IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 190
ARC 25/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DANNY BELSHAM Plaintiff
AND	PORTS OF AUCKLAND LIMITED Defendant

Hearing:	1 and 2 August 2013 (Heard at Auckland)
Appearances:	Simon Mitchell, counsel for plaintiff Richard McIlraith and Kylie Dunn, counsel for defendant
Judgment:	11 October 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Mr Belsham, was dismissed from his employment with Ports of Auckland Limited (POAL) on 16 October 2012. The reason for the termination of his employment was that he had refused to comply with a direction to start work and man a straddle crane. The dismissal was contained in a letter from Mr Raoul Borley, then acting General Manager, Terminal Operations for POAL to Mr Belsham on that date. That letter reads as follows:

> ALLEGATION OF SERIOUS MISCONDUCT
>
> Further to my letter of 2 October and our meeting yesterday, I have considered all of the information you have put forward in response to the allegation of serious misconduct.
>
> I have formed the view that on 21 August you refused to carry out proper work instructions. You have said that you did not drive a straddle on 21

> August as you were raising a health and safety issue. I do not consider this explanation to be genuine. I have formed the view that you refused a clear work instruction to drive a straddle until Mike Kirwan arrived at work. This was serious misconduct pursuant to clause 4.2.7(a) of the collective agreement.
>
> I have also considered your response on a possible sanction. I have taken into account your 19 years of service with the company. I have also taken into account the fact that you are currently on an oral warning for a similar offence, given just days before 21 August.
>
> When weighing up your conduct, I consider that I no longer have trust and confidence in your continuing in your employment with Ports of Auckland. I have therefore decided to summarily dismiss you for serious misconduct.
>
> Your final pay will be credited to your account and the details mailed to you. Please advise if you have any personal effects remaining on company premises and arrangements will be made for these to be forwarded on to you.

[2] Mr Belsham raised a personal grievance. This was not settled at mediation and was referred to the Employment Relations Authority (the Authority) for an investigation and determination. However, following the dismissal and prior to the determination, Mr Belsham also applied for, and on 19 November 2012 was granted by the Authority, interim reinstatement pending resolution of his personal grievance.

[3] The Authority conducted its investigation into the personal grievance. A determination was made by the Authority on 19 April 2013.[1] It was held that the dismissal of Mr Belsham was justifiable. Mr Belsham then filed a challenge to the determination with the Court. Costs in respect of the Authority investigation were awarded against him in a subsequent determination dated 22 May 2013.[2] No challenge has been filed to the costs' determination. He sought a full hearing of the entire matter (a hearing de novo). Prior to the hearing, an application for interim reinstatement pending the outcome of the challenge was filed. That was not proceeded with on the basis that the Court was able to allocate an early hearing of the substantive proceedings.

[1] [2013] NZERA Auckland 136.
[2] [2013] NZERA Auckland 207.

Factual outline

[4] The circumstances surrounding the eventual dismissal of Mr Belsham relate to the arrival at the Auckland Port of the vessel "Oluf Maersk" on 21 August 2012. POAL had become aware as the vessel was approaching New Zealand, there was a potential issue relating to the discharge of a container known to be spilling chemicals. The stowage plan for the vessel showed that the container was at second tier on deck. Accordingly, there may have been contamination of the container sitting below it.

[5] In the days leading up to the vessel arriving, POAL was notified that the spill had been contained. In order to manage discharge it was decided that the vessel, contrary to normal practice, would berth bow facing south. The container which had been leaking chemicals and the container beneath it were then to be off-loaded. Discussions with the Fire Service resulted in that service advising POAL that it would not attend at the discharge unless it was needed. Mr Belsham, who was likely to be the ship foreman working the north crane when the vessel did berth, was kept informed of these developments.

[6] When a decision was made the day before the vessel berthed that it would berth bow south rather than stern south, Mr Belsham's foreman duties would then relate to an area of the ship away from the container that had been spilling chemicals. POAL maintained that Mr Belsham was also informed of this the day before the vessel arrived. Mr Belsham denied knowledge of this.

[7] On 21 August 2012, when the vessel arrived, the allocator reorganised the roster for the first shift. In view of the unavailability of other straddle crane operators, the allocator rostered Mr Belsham to drive a straddle crane.

