New Zealand Employment Relations Authority Decisions

Wederell v McMillan Drilling Civil Limited (Christchurch) [2018] NZERA 1019; [2018] NZERA Christchurch 19 (20 February 2018)

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Last Updated: 14 March 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHRUCH

[2018] NZERA Christchurch 19
3013831

BETWEEN MYLES WEDERELL

Applicant

Jaron McMillan

AND MCMILLAN DRILLING CIVIL LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Sabrina Forrester Counsel for Applicant

Sara Jamieson, Counsel and Honor Mills, Advocate for Respondent

Investigation Meeting: 29 November 2017 at Christchurch Submissions received: 15 December 2017 from Applicant

22 December 2017 from Respondent

Determination: 20 February 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. **The grievance about the warning dated 25 May 2015 was resolved with its withdrawal.**
B. **The warning provided on 14 September 2015 was justified. C The warning provided on 18 March 2016 was justified.**
D. **The dismissal on 16 April 2016 was justified.**
E. **Costs are reserved and failing agreement a timetable is set.**

Employment relationship problem

[1] Myles Wederell was employed in a permanent full time position of fitter/welder with McMillan Drilling Civil Limited (McMillan Drilling) in Christchurch from 5 November 2014. He was party to an individual employment agreement. Mr Wederell had previously been employed with the parent company that McMillan Drilling separated from since in or about 2010.

[2] McMillan Drilling is a civil engineering and drilling business with branches in Christchurch and Queenstown. Its managing director is Jason McMillan.

[3] On 8 April 2016 Mr Wederell was dismissed from his employment for having an insecure trailer load and failing to report an incident. Mr Wederell says his dismissal was unjustified substantively and procedurally.

[4] Mr Wederell also says that there was a failure to act in good faith or follow a fair and proper process for the following warnings:

(a) Formal written warning dated 25 May 2015 for breach of McMillan Drilling health and safety protocols for failing to report an eye wash incident - subsequently withdrawn on 25 August 2015;
(b) Formal written warning provided on 14 September 2015 for breach of McMillan Drilling health and safety protocols for not reporting a “potentially serious near miss incident” involving a pipe rack.
(c) Formal written warning dated 18 March 2016 for failure to complete an incident report for a gas pipe explosion.
(d) Mr Wederell says that there was disparity in his treatment because incidents, accidents or near misses similar in nature have resulted in different outcomes or no disciplinary action.

[5] Mr Wederell seeks by way of remedy as clarified in final submissions three months loss of wages in the sum of $18,947.50, compensation in the sum of $15,000 together with costs and reimbursement of the filing fee.

[6] McMillan Drilling says that it carried out a full and fair disciplinary process and that it had good reason to terminate Mr Wederell’s employment for serious misconduct. It says that it acted in good faith in the circumstances in which it made the decision to dismiss including that Mr Wederell had repeatedly failed to adhere to the health and safety protocols and that he was clear about his obligations and the expectations McMillan Drilling had of him.

[7] It says that it withdrew the first warning dated 25 May 2015 when asked to do so by Mr Wederell’s solicitor because it was not issued in a procedurally fair way. It does not accept any unfairness or lack of good faith for the remaining two warnings.

[8] McMillan Drilling does not accept that there was disparity of treatment and in particular that there are no incidences sufficiently similar to the conduct of Mr Wederell.

The issues

[9] The Authority is required to determine the following issues:

- Was any issue of unfairness with the 25 May 2015 warning resolved by its subsequent withdrawal. If not then was the process leading to the warning unjustified and did Mr Wederell suffer disadvantage as a result;
- Was a grievance raised about the warning provided on 14 September 2015 within the statutory time frame or

can implied consent to raise the grievance out of time be inferred? If so was the warning the action of a fair and reasonable employer in all the circumstances;
    - Was there a full and fair investigation into the incidents on 16 and 17 February 2016

- Could a warning and a dismissal follow from one investigation about the two separate incidents that occurred on 16 and 17 February 2016;
    - Could a fair and reasonable employer have concluded misconduct from the gas pipe explosion incident;
    - Was the decision of McMillan Drilling to issue Mr Wederell with a written warning for the incident on 17 February 2016 what a fair and reasonable employer could have done in all the circumstances;
    - Could a fair and reasonable employer have concluded serious misconduct because of the insecure load and failing to report the incident;
    - Was the decision to dismiss Mr Wederell for the 16 February 2016 incident what a fair and reasonable employer could have done in all the circumstances and are there issues of disparity in treatment;
    - If the dismissal and/or warnings are not justifiable then what remedies should be awarded and are there issues of mitigation and contribution.

Test of justification

[10] The Authority has been asked in this matter to consider the justification for a dismissal and the justification for the actions of McMillan Drilling in issuing Mr Wederell with warnings.

[11] Matters involving justification require the application by the Authority of the justification test in s 103A of the Employment Relations Act 2000 ("the Act"). The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test in s 103A to consider on an objective basis whether the actions of McMillan Drilling and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[12] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether before dismissing or taking action the allegations against Mr Wederell were sufficiently investigated. Further, whether before dismissal or taking action the concerns were raised with Mr Wederell and he had a reasonable opportunity to respond to them and have his explanations considered genuinely by McMillan Drilling. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in an employee being treated unfairly.

[13] McMillan Drilling could be expected as a fair and reasonable employer to comply with good faith obligations set out in s 4 of the Act. I will set out below some material provisions in the documents that governed the employment relationship.

Material provision from documents governing the employment relationship

Individual employment agreement

Clause 7 Duties and Responsibilities

[14] Clause 7.1 provides that Mr Wederell shall honestly and to the best of his ability perform the duties and responsibilities in the employment agreement and other duties as requested from time to time by the employer.

