IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 200
5356580

	BETWEEN	ANDREW MURPHY Applicant
	A N D	GEOTECH LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Shannon Hollis, Counsel for Applicant Neil May, Advocate for Respondent
Investigation meeting:	28 August 2012 at Westport
Submissions Received	28 August and 4 September 2012 from the Applicant and 28 August and 11 September 2012 the Respondent
Date of Determination:	17 September 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant was unjustifiably dismissed and unjustifiably disadvantaged in his employment and is entitled to the remedies set out in this determination.

B Costs are reserved.

Employment Relationship Problem

[1] Mr Murphy claims that he was unjustifiably dismissed from the employment of the respondent on 29 August 2011 and that he was unjustifiably disadvantaged in his employment by his suspension from duties.

[2] The respondent argues that Mr Murphy's dismissal was both procedurally and substantively fair and that he was not disadvantaged by way of his suspension.

Brief account of the facts leading to the dismissal

[3] Mr Murphy was employed by the respondent, which specialises in tunnelling and ground stabilisation, between September 2010 and 29 August 2011 as a labourer. He was trained in rope access work, ground stabilisation, the operation of diggers and other machinery, drilling and the use of explosives for blasting.

[4] On or about Thursday, 10 March 2011, Mr Murphy was working in Lyttelton with another crew member, carrying out work using ropes. During the course of the day Mr Murphy and the other crew member had a disagreement which resulted in a minor physical altercation. The manager of the Christchurch operation carried out an investigation immediately, questioning Mr Murphy, the other employee and another witness. A decision was made to remove Mr Murphy from his rope work and to take him back to Westport, due to concerns about his ability to work safely with the other crew member.

[5] The company prepared a written warning in relation to the Lyttelton incident and, on or around 22 March 2011, an attempt was made to issue it to Mr Murphy. Mr Murphy refused to accept the written warning as the investigation process had not, in his opinion, been carried out in accordance with the correct disciplinary procedures. Namely, Mr Murphy says that he had not been given sufficient notice of the investigation, had not been told he could be issued with a written warning as a result, and had not been given the opportunity to have a support person or representative present.

[6] These arguments persuaded the company that it was not appropriate to give him a written warning and, on 22 March 2011, the company amended it to confirmation of a verbal warning. There is a conflict of evidence between Mr Murphy and the company in that Mr Murphy states that he refused to accept a verbal warning as well, for the same reasons, and that he had never seen the letter dated 22 March 2011, headed *Verbal Warning*, and which read as follows:

> *Dear Andrew,*
>
> *After the incident at Lyttelton, I am writing this letter to confirm the verbal warning you were given this morning and advise you that such behaviour will not be tolerated again.*
>
> *I understand that it was not one sided, but, when working on ropes we need to work as a team and to act far more maturely.*
>
> *Under your Individual Employment Agreement, it states that employment can be terminated for harassment of a work colleague. This is also stressed in the H&S Code of Conduct which states, "never assault, abuse or harass my fellow workers or anyone else" (which you signed). However, in this case, it has been decided to issue you with a verbal warning.*
>
> *The other person involved has also been written to.*
>
> *Yours sincerely*
> *Chris Morris*
> *Health and Safety/Human Resources*
> *Geotech*

[7] The position of the company is that, whilst Mr Murphy refused to accept a written warning, he did accept a verbal warning and had been given the letter. The evidence of Mr Morris was that Mr Murphy would often get himself into a temper, and would forget what he said and did, and that this probably accounts for him not remembering agreeing to receive a verbal warning or accepting the letter.

[8] On balance, as far as this particular conflict of evidence is concerned, I prefer the evidence of Mr Morris and believe that Mr Murphy did agree to accept a verbal warning instead of a written one.

[9] On 12 August 2011, Mr Murphy was present at a meeting (called a PSI meeting) at which various work issues were discussed, including health and safety matters. Mr Murphy complained that the back door of the van in which he had been travelling was loose, and was rattling. In Mr Murphy's opinion, this was a dangerous matter and raised a health and safety problem. One of the managers present, Mr McGlashen, stated in the meeting that Mr Murphy should take the van into the workshop and fix the back door himself. Whilst there is a conflict of evidence as to what exactly Mr Murphy said in response, it is common ground that he reacted angrily to this suggestion, saying that it was not his job to do so.

[10] Mr Murphy explained in his evidence to the Authority that he did not consider it was either appropriate or safe for him to fix the back door of a work vehicle when

he was not a mechanic. Mr Murphy did admit during his evidence that he probably did swear whilst he was responding to Mr McGlashen, but that he did not direct a swear word at anyone in particular. Statements from witnesses present at the time of the incident, which were gathered by the company during its investigation into the matter, give various accounts of what Mr Murphy said. These statements state variously that Mr Murphy either said to Mr McGlashen *"its not [my] fucken job to do that"*, or *"its not my job, I don't give a fuck"*, or *"get fucked, its not my job I'm not doing it I'm just letting you know"*.

[11] It is common ground that Ms Miller, the company administrator who was present during the PSI meeting, did say to Mr Murphy that it was his responsibility to fix the door but, again, there is a conflict of evidence as to whether or not Mr Murphy swore at her. During his evidence before the Authority, he was adamant that he only swore by saying the word *fucking* as a descriptive word and did not address it to anyone. The statements gathered by the company at the time state variously that Mr Murphy either stated to Ms Miller that *"he didn't need her input"*, or *"is not my job its your fucken job"*, or *"go fuck yourself, you do your job and I'll do mine"*, or *"I'm talking to Gordon I don't need your input Tania"*.

[12] Immediately after the PSI meeting Mr Murphy spoke to Ms Miller about a query he had with his timesheets. Ms Miller said that she would look into his query and come back to him. The company's evidence is that Mr Murphy then refused to go to work and stood staring at a corrugated iron wall for 90 minutes (although contemporaneous evidence suggests that this was for 30 minutes). Mr Murphy denies that he refused to work and said that he was waiting for a problem with a truck to be fixed and that he spent his time filling up fuel cans.

[13] The company's evidence is that Ms Miller had been badly affected by the interaction with Mr Murphy and that this had been noticed by the principal of the company, Mr Black. When Mr Black heard about the incident during the PSI meeting, he decided that it was necessary to conduct an investigation and for Mr Murphy to be suspended. By the time Mr Black had made this decision, however, Mr Murphy had already left the work site and had been working for the rest of the afternoon.

[14] Accordingly, Mr Murphy was telephoned during his day off on Sunday by one of the supervisors telling him that he was to be suspended. Mr Murphy reacted

angrily to this information, saying that the employment agreement required the company to discuss the proposed suspension with him first. Notwithstanding these representations by Mr Murphy, Mr Murphy remained suspended until his dismissal.

[15] On 15 August 2011, Mr Morris sent Mr Murphy a letter entitled *Formal Notification* which stated the following:

> *Dear Andrew,*
>
> *This letter is to formally notify you that you have been put on stand down (10 hours per day) on full pay so that an investigation can be made into the incident that took place on Friday 12 August at and after the PSI meeting.*
>
> *You have been asked to provide a statement.*
>
> *The matter, if proven, could lead to disciplinary action which could include dismissal for serious misconduct under Employment Contract Terms, i.e. Harassment of a work colleague.*
>
> *Never assault, abuse or harass fellow workers or anyone else.*
>
> *This was also reiterated in the letter confirming your verbal warning on 22 March 2011.*
>
> *A formal meeting will be held and you will have the right to have a representative present. This will give you the opportunity to present your side of the story before any decision is made by Geotech.*
>
> *Johan* [one of Mr Murphy's supervisors] *will discuss this with you to arrange a time and date that is suitable for both parties.*
>
> *Yours sincerely,*
> *Chris Morris*

[16] Mr Murphy responded to this letter stating that he had at no stage received a letter dated 22 March 2011 confirming that he had been issued with a verbal warning. He stated that no investigation process had been undertaken and that, accordingly, he was of the view that no formal verbal warning had been issued to him. Mr Murphy also pointed out that the company had not complied with clause 13 of his individual employment agreement as the proposal of suspension had not been discussed with him before suspension took place. Mr Murphy also pointed out that the letter of 15 August did not detail the allegation made against him in sufficient detail to enable a response.

[17] Mr Murphy also stated in the letter that the company had not adhered to minimum standards of procedural fairness and that he did not consider that it was

appropriate for the matter to be taken any further. He stated that, at that stage, he had chosen not to pursue a potential grievance and would simply like to move forward and he asked for a return to work date.

[18] The company replied by letter dated 19 August, writing to Ms Hollis, his legal representative. The letter stated as follows:

> *This is to clarify some of the issues raised in your latest communication.*
>
> *We are trying to complete an investigation into the events that took place in the Geotech base at Stockton last week involving your client.*
>
> *We have stood him down on pay so the investigation may proceed unhindered by staff tensions & concerns.*
>
> *Until we hear his version of events we cannot determine if further investigations & statements are required.*
>
> *Essentially the enquiry is centred on several breaches of company policy.*
>
> *Breach of company bullying & harassment policy – the verbal abuse of fellow employees.*
>
> *Breach of company Health & Safety policy – causing an unsafe working environment by showing intimidating behaviour toward a fellow employee including abusive language.*
>
> *Breaches of company code of conduct & employment contract – whether those actions were of such seriousness that they could bring the company into disrepute with the Alliance with whom Geotech has a range of contracts worth in excess of $100,000 pa.*
>
> *Failure to comply with company policies & procedures & breaching the staff code of conduct including subordination.*
>
> *Whether Andrew's actions, which the investigation shows to be breaching company policy, should be confirmed as serious misconduct in terms of the employment contract & other documents he signed.*
>
> *When the investigation is complete the matter will be discussed with the Company Principal. We will convey to Andrew what the Company's view is regarding disciplinary action & he will have a further opportunity to make any submissions before a final decision is confirmed.*

[19] Mr Morris then proceeded to obtain statements from a number of staff including Ms Miller, Mr McGlashen and others. Mr Murphy confirmed that copies of these statements were sent to him and his lawyer before the investigation meeting took place.

[20] It was during the meeting on 24 August 2011 that an issue regarding Mr Murphy falsifying his timesheet was first raised by the company. Although the

company asserted that it had warned Mr Murphy in advance, in the letter dated 19 August 2011, that it would be raising this issue, my evaluation of the evidence is that it did not do so, as there is no specific mention of the issue of timesheets. If the respondent relies upon the statement in the 19 August letter that Mr Murphy had demonstrated a *failure to comply with company policies & procedures & breaching the staff code of conduct including subordination,* that description is too generic and unparticularised to expect Mr Murphy to guess in advance what specifically the respondent's concerns were.

[21] One of the statements taken by Mr Morris prior to the meeting on 24 August 2011 referred to Mr Murphy completing a timesheet claiming 11 hours work on Sunday 31 July 2011 when he had only worked 8½ hours that day. Mr Murphy's explanation to the company during the disciplinary investigation was that he knew that he would not be in at work the following Monday and Tuesday and that the company required timesheets to be handed in the following morning. He therefore completed the timesheet for the Sunday in the morning, anticipating that he was going to work 11 hours because that is what he had done the previous day. He also said that he knew that these timesheets were checked and that if he had claimed too much, it would have been picked up by a supervisor.

[22] As it happens, this over-claiming was picked up by his supervisor and he was only paid for 8½ hours work on that Sunday. Mr Murphy claims that he was not advised of this and that was why he had spoken to Ms Miller on 12 August, asking why his timesheet had been altered and he had not been told of it. Mr Murphy did, however, concede that he had only been entitled to be paid for 8½ hours work on 31 July.

[23] The company states that, during the disciplinary investigation meeting on 24 August 2011, Mr Murphy admitted that he falsified a timesheet. It happens that the meeting was recorded by the respondent and the Authority heard that part of the recording dealing with this alleged admission. In my view, whilst Mr Murphy did say the words *"yeah, that's correct"* to the question *"so you falsified your timesheet"*, I accept Mr Murphy's explanation that he was trying to convey that it could be seen as falsification if that was what the company wanted to call it. The recording does capture Ms Hollis, who was present at the disciplinary investigation meeting, warning the parties that the term *falsification* was a serious one.

[24] After the disciplinary investigation meeting, the company sent Mr Murphy a letter dated 25 August 2011 in the following terms:

> *Dear Andrew,*
>
> *We have concluded our investigation into events which took place on Friday 12 August 2011 ……*[sic].
>
> *We have taken into consideration your submissions, those of other staff & management, together with other related background matters.*
>
> *Our disciplinary decision is*
>
> *1. We are of the opinion that there has been serious misconduct on your part, and*
>
> *2. That your employment with Geotech should be terminated.*
>
> *At this stage we have decided your period of paid stand down will end at 6pm tonight.*
>
> *We will forward a more detailed written decision as soon as possible; as you are aware you have a reasonable time to consider this. You can request an opportunity to put forward your submissions as to why we should reconsider this dismissal proposal & supply any supporting information you wish.*
>
> *Only after considering any further submissions on your part will a final decision be taken.*

[25] Mr Murphy's argument is that he and his lawyer found this a very confusing letter and understood it to mean that, in actuality, he was being dismissed despite the statement at the end that he could request an opportunity to put forward his submissions as to why the company should reconsider his dismissal. In particular, Mr Murphy relies on the reference in the letter to his paid stand down ending at 6pm that night.

[26] The evidence to the Authority of Mr Morris, who signed the letter, was that the company had intended to convey to Mr Murphy the company's initial decision but had genuinely meant to give Mr Murphy an opportunity to make any final submissions. However, he conceded that it had not been appropriate to end Mr Murphy's pay before a final decision had been made on whether he should be terminated or not and he said that, although he signed the letter, he probably did not write it, suggesting that the company's legal advisers may have done so.

[27] Due to the confusion created by the letter and the view that the decision had already been made, Mr Murphy instructed Ms Hollis to tell the company that they had no further comments to make.

[28] The letter confirming Mr Murphy's termination was dated 29 August 2011 and stated as follows:

> *Dear Andrew,*
>
> *ALLEGATIONS OF SERIOUS MISCONDUCT*
>
> *As a result of our investigation into the above allegation and consideration of your response during our meeting of 24 August 2011, please be advised that we have concluded that you did verbally abuse and behave in an aggressive and threatening manner towards another employee. In reaching this conclusion we have regard for the fact that this had not been the first time that your behaviour had been so extreme. Additional to this, you admitted falsifying your timesheet by overstating your actual hours worked. We see this as a deliberate attempt to mislead Geotech.*
>
> *Given this conclusion, your actions are considered to have seriously and significantly undermined our employment relationship with you to the extent that it is no longer reasonably tenable. As a result we are summarily dismissing you effective immediately. We have taken all the circumstances into account and considered whether there are mitigating circumstances which might justify an alternative outcome but have not found any.*

The issues

[29] The test that the Authority must apply in deciding whether Mr Murphy's grievances should be upheld is encapsulated in s. 103A of the Act. This states as follows:

> *(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.*

[30] In reaching a conclusion in this matter, the Authority must determine the following issues:

(a) Whether the decision to dismiss Mr Murphy was substantially fair;

(b) Whether the procedure followed by the respondent in dismissing Mr Murphy was materially flawed; and

(c) Whether Mr Murphy's suspension was an unjustified disadvantage in his employment.

Was the decision to dismiss Mr Murphy substantially fair?

[31] Ms Hollis, on behalf of Mr Murphy, argues that it was not reasonable for the respondent to have concluded that serious misconduct had been committed due to the disparity between the statements that had been taken by the respondent in respect of the alleged conduct by Mr Murphy on 12 August 2011. Ms Hollis has helpfully summarised in her written submissions the various accounts of Mr Murphy's responses and swearing on 12 August from the different statements taken. She had also made a table of these differences for the benefit of the company when she represented Mr Murphy at the 24 August disciplinary meeting.

[32] In particular, Ms Hollis points out that Ms Miller's statement does not record that any abuse was directed at her. Ms Hollis also points to material discrepancies

between a contemporaneous statement made by one of the supervisors, Mr Maartens, who had witnessed the altercation during the PSI meeting and his later sworn statement to the Authority. (This witness was unable to attend the Authority's Investigation Meeting and so, although certified, the evidence in his written statement will carry less weight than the evidence contained in the contemporaneous statement he made for the company). In the contemporaneous statement Mr Maartens does not record that Mr Murphy told Ms Miler to *go fuck yourself*, whereas his statement to the Authority states that Mr Murphy did say this to her.

[33] Mr Morris, the Health and Safety and Human Resources Manager for the respondent, stated during his evidence to the Authority that he had spoken to Ms Miller after she had made her written statement and she had stated to him that she had been sworn at by Mr Murphy and that she had felt frightened and intimidated by him. Mr Morris also stated to the Authority that the reason that it had been concluded that Mr Murphy had committed serious misconduct, and so had been dismissed, had been that he had sworn at Ms Murphy and had frightened and intimidated her. Mr Morris confirmed that it had not been Mr Murphy swearing at Mr McGlashen that had led to the decision to dismiss.

[34] Mr Murphy had admitted to the Authority during his evidence that he had still been angry when he had approached Ms Miller to speak to her about the timesheets but maintained that he had not sworn at her.

[35] The Authority is not able to step into the shoes of the respondent and substitute its views of whether Mr Murphy did or did not commit serious misconduct. The Authority must limit itself to ascertaining whether the respondent's actions in dismissing Mr Murphy, and how the respondent acted, *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.* Section 103A(2) of the Act. In view of Mr Morris' evidence to the Authority, which I found to be credible in general, that the dismissal was because Ms Miller had been frightened and intimated by Mr Murphy, it is necessary to determine, first, whether it had been fair and reasonable for the respondent to have concluded that Mr Murphy had frightened and intimidated Ms Miller.

[36] Ms Miller's written contemporaneous statement included the following:

> *Andrew* [Mr Murphy] *replied* [to Mr McGlashen] *"Get Fucked! It's not my job. I'm not doing it. I'm just letting you know".*
>
> *I regarded this as rude and disrespectful talk towards a supervisor. I responded to Andrew by saying – "It is your job if you re told to do it".*
>
> *Andrew replied to me – "I'm talking to Gordon. I don't need your input Tania"*
>
> *Andrew was speaking in an aggressive manor* [sic], *swearing & seemed to be very agitated during this time.*
>
> *After the PSI meeting, Andrew approached me regarding a discrepancy between his payslip & his timesheets for the week ending 31.7.2011.*
>
> *Andrew said to me – "I do my job. You do yours!"*
>
> *I replied that if he gave me his timesheet book I would look into it for him.*
>
> *He was still very agitated & acting in an aggressive manor* [sic].
>
> *I felt offended & a little bit unsafe & felt it was best not to say anything more & not to "buy into" his attitude.*
>
> *It seemed to me that he was implying that it was my fault & I wasn't doing my job properly.*
>
> *It is my view that his attitude was unnecessary & inappropriate. I conveyed this to the supervisors after the meeting.*
>
> *A short time later, another supervisor approached me & commented that Andrew's behaviour was very aggressive & he was not happy about the way that he spoke to me & to others. He asked if something would be done about it & thought that it was very inappropriate behaviour.*
>
> *I agreed with him & later wrote this statement.*

[37] Mr Morris' contemporaneous note of his later conversation with Ms Miller (Tania) includes the following:

> *Tania added that Andrew stood outside office "fuming" for 30 mins. He refused to do any work asked……*
>
> *Tania also stated that she did not take the timesheet out to discuss it with Andrew as she was too frightened after his threatening behaviour. She took it through to Grant and Gordy.*

[38] I think it is likely that, if Mr Murphy had sworn at Ms Miller, she would have recorded the fact in her contemporaneous written statement. I also believe that Mr Morris would have recorded in his diary entries Ms Miller telling him later on that Mr Murphy had sworn at her. I am therefore sceptical that Ms Miller did tell Mr Morris that Mr Murphy had sworn at her and so conclude that it had not been a reasonable conclusion for the company to have come to that he had.

[39] Mr Morris stated in his evidence, however, that Mr Murphy had been dismissed because he had frightened and intimidated Ms Miller. Ms Miller's contemporaneous statement records that she had felt *a little bit unsafe* and Mr Morris's written diary entry records that Ms Miller had told him that she had been too frightened after Mr Murphy's *threatening behaviour* to approach him. Mr Morris also gave evidence to the Authority that the principal, Mr Black, had seen Ms Miller after her encounter with Mr Murphy and had been concerned at her demeanour. (Mr Black was not present at the investigation to give evidence, so this evidence is necessarily hearsay, although the Authority may take it into consideration).

[40] When I take these factors into account, I believe that it had been reasonable for the respondent to have concluded that Ms Miller had been frightened and intimidated by Mr Murphy's behaviour to her. Whilst that behaviour may not have included direct abusive swearing, contrary to the respondent's assertions, it is very likely to have been aggressive enough for Ms Miller to have felt frightened, a conclusion the employer was reasonable in reaching.

[41] I also believe that it had been reasonable for the respondent to have concluded that Mr Murphy's behaviour in frightening and intimidating Ms Miller had amounted to serious misconduct. In reaching this conclusion I am mindful in particular of the following:

(a) The clause in Mr Murphy's employment agreement that states that serious misconduct includes, but is not limited to *harassment of a work colleague or customer.*

(b) The examples of serious misconduct in the respondent's Disciplinary Procedures which include *threats or intimidation towards any other person* and

(c) The directive in the respondent's Health and Safety Code of Conduct that states that the employee must *never assault, abuse or harass my fellow workers or anyone else.*

[42] Given the conclusion reached by the respondent that Mr Murphy's actions amounted to serious misconduct, I further believe that it had been reasonable for the respondent to have concluded that they owed Ms Miller a duty of care not to expose her to an employee who had behaved in an aggressive way towards her. In such a

case, I do believe that the respondent was entitled to take into account the previous verbal warning that Mr Murphy had received for aggressive behaviour, which I have found Mr Murphy accepted. In view of that previous aggressive behaviour, and the behaviour on 12 August 2011 that led Ms Miller to feel frightened and intimidated, I believe that the decision of the respondent company that Mr Murphy be dismissed was the action that a fair and reasonable employer could have taken in all the circumstances.

Was the procedure followed by the company in dismissing Mr Murphy materially flawed?

[43] There were a number of potential flaws in the process followed by the company, some of which are relied on by Mr Murphy to argue that the dismissal was unjustified. These are as follows:

(a) The company relied on a verbal warning that had been issued without a proper procedure having been followed;

(b) The company relied on a change in evidence from Ms Miller which differed from her contemporaneous written statement but which was not recorded in writing;

(c) The company took into account an alleged admission by Mr Murphy into falsifying his timesheets when this had not been raised with him prior to the disciplinary investigation meeting;

(d) The decision to dismiss had been made by Mr Black, the principal of the respondent company, but Mr Murphy had not been given any access to Mr Black so was unable to make any representations to him personally;

(e) The letter to Mr Murphy dated 25 August after the disciplinary meeting had been written in a confusing way and led Mr Murphy and his representative to conclude that a decision had already been taken.

Reliance on a verbal warning that had been issued without a proper procedure having been followed

[44] There is no doubt that the respondent failed to follow a fair process when it had decided to issue Mr Murphy with a written warning in March 2011. Although it is reasonable that the company had to conduct an urgent investigation for the purposes of completing an incident and investigation report, and deciding whether Mr Murphy should continue working on the ropes with the other crew member, it should have then followed a fair process before deciding to issue Mr Murphy with a written warning. As a minimum this would have entailed:

(a) advising him in advance that the company wished to discuss the incident with him for the purposes of a disciplinary investigation;

(b) warning him that the investigation could result in a disciplinary outcome, including identifying what the most severe outcome could be;

(c) advising him that he could have a support person or representative present; and

(d) giving him prior access to all relevant information relied upon by the company.

[45] None of these steps were taken and so the issuing of a written warning would have been unfair. However, I have found that I believe Mr Morris when he stated that Mr Murphy had agreed to accept a lesser, verbal warning during his discussions with the company about the matter.

[46] Mr Morris said in evidence that the company would not have dismissed Mr Murphy if he had not been issued with a verbal warning, as the incident had been regarded as a significant one. However, as I have found as a matter of fact that Mr Murphy did accept the verbal warning, even although no proper investigation had been carried out prior to it being issued, it was not unreasonable for the company to have taken it into account in investigating the 12 August incident. Indeed, it would have been artificial to have shut their eyes to the fact that Mr Murphy had been involved in a previous incident five months earlier involving aggressive behaviour.

[47] Therefore, I do not find that this matter amounted to procedural unfairness.

Reliance on a change in evidence from Ms Miller which differed from her contemporaneous written statement but which was not recorded in writing

[48] As recorded above, Mr Morris gave evidence that, after she had prepared her written statement, Ms Miller had told Mr Morris that Mr Murphy had sworn at her. This had formed part of the decision that Mr Murphy had committed serious misconduct. This additional piece of crucial evidence was not, however, recorded by Mr Morris.

[49] I believe that it was a flaw for the company not to have treated such a change in evidence as being significant and not to have obtained a further written statement from Ms Miller. However, contemporaneous statements made by Ms Miller in writing, and to Mr Morris which he recorded in writing, did show that she had felt frightened and threatened by Mr Murphy. In light of this, I believe that there was sufficient evidence before Mr Murphy during the disciplinary investigation that he was alleged to have behaved towards Ms Miller in an aggressive and inappropriate way, and I have also found that it had been reasonable for the respondent to have concluded that this had justified dismissal.

[50] In light of this, whilst it had been a flaw for the company not to have obtained a further written statement from Ms Miller, I do not find that this materially prejudiced Mr Murphy, and so did not, in itself, cause the dismissal to have been unjustified.

The company took into account an alleged admission into falsifying his timesheets when this had not been raised with him prior to the disciplinary investigation meeting

[51] There is no doubt that the company committed a significant error in springing this issue on Mr Murphy and his representative as a disciplinary issue during the disciplinary investigation meeting when he had not been told beforehand that it was going to be treated as a disciplinary matter.

[52] Mr Morris stated in evidence that the finding of the company that Mr Murphy had admitted falsifying his time sheets had not tipped the balance in the company's conclusion that Mr Murphy should be dismissed. Despite this, the issue of the

timesheets was referred to in the letter of termination and it is more likely than not that it did form part of the decision to dismiss.

[53] Therefore, as Mr Murphy was not forewarned of this matter being treated as a disciplinary matter, and it appears to have formed part of the reason to dismiss, I conclude that this failure did materially prejudice Mr Murphy. I also conclude that this failure was an action that no fair and reasonable employer could have taken in all the circumstances.

The decision to dismiss was made by Mr Black, the principal of the respondent company, but Mr Murphy had not been given any access to Mr Black

[54] Mr Morris said in evidence that the decision had been taken by the three managers present at the disciplinary investigation meeting (Mr Morris, Ms Lee and Mr Maartens) and that the decision to dismiss had been ratified by Mr Black. This does not however accord with an email sent by Ms Lee to Ms Hollis on 19 August 2011 which stated that *Chris Morris & myself will be conducting the investigation meeting with Johan Maartens as observer having been present on the day in question.* This implies that Mr Maartens was not part of the decision making team.

[55] Furthermore, Ms Lee also stated in the same email *this is not a disciplinary meeting, this is a opportunity to have his version of events recorded.* In a previous email to Ms Hollis, dated 18 August, Mr Morris had stated *no decision will be made until our Managing Director views all relevant information.* He also stated *as this meeting is not about making decisions, our legal representative will not be present.*

[56] Taking these emails into account, it is my view that Mr Black was the final decision maker, and that he played a bigger and more significant role than merely ratifying a decision already taken by Mr Morris, Ms Lee and Mr Maartens. Mr Murphy gave evidence that he tried to get hold of Mr Black on several occasions, but that he never got to speak to him. Mr Morris said in evidence that Mr Black is very hard to get hold of and that he also had difficulties in getting hold of him.

[57] This may be so, but Ms Lee managed to get hold of him to discuss the investigation meeting on 24 August. I am very sympathetic to Mr Murphy's complaint that he should have been given the chance to speak to Mr Black prior to Mr Black deciding to dismiss him. In my view, given that Mr Black was the ultimate

decision maker, the failure to afford Mr Murphy that opportunity constitutes an action that no fair and reasonable employer could have taken in the circumstances.

Was the letter to Mr Murphy dated 25 August after the disciplinary meeting written in a confusing way, leading Mr Murphy and his representative to conclude that a decision had already been taken?