[8] Normal briefing took place at 6.30 am on 21 August 2012. Mr Ian Kitching, who was the shift manager, briefed the members of the shift on the container and how it was to be handled. At that briefing session there was no demur from any of the members of the shift, including Mr Belsham. At approximately 6.45 am, Mr Belsham approached Mr Kitching and a discussion took place between them, at

which the allocator, Ms Vivian Flynn, was present. There was some dispute between Mr Belsham on the one hand and Mr Kitching and Ms Flynn on the other, as to exactly when Ms Flynn arrived at the meeting. Mr Kitching and Ms Flynn said that Ms Flynn immediately followed behind Mr Belsham into the meeting with Mr Kitching and was present throughout the discussion. Mr Belsham maintained that Ms Flynn did not arrive until sometime later. The point has some significance because Mr Belsham maintained that his refusal to work the straddle crane, which then became the subject of the disciplinary action, was on the basis that he was not prepared to work on the "Oluf Maersk" solely for health and safety reasons. Mr Belsham maintained that Ms Flynn would not have heard him raise this issue with Mr Kitching because she was not present until later. He stated, in evidence, that the allocation to work the straddle crane was a "set up" by POAL to move him away from foreman duties because POAL knew that the procedure it had adopted for handling the container leaking chemicals was not in accordance with prescribed process. There seems no doubt that Mr Belsham took a keen interest in health and safety issues at the port, which is to his credit, and had and would intervene if proper procedures were not followed, as he had previously. Mr Kitching and Ms Flynn in their evidence maintained that Mr Belsham did not raise health and safety issues at the meeting. Their recollection of the meeting, which is supported by contemporary documents, was that Mr Belsham apparently was "kitted up" to perform ship foreman duties. He appeared disgruntled at being reallocated to the straddle crane and was insisting on a further reallocation and going on deck to perform duties as ship foreman.

[9] Mr Kitching asked Mr Belsham on more than one occasion to man the straddle crane. He refused. Both Mr Kitching and Ms Flynn, who corroborated each other in their evidence, were certain that Mr Belsham at this meeting did not raise any issue relating to health and safety. Ms Flynn confirmed that Mr Belsham twice refused to man the crane saying the ship job was his.

[10] Mr Belsham did not man the straddle crane on the first shift that day. After the meeting with Mr Kitching, he went to the mess room to await the arrival of Michael Kirwan, POAL's Senior Shift Manager, Stevedoring. There was initially some dispute in the evidence relating to whether Mr Belsham was stood down by Mr

Kitching to await the arrival of Mr Kirwan or whether Mr Belsham simply decided that he would do that. Under cross-examination, Mr Kitching conceded that he asked Mr Belsham to stand down to await the arrival of Mr Kirwan after Mr Belsham had refused, on more than one occasion, to man the straddle crane. This was also confirmed by the evidence of Ms Flynn and in her file note prepared later that morning.

[11] While waiting for Mr Kirwan, Mr Belsham had a later conversation with Mr Kitching when he requested the hazard book. He also prepared a hazard reporting form which he timed at 7 am. This related to the container leaking chemicals. He maintained that he handed the hazard notice to the health and safety manager at around 7.15 am. Again, there was some dispute in the evidence as to exactly when Mr Belsham handed the document to the health and safety manager.

[12] Mr Belsham also maintained that following the meeting with Mr Kitching he sent two health and safety officers to see him. This was denied by Mr Kitching.

[13] Once Mr Kirwan arrived at work, he conducted an investigation meeting at 8.12 am that morning. This meeting was attended by Mr Kitching, Mr Belsham and a support person from the union, Mr Bell. Mr Kirwan took notes of what transpired at that meeting and Mr Belsham confirmed in evidence that the notes were an accurate record. It was clear from what was discussed that Mr Belsham was not indicating his refusal to man the straddle crane because of the health and safety issue relating to the leaking container. Rather it was because he objected to being taken away from his previously rostered duties as ship foreman. The notes confirm that on more than one occasion throughout the meeting, Mr Belsham stated that he required that he be allocated back to working on the deck. The issue with the leaking container was mentioned only once during the course of their discussions. This was not in the context, however, of Mr Belsham refusing to work the straddle crane because of health and safety issues, but rather iterating the theme he persisted with under cross-examination that the reallocation of duties was a "set up" because POAL did not want him on the ship. The inference from this allegation of Mr Belsham was that POAL believed that he would cause trouble as to improper procedures that he believed had been adopted for removal of the container. By the time of the meeting

with Mr Kirwan, Mr Belsham of course maintained he had completed the hazard report.

[14] In evidence, Mr Belsham's position was that he did raise the health and safety issue as the basis for his refusal to man the straddle crane. He claimed that he raised the issue with Mr Kitching. The presence of Ms Flynn at that meeting assumes importance in this respect. Mr Belsham maintained that he raised the health and safety issue with Mr Kitching before Ms Flynn arrived. He stated that there was a delay between him first speaking to Mr Kitching and Ms Flynn arriving. Ms Flynn maintained that she followed Mr Belsham into Mr Kitching's office immediately behind him and was present throughout the entire meeting. Her evidence was confirmed by a file note she prepared later in the morning. Mr Kitching denied that any health and safety issue was raised with him. He also denied that soon after the meeting concluded he was visited by two health and safety officers, referred to him by Mr Belsham. Mr Belsham also maintained in evidence that he raised health and safety issues at the meeting with Mr Kirwan. Apart from the oblique reference made in a different context, Mr Kirwan did not record any such assertion by Mr Belsham. Mr Belsham has conceded that Mr Kirwan's notes were an accurate record. Mr Belsham also maintained that once he became aware of the hazard he formed the view that his life was in danger and also that of his workmates. He maintained that he did discuss with others as to whether they should man the discharge of cargo from the vessel. No fellow employees were called to give evidence to support this contention. No other employees refused to work the vessel.

[15] Once the meeting with Mr Kirwan had concluded, Mr Belsham agreed to man the straddle crane for the second shift. He maintained that he drove a straddle crane from 8.20 am that morning. However, the swipe card records held by POAL showed that he did not, in fact, access the straddle crane until later and there was some suggestion in the evidence that he deliberately selected a crane being cleaned to delay his commencement on the shift. Mr Belsham claimed to have no recollection of what transpired after he did in fact return to work. Nevertheless, until that time he apparently had a very clear recollection of the nature of the discussions with Mr Kitching and Mr Kirwan. The delay in commencing the second shift was

not part of any disciplinary process against Mr Belsham. It was raised in evidence by POAL as an issue of credibility insofar as Mr Belsham was concerned.

[16] To complete the narrative of events, the container or containers which were subject to the chemical spill and contamination were successfully removed from the vessel without incident. However, the container again showed signs of leaking chemicals when it was loaded onto the wharfinger's truck to be transported to the devanning depot. Alternative procedures were adopted to ensure that it was handled and devanned in a manner in which the peril was contained.

The disciplinary process

[17] POAL commenced a disciplinary process against Mr Belsham as a result of his refusal to man the straddle crane. This followed the investigation meeting Mr Kirwan had conducted at 8.12 am on the morning. Later that same morning, Mr Kitching and Ms Flynn prepared brief notes describing their recollection of what had transpired. Mr Kirwan's uncontested notes taken contemporaneously as the discussion with Mr Belsham took place, Mr Kitching's minute recorded in an email timed at 9.59 am that morning and Ms Flynn's minute prepared a little later are useful contemporary documents prepared on the very day of the alleged incidents. They provide strong corroboration for what POAL's witnesses say occurred. The contents of these documents are set out as follows:

(a) Mr Michael Kirwan's notes

> Danny Belsham 21st August 2012
>
> Danny allocated to E1 slot on a straddle and not manning the machine at shift start.
>
> Meeting held with Danny Belsham, Ron Bell (support person) Ian Kitching, Mike Kirwan 08:12
>
> DB: I've been misplaced off the roster.
>
> MK: You have been allocated to drive a straddle and Ian has asked you to drive and you have refused. This is not a disciplinary meeting but a fact finding exercise in relation to you failing to operate a straddle when requested.
>
> DB: Let's get this right I have never refused I just want to be allocated to where I should be. I should be allocated to the north

ship. There are 2 gangs allocated this morning and I should be on the ship.

I have no issue with the training but do with the other allocation.

MK: The other person is Wayne who does not drive a straddle and as such we had nowhere else to place him without someone dropping off the job list all together. Wayne has some personal issues going on as have other people and we accommodate them in the roster where we can.

DB: I know about Wayne's issues. This was a set up I was misplaced because of the Dangerous Goods issues they didn't want me on the ship.

MK: Did you want to misplace the Yard?

DB: I should be on the ship.

MK: I've looked at the roster and feel it's reasonable and I'm asking you to man up and drive the straddle. Ian has already asked you to do this and you have refused.

DB: Don't try the refusal game I have never refused I've asked to be given the job that I should have been given, my normal allocation on the ship. I think Wayne should have been given a 2nd shift. You should have looked at what your timekeeper said. When I looked at the sheet I was on the ship.

MK: Wayne has some personal issues as have others I have looked at the allocation and find it reasonable.

DB: He could have been doing other jobs such as training.

MK: We are not here to discuss Wayne's allocation we are here to talk about you and your refusal to drive a straddle.

DB: I'm not refusing. I just want to be allocated correctly, the agreement says I should be on the ship.

MK: I'm asking you to drive a straddle.

DB: I'm asking you to consider my request.

MK: Ok Danny please give me a minute and I will talk to Ian.

Danny and Ron Bell left my office.

MK: Ian was this a fair allocation?

IK: Wayne could have been Lash leader but no longer has the skill.

MK: Was the sheet changed?

IK: I have a copy of the 1st sheet that was put out yesterday at 11:43 Danny was allocated to a straddle.

Danny and Ron returned.

MK: I have looked into the allocation and find it reasonable and I have a problem with your refusal to turn to and operate a straddle.

DB: I never refused. You said this was not a formal meeting.

MK: I said this was not a disciplinary meeting but was looking into your refusal to drive a straddle.

DB: I never refused.

MK: By not going up in a straddle when requested can be seen as a refusal.

DB: I never refused.

MK: I will look into the allocation.

DB: That's all I asked for to be given my sheets and to go up the gangway.

MK: I still have a problem with you not manning a straddle first thing, you could have driven then came down on your break to talk to me about the allocation, and you did not do this. Are you going to man up your straddle?

DB: YES

MK: Well go and man it up then.

08.40 Danny leave to operate the straddle.

(b) Mr Ian Kitching's email

At 0645 this morning Danny Belsham told me that he had an issue with the allocation of the job he had been given. He said that his allocated job should be on the ship as a leading hand and not in a straddle as he had been allocated too. I then asked him to man his straddle as per the roster and he could speak to Mike Kirwan when he arrived in. At this stage Viv Flynn had come into the office and told Danny that Mike Harvey was training Tat Lambert on one crane and Wayne McGregor on the other as he had requested to come on to 1st shift due to his wife's illness. At that stage I asked again for Danny to man up his straddle and his reply was that he would not and was going to wait for Mike Kirwan to arrive. At this point our discussion was finished and Danny went into the messroom to wait for Mike to arrive at work.

(c) Ms Vivian Flynn's file note

> This morning at start of shift I became aware that Danny had no intention to drive a straddle, he kitted up to go onto the ship. Around 6.50ish I was in the shift manager's office & heard Danny challenge the allocation with Ian Kitching. He said he was not driving, the ship job was his. Ian asked him to drive.
>
> Danny questioned Ian's directive, Ian reiterated that Danny was to man the machine. Danny told him he was not going to, Ian asked Danny to stand [d]own until Mike was here to speak to.

[18] Before turning to the disciplinary process I refer to clause 4.2.7(a) of the Collective Agreement Between POAL and MUNZ – Local 13 dated 1 July 2009 which reads:

> 4.2.7 The following are examples of conduct that may constitute serious misconduct and may warrant instant dismissal.
>
> (a) Refusal to carry out proper work instructions.
>
> …

[19] Also clause 6 of the Collective Agreement's POAL Grandparented Leading Hands Schedule dated 1 July 2009 to 30 July 2011 reads:

> **FLEXIBILITY OF EMPLOYEES**
>
> a. In the interest of maintaining flexibility and maximising efficiencies and having regard to appropriate safety standards the following shall apply:
>
> (i) Any employee may be required to perform any work for which they have the necessary skills and to undertake work at any location.
>
> (ii) The total number of employees making up the workforce shall be determined by the Company.
>
> (iii) The number of employees allocated to each activity shall be determined by the Company.
>
> (iv) While allocated to a job at the commencement of a shift any employees shall, if and when required by the Company, transfer to other activities within that same shift.
>
> (v) It is the intention of the parties that work shall proceed as required by the Company in a responsible, safe and efficient way and in accordance with the Health and Safety in Employment Act and the appropriate Codes of Practice as well as subsequent legislation.
>
> (vi) Notwithstanding the provisions of this clause the Company guarantees to maintain a safe place of work at all times and

> acknowledges the obligation to ensure that manning levels are maintained at a level that ensures this.

[20] From these clauses it can be seen that Mr Belsham agreed that flexibility in his duties was required, and that a refusal to carry out an instruction may constitute serious misconduct warranting instant dismissal.

[21] On 24 August 2012, POAL's Stevedoring Manager, Jonathan Hulme, wrote to Mr Belsham advising him of the commencement of a disciplinary procedure against him. The purpose of the inquiry was to decide whether Mr Belsham's refusal to man the crane amounted to serious misconduct justifying dismissal. A meeting was to be convened to discuss the matter. The letter enclosed the email from Mr Kitching and the notes Mr Kirwan made at the fact finding meeting. There was some difficulty experienced by POAL in serving the letter on Mr Belsham who obstructed that process. Eventually notice of the meeting was delivered to Mr Belsham at a meeting conducted on 3 September 2012. Mr Belsham was suspended at that meeting.

[22] At the meeting Mr Belsham was handed a letter which referred to his obstructive attitude to the commencement of the disciplinary process, and that this had potential to destroy the trust and confidence between him and his employer. In addition to refusing to reasonably accept the letter giving notice of the meeting, Mr Belsham had arranged for his wife to send a letter advising that POAL's letter of 24 August 2012, delivered by courier to his home, had been thrown in the fire. Perhaps Mr Belsham's obstructive attitude and antagonism can best be shown by simply setting out the letter, which his wife purportedly wrote. The letter from his wife was hand delivered by Mr Belsham to Mr Hulme on 28 August 2012. While his wife signed the letter, it is transparently obvious that Mr Belsham drafted it. Somewhat inexplicably, he continued to persist in pursuing POAL for costs he earlier invoiced.

> Dear Mr Hulme
>
> Thank you for your letter dated 24/8/2012.
>
> As Danny was not at home when I received delivery of your letter I opened and read your correspondence and filed it appropriately in the fireplace. Any more correspondence to this address will be placed in the hands of my solicitor.

> Furthermore, I am still awaiting payment for my outstanding invoice which I understand that you refuse to pay. Any further meetings regarding Ports of Auckland will take place during the [Port's] time not ours.
>
> Yours faithfully
>
> K S Belsham

[23] The invoice referred to was from Mr Belsham and not Mrs Belsham so the "I" referred to in the second paragraph was not the alleged author of the letter but Mr Belsham himself.

[24] Mr Hulme, who was now tasked with completing the process, spoke in evidence of his frustration at the effort of trying to get Mr Belsham to a meeting. Finally, when a meeting was able to be convened on 5 September 2012, Mr Belsham was accompanied by his lawyer and a union delegate. At that meeting Mr Belsham raised, for the first time, his allegation that he had not refused to work the crane because of his argument over the roster, but rather had declined on health and safety grounds. He made an allegation that the defendant had deliberately taken him off ship foreman duties to keep him out of the way and cover up breaches of procedure taking place in the handling of the leaking container. He stated that he had prepared a hazard reporting notice and given it to the health and safety manager at 7.15 am on the morning of the dispute.

[25] Mr Hulme adjourned the meeting to inquire into Mr Belsham's allegations. He reviewed all the documents and reports. He discovered that the hazard reporting notice could not have been given to the health and safety manager at 7.15 am as that manager had not arrived on site until 8.17 am. Mr Hulme stated that he was very concerned about Mr Belsham's unfounded allegation that the defendant had deliberately circumvented safety procedures and put employees at risk.

[26] Mr Hulme's inquiry left him with the view that Mr Belsham's explanations did not ring true. He wrote to Mr Belsham setting out his views on 7 September 2012. This resulted in a letter from Mr Belsham's lawyer raising concern about Mr Hulme's involvement in the process. As a result of this, Mr Hulme decided to hand over the continuation of the inquiry and process to Mr Borley. Mr Borley then reviewed all of the documentation, including matters put forward on Mr Belsham's

behalf in response to Mr Hulme's letter of 7 September 2012. He wrote to Mr Belsham on 24 September 2012 setting out his findings. His view was that the actions of Mr Belsham could be considered as serious misconduct. He invited and received comments from Mr Belsham's lawyer. He considered those and then wrote again on 2 October 2012 setting out his conclusions as follows:

a. Mr Belsham had no reasonable grounds for refusing to drive a straddle crane when instructed to do so.

b. The grounds that he advanced had no factual basis and lacked credibility.

c. His failure to follow proper process when disputing work instructions was a breach of his statutory obligation to act in good faith at all times.

d. The allegation of unethical behaviour that he made against company management, both during his refusal to work and the subsequent investigation, was a seriously aggravating feature of his misconduct.

e. His failure to provide a satisfactory explanation to the timing issues identified and which related to the eventual start time at work on the day, further compounded the seriousness of the matter.

[27] Once this letter was sent to Mr Belsham via his lawyer, a response was received seeking a further meeting. That meeting was conducted on 15 October 2012. Mr Belsham, through his lawyer, submitted it was not serious misconduct, that health and safety concerns were behind his declining to work, and that dismissal was not an appropriate response. Mr Borley's evidence of his consideration of the submissions at this meeting was as follows:

> **Decision regarding sanction**
>
> 27. Following this meeting I considered Mr Belsham's comments regarding sanction. I considered his length of service with the company and the fact that he was adamant that his conduct was not serious misconduct. Overall, I did not consider that these factors overcame the concerns I had. I determined that Mr Belsham's summary dismissal was the most appropriate outcome in the circumstances.

28. In reaching this decision I considered whether a warning would have been appropriate. I decided that I simply could not trust Mr Belsham moving forward.

29. I also considered the fact that Mr Belsham's employment was subject to an oral warning at the time of his misconduct. I knew that Mr Belsham had raised a personal grievance regarding this warning, but I still considered the warning to be relevant. He knew on 21 August that his employment was subject to a warning. He had very recently been reminded about our expectations regarding following directions. While this was a factor for me, it did not add a lot to Mr Belsham's misconduct on 21 August. I would have dismissed Mr Belsham even if his employment had not been subject to the oral warning.

30. I wrote to Mr Belsham to advise him of my decision.

[28] The letter which Mr Borley then wrote to Mr Belsham terminating his employment is as set out in the introduction to this judgment.

Legal submissions and analysis

[29] Mr Mitchell, on behalf of Mr Belsham, submitted that the defendant employer was unable to define the direction given to Mr Belsham with which he was alleged to have not complied. The ambit of this submission was that Mr Belsham did not refuse to man the crane and that from the time that he was directed to stand down by Mr Kitching, he was complying with that direction by waiting for Mr Kirwan to arrive. In this regard, he pointed to some conflict in the evidence of Mr Kitching in that in his email he said that Mr Belsham indicated that he was going to wait for Mr Kirwan to arrive but, of course, in the file note of Ms Flynn and in Mr Kitching's own evidence it was stated that Mr Belsham was asked to stand down.

[30] The second submission made was that when the Collective Agreement Grandparented Leading Hand Schedule is considered, it is clear that Mr Belsham was employed as a leading hand and, therefore, had an entitlement to supervisory duties. Accordingly, being rostered onto the straddle crane was unusual and out of the ordinary. This, coupled on the day with the health and safety issue that Mr Belsham considered to be serious, led to him drawing a connection between the two and making the allegation that he did. Mr Mitchell submitted that it was necessary, therefore, to determine whether, against the background of these issues, a fair and

reasonable employer would dismiss an employee for failing to carry out the instruction in all of the circumstances prevailing. In any event, Mr Mitchell submitted that, in view of the fact that Mr Belsham did not work for a period of only 40 minutes, it could not be regarded as serious misconduct leading to dismissal.

[31] Mr Mitchell also submitted, on behalf of Mr Belsham, that there had been an insufficient investigation into the matter. In this respect, he was referring to alleged inadequacies in the inquiries of Ms Flynn. He also pointed to the issue of whether the employer genuinely considered the plaintiff's explanations as to what transpired on that morning. To be taken into account when considering this issue was the fact that Mr Hulme stood aside when Mr Mitchell criticised the tone of correspondence he was sending to Mr Belsham. Further, there was the issue of an altercation at one of the meetings where Mr Belsham alleged that he was assaulted by the human resources consultant for the company. Mr Mitchell submitted that when all of the circumstances are considered, the decision to dismiss was not one that a fair and reasonable employer could have reached.

[32] The company's position was that it was evident that Mr Belsham refused to man the crane purely on the basis of his dispute with the rostering. It was submitted that, when properly analysed, his evidence was not credible when he maintained that, as early as his meeting with Mr Kitching, he raised a health and safety issue as the basis for refusing to work. Mr McIlraith, on behalf of POAL, submitted that the health and safety issue was raised as an afterthought by Mr Belsham when he realised that he was in difficulty with the stand that he was taking. This was endorsed by the fact that the hazard report was not prepared until after the refusal to work and that Mr Belsham was not credible in his allegation as to when he gave that to the health and safety manager. All in all, Mr McIlraith submitted that the grounds set out in Mr Borley's final letter prior to the dismissal were established on the evidence. The company was entitled to adopt the view that, as a result of Mr Belsham's behaviour against his history of employment, it no longer had trust and confidence in him as an employee.

[33] Mr McIlraith, in his submissions, also pointed to the fact that Mr Belsham's theory of the case raised during the course of the challenge that the company rostered

him work on the crane as a cover-up for some breach of health and safety considerations, was not put to any of the employer witnesses by his counsel. Serious credibility issues arise, Mr McIlraith submitted, in respect of Mr Belsham, from his allegations as to when Ms Flynn joined the meeting with Mr Kitching; his allegations as to the delivery of the hazard reporting notice; his allegations as to when he actually commenced working on the day relating to the straddle crane that was subject to cleaning; and his overall obstinate behaviour in obstructing the disciplinary process.

Remedies sought

[34] Mr Belsham sought reinstatement in the event that he was successful with his challenge. In addition, he sought reimbursement of lost wages and compensation for humiliation and upset as a result of his dismissal. On the issue of reinstatement, all but one of the witnesses for the employer gave evidence. They referred to the need for strict discipline at the port and, in view of Mr Belsham's previous behaviour and the seriousness of his behaviour on this occasion, the difficulty with him being assimilated back into the workforce.

Legal principles applying

[35] The defendant must establish that the dismissal of Mr Belsham was justifiable. The statutory test of justification is contained in s 103A of the Employment Relations Act 2000. That section 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.
> (3) In applying the test in subsection (2), the Authority or the court must consider—
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
(a) minor; and
(b) did not result in the employee being treated unfairly.

[36] In *Angus v Ports of Auckland Ltd*[3] a full Court considered the amendments to s103A, and the ambit of the Court's enquiry in the light of its decision in *Air New Zealand Ltd v V*[4] decided prior to the amendments. The Court stated in *Angus* as follows:

> [24] There are substantial and significant parts of former s 103A that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in *V*. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[37] Also in *Angus*, the Court, in analysing the section, emphasised that the role of the Court is not to substitute its view for that of the employer. It is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. In this regard, the Court stated as follows:

> [58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances

[3] [2011] NZEmpC 160.
[4] [2009] ERNZ 185.

> will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[38] Both counsel referred to *Angus* amongst other authorities. Consideration of the other authorities was helpful, but there is really no need to go beyond the statements made by the full Court in *Angus*. It restated the principles applying prior to the amendment to s 103A and how they are to be applied in the light of the statutory change.

[39] Mr McIlraith in his submission, noted the following passages from *Angus* which set out the effect of the amendments:

> [22] The change from "would" in former s 103A to "could" in new s 103A is not dramatic but, contrary to the submission put to us by Mr Mitchell, it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. What new s 103A ("could") contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.
>
> [23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[40] For a more recent consideration as to the process by which an employer arrives at its substantive decision, Judge Couch, in *De Bruin v Canterbury District Health Board*[5] stated:

> [38] The test of justification comprises both the substantive decision made by the employer and how the employer arrived at that decision. It is, however, convenient to discuss the process and the outcome separately. In this case, I begin with the process adopted by CDHB.

[5] [2012] NZEmpC 110.

> [39] Section 103A(3) sets out considerations which must be taken into account when considering process. Subsection (4) expressly authorises the Court to also take any other appropriate factors into account. Subsection (5) precludes conclusions based on minor or inconsequential defects in process. In applying these provisions, I adopt what the Court in *Angus* said:
>
> > [26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be take into consideration having regard to the particular circumstances of the case.

Conclusions and disposition

[41] I do not accept Mr Mitchell's submission that Mr Belsham was entitled to rely upon the direction given by Mr Kitching for him to stand down while he waited for Mr Kirwan to arrive. The behaviour which needs to be considered is that which preceded Mr Kitching's frustrated response to Mr Belsham's intransigence. The evidence, supported by contemporary documents, shows that Mr Belsham's allegation that he raised health and safety issues at the outset with Mr Kitching before Ms Flynn arrived was not correct. I accept the evidence of Ms Flynn that she followed Mr Belsham into Mr Kitching's office and was immediately behind him. If there had been a discussion on health and safety issues, that would have been recorded by Ms Flynn in her evidence and certainly in the note that she made on the day. In any event, even when Mr Belsham was interviewed by Mr Kirwan it was clear that his main point of contention was the fact that he had been rostered off from his position on the vessel to the straddle crane. An analysis of all of the surrounding evidence leads me to the view that Mr Belsham was not correct in his assertion that

the reason that he would not work the crane was because of the leaking container and the health and safety issues that posed. The statements that he made during the investigation meeting with Mr Kirwan make it plain that his assertion simply cannot be true. Even though he was stood down by Mr Kitching, the company was entitled to assess his behaviour on what transpired before that point.

[42] Mr Belsham's behaviour on the day can be assessed against the background of the tense industrial situation which prevailed at the port at this time. That would not preclude justification of actions taken on the basis of health and safety considerations if they were genuinely held. However, in the days leading up to this incident, Mr Belsham had been disciplined for other insubordination. It is significant also that if the issue with the container was as serious as Mr Belsham maintained, other employees would have taken the same stand as he did, but none did. Certainly, there was no evidence from any other employee that the vessel was unsafe to discharge. Mr Belsham called as a witness, the Secretary/Treasurer of the Auckland branch of the union to which he belonged. That evidence was that Mr Belsham reported the health and safety issue to the union at 11 am on the day in question. That was rather late in the piece. It is significant that there is nothing in the evidence from the union that they regarded the matter as so serious as to remove other employees from the site.

[43] Once the employer was confronted with the actions of Mr Belsham, it then undertook a very thorough process of investigation in the first instance, and then instigated the disciplinary process. Mr Kirwan was careful to carry out an inquiry and he recorded minutes of what transpired at that meeting, which Mr Belsham does not dispute. Mr Kitching and Ms Flynn, on the very morning of the day in question, recorded in writing what had occurred from their observations. Once the company had ascertained what it regarded as the situation, it set in place the disciplinary process despite Mr Belsham's attempts to obstruct that. It gave Mr Belsham, via his lawyer, every opportunity to present his side of the matter. It is true that Mr Belsham maintained that the health and safety issue prevailed and so the company was faced with his assertions as to his actions and stated motivations at the time. It considered that against what Mr Belsham said at the time and what other employees observed. Finally, Mr Borley concluded, in view of the contradictions and credibility issues

arising from what Mr Belsham was alleging, and also the clear assertions of the other employees, that Mr Belsham was guilty of serious misconduct and that dismissal was the appropriate response in all of the circumstances.

[44] The issue for the Court to decide is whether the dismissal was one of the actions that a fair and reasonable employer could take in all of the circumstances existing at the time. Right up until the last meeting, the company was prepared to listen to Mr Belsham's explanations and consider the submissions put forward on his behalf by Mr Mitchell. At the final meeting on 15 October 2012, Mr Mitchell put forward alternatives so far as any sanction was concerned and submitted that a warning rather than dismissal would be the appropriate response. The company carefully considered that before dismissing Mr Belsham in writing the following day.

[45] In summary, the circumstances prevailing at the time of the dismissal which are relevant to an assessment of the employers' decision in this matter are as follows:

a) Potential peril from the cargo was known and steps were taken to deal with it by having the Fire Service stand by;

b) Mr Belsham had been warned previously for breach of his obligations as an employee;

c) Mr Belsham had been in discussion with the employer in the days leading up to the vessel arriving about the steps to be taken to deal with it;

d) Mr Belsham knew of the reasons for the change in rostering such that he was required to man the crane. The terms of his employment covering flexibility required him to work the crane if directed;

e) The evidence of company witnesses present, supported by contemporary documents in the form of minutes and memoranda, confirmed Mr Belsham did not initially raise health and safety issues for refusing to man the crane. He was insisting on assuming his previously rostered duty by being an overseer on the deck of the vessel;

f) Even when he agreed to man the crane during the second shift, he took up the duties late and acted in a way in which the only inference can be that he set out to frustrate the early engagement of the crane to work the vessel and discharge its cargo;

g) A further inference which can be taken from the overall circumstances as they unfolded, including the way that the disciplinary process then proceeded, was that Mr Belsham used the health and safety issue as a retrospective justification for his insubordination;

h) His obstinate and obstructive behaviour during the disciplinary process, which the employer was entitled to pursue, severely tested the trust and confidence which must exist in the employment relationship.

[46] In all of the circumstances prevailing, even though Mr Belsham refused to work for a relatively short period, this was quite a substantial dereliction of duty. The vessel being discharged presented a difficult situation at the port. The company had a contingency plan in place. That plan had been presented to Mr Belsham. Rostering difficulties arose such that he needed to be taken from supervising on the vessel to manning a crane. His refusal would have exacerbated the difficulties which the employer already faced on the day. Clearly, a reasonably stern response was necessary. This was not a position, which was finely balanced such that it could be said that a fair and reasonable employer could not have reached the decision to dismiss as opposed to taking some lesser disciplinary measure. In addition, the behaviour by Mr Belsham to obfuscate the true reasons for his behaviour, his clear deceit and his curious actions in the disciplinary process meant that the employer was entitled to take the view that it could no longer have trust and confidence in him as an employee.

[47] In all of the circumstances, the dismissal was an action which a fair and reasonable employer could take. Accordingly, the challenge is dismissed.

[48] Issues of costs arise. Costs will be reserved. If the defendant intends to seek costs against Mr Belsham, then a memorandum of submissions is to be filed within

14 days from the date of this judgment. Mr Belsham may then file any response within a further period of 14 days. The Court will then make a decision on costs.

M E Perkins
Judge

Judgment signed at 1 pm on 11 October 2013