[15] Clause 7.2 provides amongst other matters that Mr Wederell shall act within McMillan Drilling policies as contained in any personnel manual work rules or code of conduct and in accordance with any written or oral directions from time to time given by the employers.

[16] A letter dated 26 February 2016 to Mr Wederell setting out allegations about the incidents on 16 and 17 February 2016 stated that the actions, if established, may constitute a breach of clauses 7.2 and 24.1 of the employment agreement. Further that the actions may

constitute a breach of clause 25.1 (j) giving rise to serious misconduct and clause 25.2 which provides that failure to observe

safety rules may lead to dismissal after appropriate warnings.

Clause 24.1 Conduct

[17] Amongst other matters clause 24.1 provides that Mr Wederell shall be bound by and adhere to McMillan Drillings policies and all lawful and proper instructions.

Clause 25.1 – offences which constitute serious misconduct and may give rise to summary dismissal

[18] Clause 25.1(c) referred to in the letter of dismissal – Refusal to undertake the duties of the Employee's position, or failing to adhere to the Employer's code of conduct, its policies or to carry out any proper and lawful instruction given by the Employee's supervisor or any other person acting with the authority of the Employer.

[19] Clause 25.1(j) –Interfering with safety equipment or otherwise acting in a manner that threatens safety, health, or hygiene in the workplace or in a manner that hinders the safe and proper performance of other Employees.

Clause 25.2 – acts or omissions which may, after the appropriate warnings lead to dismissal

[20] Clause 25.2 (g) -Failure to comply with the Employer's policy on smoking in the workplace, or to observe safety rules.

Health and safety policy

[21] McMillan Drilling has a health and safety policy which was reviewed in June 2015. It was stated in the 26 February 2016 letter to Mr Wederell that if the actions alleged are established he may be in breach of the health and safety policy because he failed to "immediately report an accident, incident, unsafe conditions and/or hazards to your supervisor." Mr Wederell said in his evidence to the Authority that he was aware there was a

health and safety policy although could not recall what it said and he had been to "a couple of health and safety meetings".

Motor vehicle and mobile phone use policy

[22] The Authority was provided with a copy of the motor vehicle policy with Mr Wederell's signature on it dated 16 August 2012. The policy which was also referred to in the 26 February 2016 letter required the reporting of any near hits, crashes and scrapes including those that did not result in injury.

Was any issue of unfairness with the 25 May 2015 warning resolved by its subsequent withdrawal?

[23] On 22 May 2015 Mr McMillan understood from a manager that Mr Wederell has used eye wash equipment to remove debris from his eye but the incident was not reported. The company contracts manager on observing this had verbally advised Mr Wederell that he was required to fill out an incident report.

[24] Mr McMillan considered that the failure to fill out an incident report was a breach of the health and safety policy. On 25 May 2015 he provided Mr Wederell with a formal warning for breach of health and safety protocols.

[25] On 14 August 2015 Mr Wederell's solicitor Peter Maciaszek wrote to Mr McMillan. He noted in his letter that the warning had been issued without proper process and further that he did not accept that it was substantively justified. Mr Maciaszek stated in his letter that there had been a discussion with Mr Wederell about his obligations under his employment agreement. Further he stated there was no issue about health and safety protocols which he wrote are important in all lines of work but "certainly more so in your type of business given the obvious risk". He was no doubt referring to the business of McMillan Drilling which involved use of machinery and specialist equipment and movement of heavy items such as large steel pipes and timber poles.

[26] Mr Maciaszek wanted McMillan Drilling to confirm the withdrawal of the formal warning by return. When there was no response to his letter he wrote again on 21 August 2015 to Mr McMillan advising that Mr Wederell's employment had been affected to his disadvantage by the unjustifiable action of McMillan Drilling. He noted:

Notwithstanding this notice (which we are required to issue today in view of the time limits) we nevertheless still ask that this entire matter be resolved by your company simply withdrawing the written warning. If that is done properly then this matter will be entirely at an end. May we please hear from you.

[27] On 25 August 2015 Mr McMillan wrote to Mr Wederell by email copying in Mr Maciaszek and advised that the email was a retraction of the written warning which would be removed from Mr Wederell's file. Mr McMillan in his email said that there was to be a meeting to discuss the incident at an agreed time "as health and safety is paramount at our company and we want to ensure that all staff follow the required procedures thus keeping all staff safe in our workforce."

[28] I find that the unjustified action causing disadvantage grievance that was raised by Mr Maciaszek about the 25 May 2015 warning was resolved when the warning was withdrawn. That was the only remedy Mr Wederell sought. The Authority encourages those in employment relationships to resolve matters themselves because that is consistent with the object of the Act. There was a meeting that took place as foreshadowed in Mr McMillan's email of 25 August on 31 August 2015 and I'll turn to that now.

Subsequent meeting 31 August 2015 to discuss incident and protocol about reporting

[29] Meeting notes were taken and Mr Wederell signed the notes as true and correct. He said in his evidence that he did not recall all aspects of the notes including the reference to a need to report incidents straight away such as dropped pipes. The notes reflect there were several health and safety matters discussed including equipment and the need to report

incidents with dropped pipes as an example. I accept that it is more likely than not that the notes Mr Wederell signed do reflect what was discussed.

[30] The reminder to report incidents is relevant because Mr McMillan said that it was after that meeting that he became aware that Mr Wederell had failed to report an incident involving a dropped pipe rack that occurred just prior to that meeting on 28 August 2015. Mr McMillan said that he was told of this incident by another employee, who I shall call X, who had been working with Mr Wederell when the pipe rack dropped.

The warning provided on 14 September 2015 to Mr Wederell

Letter of 3 September 2015 about dropped pipe rack and no reporting

[31] On 3 September 2015 Mr McMillan wrote to Mr Wederell. Mr McMillan set out in his letter that he required Mr Wederell to attend a meeting to discuss the pipe rack incident as well as his responsibilities about health and safety at the workplace and the importance of reporting any hazards, accidents, incidents and near misses to prevent these occurring in the future. The letter provides that as the meeting may determine whether Mr Wederell receives a written warning, he may wish to have a representative with him.

[32] The main complaint that Mr McMillan advances about this matter is that the warning was pre-determined. The basis for that I understand is the second paragraph in the letter of 3 September 2015 where Mr McMillan wrote:

Please be advised that in light of the incident and the fact that it went unreported, I am considering issuing you with a formal written warning.

10 September meeting to discuss issues

[33] A meeting took place on 10 September 2015 to discuss the incident and primarily the fact that no report was filled out. Mr Wederell and Mr McMillan attended the meeting. The notes taken by Mr McMillan show that Mr Wederell said that he and another employee X had

had an argument and X brought up the pipe rack. Mr Wederell is recorded as saying that if Mr McMillan had not talked to X he would never have known about it. Mr Wederell referred to other incidents where there had been dropped pipes and no report filled in and said that he had recorded a number of incidents in his diary and many went unreported. Mr McMillan wrote at the bottom of the notes that Mr Wederell was more concerned about other employee's incidents than the importance and seriousness of making sure incidents are avoided and if they occur forms are filled out.

The written warning provided on 14 September 2015

[34] It was accepted that although that written warning is set out in a letter dated 3 September 2015 it was in fact given to Mr Wederell on 14 September 2015 after the disciplinary meeting had been held. Mr McMillan explained that he had simply used the original template to issue the warning and the date was not changed, and this was supported by the metadata supplied in the bundle of documents. There was also a handwritten amendment to the date of the letter which alerted Mr Wederell to the error. Ms Forrester confirmed in final submissions that the date of the letter is not in contention. I accept the written warning was provided to Mr Wederell on 14 September 2015 therefore. The warning was issued for breach of health and safety protocols because there was no reporting of a potentially serious near miss incident. It provided that it follows a meeting and verbal instructions about a previous unreported incident and that further breaches could result in termination of employment.

Raising a personal grievance about the warning

[35] There is no evidence of any grievance being raised about this warning within the statutory timeframe of 90 days. The Authority did raise this as a potential issue at the start of the investigation meeting. The first time there is any reference to the written warning is in a letter from Mr Maciaszek to Mr McMillan dated 4 March 2016 following the February 2016 allegations. It appears from the letter that Mr Maciaszek had only at that time become aware of the September 2015 incident and outcome. There is an issue as to whether the 4 March

2016 letter and other communication at that time, all of which is outside of the statutory timeframe for raising a grievance, does in fact raise a grievance. I find in all likelihood that a grievance about the September warning was not clearly raised until the first statement of problem was lodged with the Authority in June 2017.

Implied consent to grievance raised out of time

[36] No issue was formally taken by McMillan Drilling about the grievance not having been raised within time in final submissions. This is in all likelihood because there is a reasonably strong argument that McMillan Drilling implicitly consented to the grievance being raised out of time. Neither the first nor the second statement in reply allege that the 14 September warning grievance was raised out of time and both address the circumstances leading to its imposition. Mr McMillan gave evidence to the Authority about the warning and it was referred to in submissions lodged on behalf of McMillan Drilling. I cannot therefore infer that McMillan Drilling objects to the personal grievance about the 14 September 2015 grievance being raised out of time but rather its conduct is such that it is not unreasonable to conclude consent to an extension of time. It follows therefore that I do have jurisdiction to determine a grievance about the 14 September warning out of time.

Was there pre-determination of the disciplinary outcome or was the warning the action a fair and reasonable employer could have taken in all the circumstances process?

[37] The only procedural issue raised in final submissions on behalf of Mr Wederell is that the disciplinary outcome of a warning was pre-determined. Reliance is placed on the words in the letter of 3 September advising Mr Wederell of the incident for discussion that Mr McMillan was considering issuing him with a formal written warning. It is also important to assess what occurred after the letter of 3 September was provided.

[38] There was a meeting and an opportunity for Mr Wederell to give an explanation. Mr Wederell did not deny that there was an incident or that he had failed to report it. His explanation essentially was that lots of incidents go unreported. Mr McMillan did not accept

in his evidence to the Authority that he had pre-determined the outcome. He concluded Mr Wederell did not seem to appreciate the importance of employees abiding by health and safety requirements. In his oral evidence he said he was also concerned about the proximity of the event to the 31 August meeting and the failure to Mr Wederell to disclose the incident during that meeting when there was discussion about the need to report any other health and safety matters. There was a concern that the matter was only brought to his attention through a third party, another employee.

[39] Any explanation that other incidences went unreported has to be weighted with the fact Mr Wederell had been told a little over a week earlier to report such incidences and he never mentioned the pipe rack incident. A fair and reasonable employer could be concerned that Mr Wederell did not seem to appreciate the need to report incidences as part of improving health and safety at McMillan Drilling, and that a written warning fell within a reasonable range of responses to the conduct.

[40] I am not satisfied that the particular sentence relied on in the 3 September 2015 letter meant that Mr McMillan did not approach the meeting on 10 September 2015 with an open mind as to the outcome. Objectively assessed it is not a situation where I find the outcome of the investigation was unlikely to be changed by what Mr Wederell has to say. I do not find pre-determination of the disciplinary outcome before the 10 September 2015 meeting.

[41] I find that a fair and reasonable employer was justified in giving Mr Wederell a written warning on 14 September 2015 in all the circumstances.

Was there a full and fair investigation into the incidents on 16 and 17 February 2016?

Further incidents between 14 September 2015 and February 2016

[42] I accept that the evidence supports the relationship had become somewhat strained between Mr Wederell and Mr McMillan in 2015 although there were different views about the reasons for this. Mr Wederell felt that particularly after McMillan Drilling withdrew the

25 May written warning he was treated differently to make his ongoing employment difficult. Mr McMillan did not accept that and said that he had concerns about Mr Wederell's attitude to health and safety. Regardless there were no further disciplinary issues about the failure by Mr Wederell to report incidents from 14 September 2015 until February 2016.

The allegations set out in a letter to Mr Wederell from Mr McMillan dated 26 February 2016

[43] By letter dated 26 February 2016 Mr McMillan wrote to Mr Wederell about allegations he had failed to lodge incident reports for nears misses and/or health and safety incidents in breach of the company policy. There were two allegations to be investigated. One occurring on 16 February and one on 17 February 2016. The allegations are set out below.

16 February 2016 incident

[44] On 16 February 2016 Mr McMillan had received a complaint from the manager of a transport service company (CTS). A photo of an anchor end place which weighs approximately 35 - 50 kg was provided by CTS and attached to the letter. The anchor plate had fallen off a McMillan Drilling truck as it was going around the Halswell Junction Road roundabout and had bounced along the road smashing into the CTS truck causing approximately $6000 worth of damage. Mr McMillan was aware that it was Mr Wederell who was delivering a pallet of anchor end plates to a transport company ST which is approximately 15 minutes from the roundabout. Photos were attached to the letter from McMillan Drilling cameras that showed Mr Wederell driving the truck without the load on the deck being tied down or secured. Photos from ST were attached to the letter showing the load arriving at the freight depot spread all over the deck on arrival. Mr McMillan wrote that ST had to restack the pallet. It was

alleged that if established then there was a failure to report the incident.

17 February 2016 incident

[45] It was alleged on 17 February 2016 Mr Wederell blew a plastic cap off a pipe he was cutting which resulted in a loud bag resembling a gunshot sound and failed to report to the incident.

[46] The letter referred to potential breaches of McMillan Drilling health and safety policy, motor vehicle policy and directions as discussed in monthly health and safety meetings. There was also reference to potential breaches of provisions in the employment agreement. The written warning provided to Mr Wederell on 14 September 2015 was also referred to as being in respect of a similar health and safety policy breach and a concern that the dislodging of the anchor end plate could have resulted in an accident that may have been fatal

[47] Mr Wederell was advised in the letter that his actions could be considered serious misconduct and disciplinary action up to termination of employment could be taken. Mr Wederell was invited to a meeting to discuss these matters and was advised that he could bring a representative with him.

Disciplinary meeting on 4 March 2016

[48] Mr McMillan attended the meeting with another employee of McMillan Drilling who took notes. Mr Wederell attended with his solicitor Mr Maciaszek. These notes were subsequently provided to Mr Maciaszek for any comments or additions with a letter from Mr McMillan dated 8 March and the initial explanation expanded which I will come to.

Explanation to the first allegation from the notes taken at the meeting on 4 March 2016

[49] The notes taken record that Mr Wederell said he loaded the anchoring plates on the truck but did not tie or secure them as he thought they were heavy enough not to slide. While on route to ST he braked behind a car that had stopped at the roundabout and the plates went “flying”. He stopped at a garage and restacked the load and proceeded to ST to get a new pallet to restack the load. He said that he was “pissed off/angry” because he had to restack the

load so he did not report the incident. He said that he was not aware the plate came away during the incident.

Explanation to the second allegation from notes taken at the meeting on 4 March 2016

[50] Mr Wederell disputed that he was asked by the project manager to complete an incident report about the gas explosion. His explanation as to why he didn’t report it was that it was not important and that it was unsafe to report. Mr Maciaszek further explained that Mr Wederell felt it belonged within a range of things that do not get reported and Mr Wederell did not think it was serious enough; “10 seconds worth of gas - relit the torch and it went pop”. Mr Wederell did agree that the rest of the staff needed to be aware of this matter and if that it happened again it would be reported.

[51] There was some discussion as to whether the two allegations could amount to serious misconduct.

Letter from Mr Maciaszek dated 4 March

[52] By letter dated 4 March 2016, the same day as the disciplinary meeting Mr Maciaszek provided some further factors that Mr McMillan should take into account. These were that the factual matters raised could not constitute serious misconduct as set out in the employment agreement because they do not logically fall within any of the categories. Further that whilst clause 25.2 of the employment agreement may be relevant dismissal could only occur after appropriate warnings have been given and that the warning on 25 May was withdrawn. In respect of the 3 September warning Mr Maciaszek submitted that there was pre-determination and he suggested the most appropriate outcome would be a verbal warning.

Letter dated 8 March 2016

[53] Mr McMillan wrote to Mr Wederell by letter dated 8 March 2016 setting out the allegations of misconduct and/or serious misconduct and Mr Wederell's responses to those.

Mr McMillan also attached a copy of the meeting notes from the meeting of 4 March and additional documents, including three diary notes recording discussions with Mr Wederell and a copy of an email from the project manager in respect of the gas pipe incident dated 24 February 2016. It was noted that the diary notes did not record disciplinary actions but rather were to establish Mr Wederell had been made aware "on multiple occasions" about the importance of adhering to the health and safety policies. The letter advised that Mr Wederell could respond to these matters. Mr McMillan advised that any further comments about the allegations were to be provided in writing on or before Tuesday 15 March 2016 or alternatively he was happy to meet with Mr Wederell and his representative.

Letter dated 15 March 2016

[54] By letter dated 15 March 2016 Mr Maciaszek responded to Mr McMillan. He added two observations to the responses that Mr McMillan had set out in his letter from Mr Wederell to the allegations. He stated that he did not propose to comment in detail on the notes from the meeting unless it became relevant later on. The additions to the explanations were that Mr Wederell had noted the anchor plates had been shrink wrapped which contributed to his belief the load was secure enough and that after he had braked heavily he was unaware that an item had fallen off the truck and promptly stopped to restack the load.

[55] In relation to the gas incident Mr Wederell referred to the fact that only a small amount of gas had accumulated in the pipe and that this type of explosion had occurred many times before in the yard.

[56] Mr Maciaszek asked for a list of reported incidents since 1 January 2015 and referred to his earlier view that dismissal can only be an option if appropriate warnings had previously been given under clause 25.2 of the employment agreement.

Letter dated 18 March 2016

Written warning given in respect of the 17 February 2017 gas pipe explosion incident

[57] The letter dated 18 March 2016 dealt with two matters. The first was the gas pipe explosion incident. Mr McMillan concluded that this constituted misconduct and a breach of clauses 7.2(b), 24.1 and 25.2(g) of the employment agreement. He stated he had made a decision to issue a written warning.

Further investigation in respect of the 16 February 2017 insecure trailer load and failure to report incident

[58] In the same letter Mr McMillan referred to the failure to report the incident and an insecure trailer load. He set out that he had further evidence regarding the anchor plate incident and he attached a photo which showed the plate ended up on the side of the road after the incident on the way to ST's yard to where Mr Wederell was travelling at the time.

[59] He noted in the letter that assuming Mr Wederell's explanation to the incident was accurate then Mr Wederell was aware that the load was unstable and yet continued to drive to ST in a manner that resulted in the load arriving there spread all over the deck and requiring restacking again by ST. He asked Mr Wederell to confirm this in paragraph 10 of the letter.

[60] Mr McMillan set out in the letter that if this is the case then he was concerned that there was a serious risk of another anchor plate falling off the truck which may have resulted in serious injury and/or death to members of the public for which Mr Wederell or the company could become liable. He set out that he was concerned Mr Wederell did not take the incident seriously and take appropriate steps in the circumstances. Mr McMillan asked for details of the garage that Mr Wederell said he had stopped at so he could investigate that further.

[61] Mr McMillan gave a further opportunity for comment, including details of the garage Mr Wederell stopped at to restack the truck, to be provided in writing by 22 March. He said

that he was happy to meet further to discuss the matters. I find that it was clear in the 18 March 2016 letter that there was a further concern about continuing to drive after knowledge of an insecure load and Mr Wederell was given an opportunity to respond to that.

Letter 22 March 2016

[62] Mr Maciaszek responded to Mr McMillan's letter of 18 March and in respect of the warning issued for the gas pipe explosion incident expressed concerns that the letter of 26 February 2016 contemplated a singular step even though there were two incidents. He wrote that there could only be one warning issued and there could not be further disciplinary outcome. Mr Maciaszek also referred to the garage where Mr Wederell advised he stopped after becoming aware that the load had become unstable. I shall refer to the garage as the NPD in Halswell Junction Road. In his oral evidence to the Authority Mr Wederell did not accept that he stopped at that garage which was situated before the roundabout. If he had stopped at that garage that would mean that Mr Wederell, after he was aware there was an insecure load, stopped and redistributed the anchor plates before the roundabout and before the anchor plate came off. Mr Wederell said in his evidence to the Authority that he stopped on the side of the road after the roundabout.

Letter 23 March 2016

[63] Mr Maciaszek sent a further letter on 23 March 2016 asking again for a list of reported incidents since 1 January 2015 where incidents or accidents had occurred.

Letter 31 March 2016

[64] On 31 March 2016 Mr McMillan responded to Mr Maciaszek by letter dated 31 March 2016. He noted that "you have elected not to respond to paragraph 10 of the letter dated 18 March 2016" in which he requested Mr Wederell to confirm the contents of the first sentence. He then advised that since 1 January 2015 there has been a total of 82 health and safety incidents and/or near misses reported. He noted that the considerable majority were reported

voluntarily by staff and a minority following a request by senior staff or Mr McMillan to do so. He was unaware of a time an employee had failed to complete a report after a request. Further that he was not aware of incidents that have not been reported and asked for those to be disclosed as the allegation was of concern.

[65] He asked for confirmation as to whether Mr Maciaszek wanted to have a second meeting or if there was confirmation that the letter satisfied his queries then he would advise of the decisions.

[66] The Authority questioned Mr McMillan whether there was a response about a second meeting before the decision to dismiss was made. I am satisfied that there was a telephone call between Mr McMillan and Mr Maciaszek on 5 April 2016. Mr McMillan as a result was expecting a response from Mr Maciaszek the following morning. There was no further communication and Mr McMillan proceeded to make a decision to dismiss Mr Wederell on 8 April. I do not in the circumstances conclude unfairness about the fact that there was not a further meeting.

Letter of dismissal 8 April 2016

[67] Mr McMillan wrote to Mr Wederell and Mr Maciaszek on 8 April 2016. Mr McMillan had concluded that Mr Wederell had breached clause 24.1 of the employment agreement by not adhering to policies and lawful and proper instructions given by the company in the incident in which an anchor plate fell off a truck he was driving after he failed to secure the load and subsequently failed to report.

[68] He set out that he found this constitutes serious misconduct. Mr McMillan said in the letter that it is "crucial

that health and safety matters are taken seriously and our policies are adhered to at all times." He noted that "It is particularly important that I can trust staff to conduct themselves in a safe manner in carrying out their duties and also that they are willing and able to take and follow reasonable instructions." In the letter Mr McMillan set out that he had formed a view Mr Wederell's responses were not satisfactory and had not addressed the

concerns raised. He concluded that he believed the conduct amounted to serious misconduct and the outcome was dismissal for serious misconduct. It was accepted by McMillan Drilling that Mr Wederell was unaware the anchor plate had come off.

Conclusions about the fairness of the investigation into the incidents on 16 and 17 February 2016

[69] Ms Forrester in her submission set out three reasons why the dismissal was unjustified. The first was that no serious misconduct had arisen and no proper process was followed in relation to earlier warnings. The second was that the process adopted by McMillan Drilling was unfair because both matters were raised together in the letter of 26 February 2016 and dealt with at the subsequent disciplinary meeting and there could only be one disciplinary outcome in respect of both which was a warning. The third was that Mr Wederell was treated differently to other employees of the company and there was disparity of treatment.

[70] There was one disciplinary meeting held about the two separate incidents on 16 and 17 February 2016. The only face to face meeting was on 4 March 2016 and Mr Wederell was represented at the meeting. This was followed by correspondence between Mr McMillan and Mr Maciaszek, provision of further information and expanded explanations before the decisions were reached that there was misconduct and serious misconduct. Mr Wederell understood the concerns of McMillan Drilling, had an opportunity to explain his actions/inactions and his explanations were considered.

[71] The main procedural concern raised by Mr Wederell is that as the two incidents were raised and investigated together there could only be one disciplinary outcome, a warning. Mr Maciaszek referred to the failure to lodge incident reports in breach of the company policy being a "singular step" notwithstanding the two incidents being raised. The incidents occurred on separate dates and were set out separately and explained separately. There was a range of possible outcomes set out in paragraph 8 of the 26 February letter up to dismissal.

[72] There can be different findings in a disciplinary process for different concerns. An allegation may be found not to be proven or not found to be conduct that would have justified dismissal. In other cases it is clear from the reasons for dismissal that they include cumulative findings about a number of allegations.

[73] In this matter Mr McMillan concluded that the gas pipe incident was misconduct and the disciplinary outcome that followed was a written warning on 18 March 2016. He concluded the conduct on 16 February 2016 amounted to serious misconduct and the disciplinary outcome was dismissal.

[74] I am not persuaded that there was any correspondence throughout the disciplinary process to suggest different disciplinary outcomes for the separate incidents was not possible or that dismissal was only available if both incidents were found to amount to serious misconduct. Mr McMillan said in his evidence that the failure to secure the trailer load on 16 February was a serious incident which "stood apart from the other incident" and it presented serious danger to the public and that the reason for not reporting the incident was not an acceptable one. He concluded it required a greater level of investigation.

[75] Objectively assessed the process satisfied the requirements in s 103A(3)(a) of the Act and was consistent with good faith obligations for investigation of both incidents. There was reference in Ms Forrester's submissions to pre-determination but I am not satisfied that there was evidence to support that Mr McMillan closed his mind to the explanations and issues before him. A different disciplinary outcome for the two separate incidents does not vitiate the overall fairness of the process.

Could a fair and reasonable employer have concluded misconduct from a failure to report the gas pipe explosion incident?

[76] Mr Wederell accepted that the incident occurred with the gas pipe explosion. His explanation was that it was not an incident that justified an incident report. Only a small amount of gas had accumulated in the pipe and the type of explosion had occurred many

times previously. He did not accept as the project manager put in an email to Mr McMillan that he was asked to complete an incident report but did not do so. The project manager had also recorded in his email that Mr Wederell showed "a lack of

concern regarding what I feel could have been a serious incident had someone been working in the vicinity at the time . . .”

[77] I find that a find and reasonable employer could have concluded in all the circumstances the failure to report the incident amounted to misconduct.

Could a fair and reasonable employer have issued a warning to Mr Wederell?

[78] A fair and reasonable employer could have concluded that Mr Wederell knew that he should report incidents of this nature. He had been warned in September 2015 about a failure to do so and there was an emphasis placed on incident reporting at health and safety meetings. I find that a fair and reasonable employer could in all the circumstances have issued Mr Wederell with a written warning.

Could a fair and reasonable employer have concluded serious misconduct because of the insecure load and failing to report the incident on 16 February 2016?

[79] Ms Forrester submits that a finding of serious misconduct was not available to McMillan Drilling for the 16 February incident because there were insufficient warnings for it to be seen as other than misconduct. Further that Mr Wederell was not aware that the anchor plate had fallen off and he had attempted to make the load secure before delivering the items to ST.

[80] The numbering in the employment agreement is somewhat problematic but clause

25.1 is in a part of the employment agreement that sets out offences which constitute serious misconduct and may give rise to summary dismissal. In reaching a finding of serious misconduct Mr McMillan was satisfied that Mr Wederell had breached clause 25.1(c) of the employment agreement. The relevant part of clause 25.1(c) is about a failure to adhere to the employer’s policies or carry out any proper and lawful instruction given by a person acting

with the authority of the employer. The possibility of a finding of a breach of policy was clear from the outset of the disciplinary process with reference made to clause 24.1 in the employment agreement and the health and safety policy requirement to report incidents.

[81] Mistakes happen from time to time in employment relationships and a simple mistake will not usually be one that causes an irreparable breakdown of the employment relationship. A single act of negligence has been found to justify dismissal when it is sufficiently serious that it impairs trust and confidence. In *Click Clack International Limited v James*1 for example there was an action found to be reckless.

[82] Ms Jamieson refers the Authority to *Angel v Fonterra Co-operative Group*2 which was also a case about a failure to adhere to a policy. It was held in that case that there had to be an assessment of whether the failure to comply with the policy was because of inadvertence, oversight or negligence or whether it was deliberate in the knowledge it was wrong.

[83] Mr Wederell had been told to report incidents previously. He had been provided with a warning on 14 September 2015 as the result of a failure to report an incident which followed a reminder to report incidents at a meeting on 31 August 2015.

[84] Mr Wederell thought that the load was sufficiently secured when he set out. He did not dispute that he then became aware the load had become unstable. He said that he stopped to flatten the plates down in the deck before continuing on. Mr McMillan was left unclear about where Mr Wederell had stopped to do that because of the information provided. Despite an opportunity to give further explanation none was provided about why Mr Wederell continued to drive with an insecure load. I understand from his evidence at the investigation meeting that he believed having spread the plates on the bed of the truck they could not fall out of the truck. There are as Mr McMillan said in his evidence legal obligations in the on a driver to ensure the load in the vehicle is secure. Mr McMillan concluded the load should have been

1 *Click Clack International Ltd v James* [1994] 1 ERNZ 15

2 *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [81]

tied down or Mr Wederell could have contacted McMillan Drilling and advised them of the situation rather than continuing on.

[85] Mr Wederell accepted that he was aware that there was an incident to report because of the insecure load but did not do so because he was angry he had to restack the load. A fair and reasonable employer could conclude a measure of deliberateness in the decision not to report the incident on the part of Mr Wederell in the knowledge that one should have been reported.

[86] Objectively the incident could not be described as marginal to report or not. Mr Wederell had also been told on 31 August 2015 to report anything that occurred straight away such as dropped pipes. The incident on 16 February involved a pallet of heavy anchor plates that had become unstable in the back of a truck to the extent that they had moved around and one had fallen off the truck and smashed into another truck. It was accepted that Mr Wederell was unaware of the damage to the other truck. If McMillan Drilling had not received a complaint about the damaged truck it would have had no knowledge that a pallet of anchor plates could and should not be transported secured by shrink wrap alone. There would have been no ability in the absence of an incident report to inform other employees about that so as to eliminate or minimise risk in the future and that could have resulted in very serious consequences. Mr Wederell said in his evidence that he felt unsafe for his employment in reporting the incident. McMillan Drilling however, had to have confidence in Mr Wederell that he would report incidents and take health and safety seriously in accordance with health and safety obligations in the policy.

[87] I find that a fair and reasonable employer could conclude that driving with an insecure load and failing to report an incident about that insecure load was sufficiently serious in all the circumstances as to deeply impair trust and confidence in Mr Wederell.

[88] A fair and reasonable employer could conclude a failure to report the incident and driving with an insecure load was serious misconduct.

Could a fair and reasonable employer have reached the decision to dismiss

Disparity

[89] The Employment Court *3* recently considered why an allegation of disparate treatment may be relevant to a dismissal by reference to the rationale in another Employment Court judgment*4*. Summarised the rationale is that an important aspect of treating an employee fairly and reasonably requires consistency in treatment in cases where the conduct and circumstances are sufficiently similar.

[90] Mr Wederell says that he was treated differently to other employees involved in comparatively similar incidents, accidents or near misses as serious in nature and with a failure to report the incidents and he says that is unfair.

[91] The Court of Appeal5 set out three issues to be considered:

(a) Was there disparity of treatment?
(b) If so, was there an adequate explanation to the disparity?

(c) If not, was the dismissal justified notwithstanding the disparity for which there was no adequate explanation?

[92] I heard evidence about a number of incidents from Mr Wederell and a previous employee of McMillan Drilling who held the role of supervisor in the company, Justin Bloomfield. Mr Bloomfield left McMillan Drilling in or about June/ July 2015 and confirmed there were health and safety meetings on a regular basis about 12 months before he left.

3 *Nel v ASB Bank* [2017] NZEmpC 97

4 *Rapana v Northland Co-Operative Dairy Company Ltd* [1998] 2 ERNZ 528 at 537

5 *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] NZCA 428; [2005] ERNZ 767 at [45]

[93] There is guidance from the Employment Court about considering comparative conduct for a disparity assessment. Judge Corkill in *Nel v ASB Bank Limited*6 stated:

In short, when making a disparity assessment, it will be necessary to consider whether the comparative conduct is sufficiently similar. Consideration should be given to all relevant circumstances, including context. The assessment will be case-specific. The analysis is for the purpose of determining whether the dismissal or other step taken meets the statutory test of justification under s 103A of the Act.

[94] I have considered the timing of the events. I accept there is no requirement of proximity when assessing disparity between the comparator conduct and the dismissal and this was confirmed in *Nel.7* However it was also recognised that all circumstances need to be considered and timing may be one of these.

[95] One of the circumstances I find about timing in this case was a greater emphasis on the reporting of incidents at McMillan Drilling as they arose and an improvement in the health and safety culture. I accept the evidence supports attempts to continually improve health and safety at McMillan Drilling and this needs to be recognised in assessing disparity. Since 1 January 2015 there were 82 reported health and safety incidents or near misses which would support that. Two other employees had employment terminated for health and safety breaches. Mr McMillan did accept some awareness that incidents do from time to time go unreported. He disagreed however with a culture as stated by Mr Bloomfield in his evidence of "no harm no foul" and said that was not a culture that stemmed from McMillan Drilling.

[96] The main circumstance in this matter is that Mr Wederell had not reported incidents on four occasions. He had been spoken to specifically about the importance of reporting incidents by Mr McMillan and reminded that even incidents that he said were minor should be reported. Importantly on two of the four occasions, the eye wash and gas pipe explosion incidents, he had been observed by a supervisor who had then reported concerns to Mr

6 *Nel v ASB Bank Limited* above n 3 at [52]

7 *Nel v ASB Bank Limited* above n 3 at [56]

McMillan. This would seem to support a culture change from Mr Bloomfield's time as supervisor/foreman, when he said in his evidence that that dropped pipes were not reported.

Overhead line

[97] The first incident both Mr Wederell and Mr Bloomfield referred to was an overhead line taken down by a rig being transported to a site and the line was left lying over a car. Mr Bloomfield said that the supervisor in charge of that job was told about the incident by staff who had witnessed it and he advised them to take an alternative route back to the workshop as no-one had seen them causing the damage. He said that senior management was made aware of the incident and no action was taken. Mr Wederell said that nothing happened about this until Mr Bloomfield mentioned it in a health and safety meeting. Mr Bloomfield accepted that he had not witnessed the incident.

[98] Mr McMillan said that this was not accurate. He said that he became aware of the incident after the fact and spoke to the person involved, held a formal meeting and issued a letter about the seriousness of failing to report an incident. An incident report was then filled out. He said that this was the first incident of this type with this person with regards to health and safety compliance.

[99] The conduct involved an off- site incident and what seems to be an attempt to keep it secret. Although no evidence as to the exact date it clearly occurred before July 2015 because Mr Bloomfield was still employed. I am not satisfied that Mr McMillan knew about it and when he did become aware he dealt with the matter formally. He said it was the employee's first non-compliance with health and safety requirements and the line was a redundant phone line. I do not find that it is sufficiently similar to Mr Wederell's conduct because Mr Wederell had failed to report incidences in circumstances where the importance of doing so had been clearly drawn to his attention. The reason for the difference in treatment was that Mr Wederell had been told previously to fill in an incident form and it was not his first non- compliance with health and safety requirements.

Hardhat on rig controls

[100] Mr Bloomfield and Mr Wederell gave evidence about an incident where a hardhat was placed by a supervisor on the controls of a rig on two occasions causing the mast to lean forward almost capsizing the rig. Mr Bloomfield said that no action was taken and when he brought it up at a meeting he was told that nothing was wrong with the rig. Mr McMillan said that when he became aware of the incident he personally interviewed the operator of the rig. It had become clear that the hard hat had nothing to do with the mast dropping unexpectedly. He said that the company undertook an extensive troubleshooting exercise to identify the issue including meeting with the manufacturer of the rig in Italy who agreed to send upgraded valve blocks to remedy the problem which were replaced on the rig. On one machine an O-ring was found to be split and Mr McMillan said that the incident referred to was due to a mechanical defect and not the placement of a hard hat.

[101] I do not find that this was sufficiently similar conduct to the case involving Mr Wederell. This incident was known about and it was concluded that it was a mechanical issue. It was not a failing to report issue

Hiab Crane Truck

[102] Mr Wederell said that he had to jump out of the way of a metal pipe falling after the chain that was carrying it snapped and that Mr McMillan witnessed it and there was no action taken. He said that it was not until he raised the incident several times that it was included on the health and safety register.

[103] Whilst this was a matter about health and safety concerns there was no evidence to support that the concern was that the incident had not been reported and I do not find sufficiently similar conduct on that occasion.

Wooden pile incident

[104] This matter was raised by Mr Bloomfield to illustrate that completing incident reports was not always an automatic response rather than to support disparity in treatment. Mr Bloomfield did indicate as a supervisor that a form should be completed. The evidence supported that McMillan Drilling was taking steps to make sure that there was a change in reporting habits. Mr Bloomfield did say in his oral evidence that towards the end of his time incidents were being reported and there were forms to do that.

Unlicensed driver and jack-knife with a trailer

[105] These matters were raised in oral evidence. Mr McMillan said that the young driver was not aware he was unlicensed and he told Mr McMillan straight away and filled out an incident report. The jack knife incident was also reported.

[106] I do not find that the conduct is sufficiently similar about those matters as incident reports were completed.

Conclusion

[107] Employees can feel particularly aggrieved if they conclude that they have been dismissed in circumstances where others have maintained their roles. I accept that is how Mr Wederell felt but the conduct to be compared has to be sufficiently similar in a disparity assessment. I am not satisfied for the reasons set out above that Mr Wederell was treated in a disparate manner. In the circumstances where one incident could be said to be most comparable there was a satisfactory explanation for the difference in treatment because it was the employee's first failure to comply with health and safety obligations.

[108] Mr Wederell knew that McMillan Drilling wanted him to complete incident reports when an incident occurred. He had been previously talked to and warned about completing incident reports. When he failed to do so with the insecure load incident McMillan Drilling clearly lost trust and confidence that he would report incidents into the future. Mr McMillan

said in his written evidence that the failure to secure the load was unacceptable but could have been dealt with through training or discussion. He said it was the failure to report the incident and the lack of explanation for doing so that was of real concern, coupled with the lack of ownership of responsibility for health and safety and lack of acknowledgment about the serious consequences of not adhering to the health and safety polices.

[109] I find that in all the circumstances dismissal was within the range of reasonable responses available for McMillan Drilling.

[110] A fair and reasonable employer could have dismissed Mr Wederell in all the circumstances.

[111] Mr Wederell's dismissal was justified.

Costs

[112] I reserve the issue of costs. Agreement may be able to be reached failing which Ms Jamieson has until 7 March 2018 to lodge and serve submission as to costs and Ms Forrester has until 21 March to lodge and serve submissions in response.

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Helen Doyle

Member of the Employment Relations Authority