[58] I agree that this is a confusing letter. It refers to *our disciplinary decision*. Significantly, it also states that Mr Murphy's pay would end at 6pm that evening. Furthermore, it does not state what the disciplinary findings were. It merely states that there had been serious misconduct on Mr Murphy's part. It should have spelled out what the factual findings were. (E.g., that Mr Murphy had sworn at Ms Miller, that he had frightened and intimidated her and that he had admitted falsifying his timesheets). Given these problems, it is of little surprise that Mr Murphy and Ms Hollis concluded that any further representations on his part would be pointless.

[59] I therefore find that this letter was one that no fair and reasonable employer could have written in the circumstances.

[60] In conclusion, I find that there were significant flaws in the process followed by the respondent that were more than minor. These flaws have caused the dismissal to be unjustified.

[61] I also conclude that these flaws caused Mr Murphy unjustified disadvantage in his employment.

Was Mr Murphy's suspension an unjustified disadvantage in his employment?

[62] Mr Murphy's employment agreement stated at clause 13 the following:

> *In the event the Employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the Employee, and considering the Employee's views, suspend the Employee on pay while the investigation is carried out.*

[63] The respondent admits that Mr Murphy was not given a opportunity to discuss the proposal to suspend him, because Mr Black had decided that Mr Murphy should be suspended, and that was that. This clearly upset Mr Murphy (as is evidenced by his argument with Mr Maartens when Mr Maartens told him he was to be suspended) and so I am satisfied that this failure created a disadvantage in Mr Murphy's

employment. Clearly the fact that Mr Black dictated that Mr Murphy should be suspended without discussion does not justify the failure, and so I conclude that the disadvantage was unjustified.

[64] However, I am of the opinion that, substantively, the decision to suspend Mr Murphy was justified, given the nature of the allegation against him, which was of aggressive behaviour towards a work colleague.

Remedies

[65] Section 123 of the Act provides for the provision of remedies following a finding of personal grievance. The section gives the Authority the discretion to award one or more of the remedies described, including reinstatement, lost wages, compensation for loss of benefit and compensation for humiliation, loss of dignity, and injury to the employee's feelings. Mr Murphy does not seek reinstatement.

[66] It is my view that, as I have found that the dismissal was substantially justified but procedurally flawed to a material extent, the respondent could have justifiably dismissed Mr Murphy had it followed a fair process. Following such a fair process would not have taken materially longer than the time already taken, and so I do not believe that it is just and equitable to award to Mr Murphy anything in respect of lost wages or loss of benefits.

[67] The exception to this is the loss of pay in relation to the decision to take Mr Murphy off pay on 25 August 2011 before he was dismissed on 29 August 2011. I therefore order that the respondent pays to Mr Murphy the net pay he would have received had he remained on pay until (and including) 29 August 2011.

[68] I believe that it is appropriate to award Mr Murphy compensation under s. 123 (1)(c)(i) of the Act for humiliation, loss of dignity, and injury to the employee's feelings, both in respect of the flaws in the procedure leading to his dismissal and the failure to comply with the employment agreement in respect of the decision to suspend him.

[69] Mr Murphy has not claimed any specific amount, and I believe that the award should be relatively modest. I award a total of $7,500 under s. 123 (1)(c)(i) of the Act.

[70] Having assessed the remedies, Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance:

> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[71] I have already taken into account the extent of the remedies to be provided by concluding that Mr Murphy should not receive an award for lost wages. However, I must now decide whether the award under s. 123 (1)(c)(i) of the Act should be reduced.

[72] There is no doubt that, had Mr Murphy not lost his temper on 12 August 2011, he would not have been dismissed. Furthermore, although I had sympathy with Mr Murphy's objection to fixing the broken door himself, due to his inexperience as a car mechanic and the risk that could have accrued had he done it ineffectively, Mr Murphy's reaction was both excessive and created an intimidating environment which frightened a member of staff. Therefore, Mr Murphy's actions were blameworthy.

[73] I believe that it would be just to reduce Mr Murphy's award under s. 123 (1)(c)(i) of the Act by 25%.

Orders

[74] I order the respondent to pay Mr Murphy:

> (a) A sum equivalent to the net pay he would have received had he remained on pay until (and including) 29 August 2011;
>
> (b) The additional sum of $5,625.

Costs

[75] Costs are reserved. Any claim for costs by the applicant should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the respondent shall have a further 28 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority