is the Emergency Community Services policy unlawful?

[13] Mr Wasson is a member of the NZ Engineering Printing and Manufacturing Union (“the EPMU”) and his employment is covered by the Top Energy Limited collective agreement April 2011–March 2013 to which both the EPMU and Top Energy are parties (“the Collective”). At all relevant times, Mr Wasson was employed by Top Energy as a senior faultman, was the Chief Fire Officer of the Kerikeri Volunteer Fire Brigade and was a delegate of the EPMU.

[14] The Collective provides at page 3:

Coverage... your personal terms of employment comprise this Employment Agreement and the additional matters confirmed in your appointment letter. Other company policies and procedures, including the Top Energy Code of Conduct, also apply to your employment. Such policies and procedures may be amended by Top Energy from time to time, but may not be inconsistent with this Employment Agreement.

[15] At page 6 of the Collective it says:

Hours of Work....The ordinary hour of work are 40 per week, and may be worked over any 5 days of the week, Monday to Friday inclusive, between the hours of 0600 and 1800hrs. The normal start and normal finish times are 0730 and 1600hrs Monday to Friday unless otherwise advised...

[16] At page 9 of the Collective it provides in respect of a standby roster as follows:

Standby.....The Company shall operate a rotating roster of employees required to work on standby to cover after hours faults. If you are suitably qualified you may be required to be placed on the roster. Each roster shall cover a minimum period of three months and will be published at least two weeks prior to its

commencement....The rates paid for being on Standby are as specified in Schedule A...

Standby Rates

Per full week. \$272.79

[17] Top Energy's Code of Conduct states at para 17:

Employees must ensure that there is no conflict between their Top Energy Group duties and their private interest and any such concerns should be disclosed through discussion with their manager. Employees must ensure that their actions, at no time, bring the Top Energy Group into disrepute in any way."

[18] In 2010, Top Energy decided that a policy was required in respect of emergency community service work carried out in work hours by some of its employees. Top Energy had experienced a number of issues regarding community service work in its organisation. Mr Geoffrey Smith, Project Delivery Manager, Top Energy, says it was difficult to keep a record of those employees taking time off work to attend emergency community service work and it was impacting on the business operationally. Mr Smith says it was not just an issue involving Mr Wasson, but others at Top Energy who were involved in volunteer community service work including Mr Hamish Lewis and Mr Todd Campbell. Mr Smith says Top Energy determined that it was important to have some rules on the issue. The importance of having rules was accepted by Mr Hamish Lewis, an employee of Top Energy at the time, and a volunteer firefighter.

[19] In June 2010, Mr Lewis and Mr Todd Campbell, another employee of Top Energy and a volunteer firefighter attended a Fire Service call-out during work hours. An issue arose the next day over their timesheets. Mr Lewis and Mr Campbell met with Mr Smith, Top Energy and Mr Kevin Wilson, former Top Energy Manager in Mr Smith's office. Mr Wasson was at the meeting and was the EPMU delegate at the time. There was a discussion about having a policy regarding community service work call outs.

[20] Following this meeting, a draft policy dated July 2010 was circulated by Top Energy. Mr Wasson and others who were involved in emergency community service work and who were to be affected by the policy were consulted about the draft emergency policy. The draft emergency policy stated:

Top Energy is committed to supporting community service. Where employees choose to undertake voluntary community work that in emergency situations may affect their attendance and work for Top Energy, the company will endeavour to accommodate them. This policy only applies to situations where the community requires a response on an emergency basis and the individual is an established member of an Emergency Service. For this policy, Emergency Services are:

- *St John Ambulance*
- *Fire Service*
- *Coastguard*
- *Police*
- *Civil Defence*
- *Any other organisation approved by the Top Energy CEO*

[21] The purpose of the policy included:

To:

- *Provide clear guidance to employees on how to apply the policy:*
- *Manage conflicts of interest... this policy is not intended to impose unnecessary restrictions on private activities but sets out the parameters that are contingent with the requirements of Top Energy.*

[22] The operating guidelines included the following statement which has been referred to in this determination as “*the prohibition*”:

- *Employees who are on rostered standby/call-out for Top Energy must not make themselves available for any other emergency service standby/call-out activities as this would be a conflict of interest with the employee’s conditions of employment with Top Energy...*

[23] Mr Wasson, as the EPMU delegate prepared feedback on the draft emergency policy on behalf of himself, Mr Lewis and Mr Campbell. Mr Wasson discussed his feedback with Top Energy’s Human Resources Manager, Ms Shirley Field and asked if she would type up his submission, which she did. Ms Field emailed the written feedback to Mr Wasson so he could check it before it was submitted.

[24] Mr Wasson claims that he was not aware of the prohibition in the draft emergency policy because he only browsed it. I struggle to accept Mr Wasson’s evidence. Mr Wasson’s written feedback addresses the prohibition in my view. Mr Wasson’s feedback includes the following:

My priority and primary responsibility has always been to my duties at Top Energy, I have never left a job that I have been undertaking to attend an emergency call-out for the Fire Service unless there has been the ability for another employee to adequately complete the job...I am committed to the senior position I hold in the Fire Service and wish to continue in helping to provide the level of service to my community that is required. As the Service is totally volunteer driven it becomes a serious community issue if resources are not available to deliver the service.

[25] Mr Wasson's submission goes on to address the cap of 16 hours paid leave proposed by Top Energy for those employees undertaking emergency community service work. Mr Wasson's feedback was that 20 hours paid leave would be more appropriate for those undertaking emergency community service work.

[26] Top Energy took Mr Wasson's submission on board and made up to 20 hours paid leave available upon request, for those employees undertaking emergency community service work. On 6 April, an email from William Acker, Quality Improvement Manager, was sent to a number of senior employees including Mr Smith and Mr Wasson. The email stated "*the following policy was added to the SharePoint Policy Library....Emergency Community Service*".

[27] The policy was finalised and distributed at a meeting of Top Energy employees on 8 September 2011 which was chaired by Mr Wasson. Three other Top Energy policies and 24 memos were also distributed at the meeting. Mr Wasson accepts he was at the meeting and signed the attendance register.

[28] During its investigation into whether Mr Wasson had breached the emergency policy, Top Energy considered Mr Wasson's claims that he was not aware of the final policy and rejected his claims. This was a conclusion in my view that Top Energy was able to reach in the circumstances.

[29] The draft policy was finalised and introduced by Top Energy following a proper process of consultation, in my view. There were discussions with employees, including Mr Wasson over an extended period of time about the need for rules in respect of attending emergency community service work and Top Energy's requirements. A draft emergency policy was prepared and distributed. Staff were consulted and Mr Wasson, a senior employee and EPMU delegate provided written feedback on behalf of those the draft policy affected. Feedback was considered by

Top Energy, the policy was finalised and staff received the final policy at a meeting chaired by Mr Wasson.

[30] The policy is not inconsistent with any of Mr Wasson's terms of employment as contained in the Collective. Mr Wasson is required to work 40 hours per week, 5 days a week in accordance with the provisions of the Collective. There are provisions in the Collective governing overtime work and work on the standby roster. Mr Wasson and others engaged in emergency community services work have for many years been allowed by Top Energy to attend to community service work during working hours. Top Energy allowed such employees to take a certain amount of paid leave a year in order to attend to such community work in line with its community focus. Top Energy was not required by law to provide time off for its employees to undertake such work nor was it obliged to offer an amount of paid leave for such activities. Top Energy chose to allow this to occur in recognition of its commitment to the community.

[31] When it became apparent that the community service being carried out by Top Energy employees needed to be properly managed, discussions were held with affected employees about the introduction of a suitable policy. A consultative process was undertaken and a policy introduced.

[32] The emergency policy clearly states its purpose including to “...*define guidelines...manage conflicts of interest...*”. Ms Field gave examples of conflicts which could arise if an employee of Top Energy was on the call out roster and also made him/herself available to attend an emergency call out for the Fire Service or another community organisation. The situations arising because of such a conflict could be very serious. Mr Wasson accepts that there could be a conflict but that such a situation would be extremely rare and if it arose he would hand over his Fire Service responsibilities. Top Energy recognised the danger of a conflict situation arising and formulated a policy to remove such a risk. In my view, Top Energy in formulating the policy was acting responsibly. I find the policy is not unlawful.

Second issue

Was the “*withdrawal*” by Top Energy of Mr Wasson’s “*privilege*” to attend emergency community service work during work hours for a period of 12 months the withdrawal of a discretionary benefit or the removal of a condition of employment?

[33] Mr Caisley for Top Energy, submitted that the withdrawal of the privilege was akin to withdrawing a discretionary benefit and was therefore not capable of amounting to a disadvantage pursuant to s103(1)(b) of the Act. Ms McNally, for Mr Wasson submitted that the ability to respond to Fire Service Call outs is a significant condition of Mr Wasson’s employment and its removal by Top Energy was “*not only excessive and unreasonable, but gave rise to a disadvantage in the employment*”.

[34] Ms McNally in her submissions referred to the decision of Chief Judge Colgan in *ANZ National Bank v Doidge*¹. At paragraph 45, Judge Colgan says;

Unjustifiable disadvantage in employment need not be confined to breaches of contract. Section 103(1)(b) refers to “condition[s]” of employment. A personal grievance is a broader notion than a breach of contract. Payment of the mileage allowance may have been a “condition of employment” but not a “term of the contract.

[35] Mr Wasson had been able to respond to Fire Service Call outs for many years and in 2011 a policy was introduced by Top Energy regulating such community service work by its employees during work hours. The policy provided for payment for up to a certain level of hours each year to attend to such work. I accept Ms McNally’s submission that the ability to respond to Fire Service Call outs during work hours is a condition of Mr Wasson’s employment. The withdrawal of Mr Wasson’s ability to attend to such work for a period of 12 months was the withdrawal of a condition of employment, not the withdrawal of a discretionary benefit. In those circumstances, the withdrawal is capable of amounting to a disadvantage under s.103(1)(b) of the Act.

Third Issue

If the privilege is a discretionary benefit can its withdrawal constitute a disadvantage under s103(1)(b) of the Act?

¹ [2005] ERNZ 518

[36] Given my finding that “*privilege*” is a condition of Mr Wasson’s employment not a discretionary benefit, I do not need to answer the third issue.

Fourth Issue

If the privilege is not a discretionary benefit but a condition of employment was its withdrawal an unjustified disadvantage?

[37] Top Energy concluded that in responding to an emergency call out while on its standby roster Mr Wasson was in breach of its emergency policy. Top Energy formed the view that this constituted serious misconduct in the circumstances. Top Energy determined the most appropriate disciplinary sanction in the circumstances was to *withdraw* Mr Wasson’s *privilege* to have 16 hours paid time off work to attend other emergency service work during work hours for a period of 12 months.

[38] It is for Top Energy to establish the disciplinary action was justified pursuant to s.103A of the Act. Section 103A(2) states:

103A Test of justification

- (1) *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.”*

[39] Section 103A was considered by a Full Court of the Employment Court in *Angus v Ports of Auckland*². The following findings of the Full Court are relevant:

- [36] *The most important change to former s 103A is that by use of the word “could” in substitution for the former “would”, Parliament has indicated that there may be more than one justified sanction available to an employer in any given situation in employment which might result in the employee’s dismissal or in disadvantage to the employee in his or her employment.*
- [37] *The effect of new s103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.”*

² [2011] NZEmpC 160

[40] The test requires the Authority in this matter, to determine whether on an objective basis preventing Mr Wasson from attending community services during normal work hours for a period of 12 months is within the range of responses open to a fair and reasonable employer. If the sanction is within the range then it will be justified.

[41] Mr Wasson has admitted the conduct in question. Whether the conduct constituted serious misconduct is always a matter of degree³. The Court of Appeal in *Buchanan* referred to two of its earlier judgments in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 and *W&H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. The Court of Appeal in both those cases stated it is always a matter of degree when determining the type of conduct which could constitute serious misconduct. The Court described it as “*conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship*”.

[42] Top Energy’s Code of Conduct provides at the outset that in the event an employee does not maintain expected standards of behaviour as set out in the Code, “... *some form of disciplinary action may be necessary in accordance with the Top Energy Group’s “Disciplinary Policy...”*”.

[43] Clause 2 of the Code requires employees to “... *uphold the philosophy, policies, operating procedures and standards...*”.

[44] Clause(b) of the Disciplinary Policy provides examples of Serious Misconduct which include “... *failure to uphold the philosophy, policies, operating procedures and standards of Top Energy*”. The Code provides that serious misconduct may warrant severe disciplinary action which may extend to dismissal.

[45] Top Energy undertook an investigation during which Mr Wasson was represented by a representative from the EPMU. Mr Wasson denied being aware of the prohibition. Top Energy investigated Mr Wasson’s claim and rejected it. Top Energy concluded Mr Wasson had received the emergency policy on at least two occasions prior to attending the Fire Service Call out on 13 December. Despite being aware of the prohibition, Mr Wasson chose to make himself available to attend the

³ *Chief Executive of the Department of Inland Revenue v Buchanan (No2)* [2005] ERNZ 767 at para [36]

Fire Service Call out while being on the standby roster. This was an inherently dangerous situation, a conflict between Mr Wasson's duties for Top Energy and for the Fire Service could have occurred. This is the type of situation contemplated by the emergency policy. When attending the call out, Mr Wasson exceeded the speed limit. Mr Wasson was issued with and accepted a written warning for acting in breach of Top Energy's vehicle policy.

[46] Mr Wasson's action in attending the Fire Service Call out while being on standby for Top Energy in breach of the emergency policy placed him in a conflict of interest situation which had the potential to be very dangerous. Mr Wasson claimed that in the extremely rare occasion that a conflict situation might arise, he would hand over the Fire Service responsibilities to someone else. Top Energy had formulated the emergency policy for this precise purpose. However, Mr Wasson was not prepared to abide by it, relying instead on his own judgment as to whether a conflict situation had arisen whereupon he would hand over the Fire Service responsibilities.

[47] Top Energy conducted a thorough investigation and concluded Mr Wasson had seriously breached the emergency policy and this constituted serious misconduct under the disciplinary policy. On the evidence available to Top Energy (and now the Authority), I am satisfied that Top Energy was entitled to conclude Mr Wasson's actions, in clear breach of the emergency policy, constituted serious misconduct for which disciplinary action was appropriate and required.

[48] Mr Wasson claims the disciplinary action taken by Top Energy, namely prohibiting him from attending community services during normal work hours for a period of 12 months and requiring that he not attend community service calls while on standby in accordance with Top Energy's emergency policy is not the action of a fair and reasonable employer.

[49] The Court of Appeal in *Oram*⁴ confirmed that there may be more than one correct response open to a fair and reasonable employer. The evidence is that Top Energy gave consideration to various forms of disciplinary sanction and took into account Mr Wasson's lengthy period of service before confirming the appropriate disciplinary action. The disciplinary action taken was less serious than dismissal and in my view was the action of a fair and reasonable employer in the circumstances.

⁴ Paragraph [457]

[50] Mr Wasson says he was never given a chance to comment on the disciplinary sanction before it was imposed upon him. It is regrettable that Mr Wasson and his representative from the EPMU were not provided with an opportunity to address the sanction before it was imposed. However, in my view this was a minor defect in an otherwise comprehensive disciplinary process undertaken by Top Energy and has not resulted in Mr Wasson being treated unfairly. Section 103(5) of the Act states that in such a case the Authority must not determine the action taken by the employer (Top Energy) to be unjustifiable.

[51] Mr Wasson is paid to have paid time off work each year during normal work hours to attend the Fire Service. Mr Wasson has had his ability to have 16 hours paid time off work during normal work hours to attend such work removed by Top Energy for a period of 12 months. Mr Wasson is not being penalised financially, Mr Wasson is still paid but is paid to attend to his normal duties for Top Energy rather than to attend to Fire Service duties. Mr Brian Butt, Fire Region Manager, Northern, in a letter to Top Energy's CEO on 26 June 2013 supports Top Energy's emergency policy, recognises that volunteers will not be continuously available to it and confirms that it is ultimately the responsibility of the employer to release their employees. Given Mr Wasson's serious misconduct, Top Energy have determined not to release Mr Wasson from his duties for it during normal work hours for a period of 12 months and have warned Mr Wasson that he is not to attend community service calls while on standby in accordance with Top Energy's emergency policy.

[52] I find the sanction imposed on Mr Wasson to be within the range of responses open to a fair and reasonable employer in the circumstances. I do not find Top Energy's actions to constitute an unjustified disadvantage under s.103(1)(b) of the Act.

Costs

[53] Costs are reserved. The respondent has 14 days in which to file a memorandum as to costs and the applicant has 14 days in which to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority