# New Zealand Employment Relations Authority Decisions



## A v R (Wellington) [2016] NZERA 729 (19 February 2016)

Last Updated: 17 December 2021

**ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION**

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| **IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON** | | |
| | | [2016] NZERA Wellington 24 5530600 |
| | BETWEEN | A<br>Applicant |
| | AND | R<br>Respondent |
| Member of Authority: | Trish MacKinnon | |
| Representatives: | Jock Lawrie, Counsel for Applicant | |
| Hamish Kynaston and Jen Howes, Counsel for Respondent | | |
| Investigation Meeting: | 11 – 14 August 2015 | |
| Submissions Received: | Oral and written from both parties on 14 August 2015 | |
| Determination: | 19 February 2016 | |
| **DETERMINATION OF THE AUTHORITY** | | |

**Employment relationship problem**

[1] A was employed by the respondent for approximately ten years until his employment ended on 10 September 2014. This followed a period of some four months during which A was on special paid leave from his employment. A claims he was suspended during this time. He says the suspension was unjustifiable and disadvantaged him in his employment. He also claims his dismissal was unjustifiable and he seeks reinstatement to his former position or to one no less favourable.

[2] By way of an alternative to his claim of unjustified dismissal, A claims a further grievance for unjustifiable action. He says the deficiencies in the employer's investigation and its investigation report were such that notifying its decision to dismiss A was not the action of a fair and reasonable employer. It constituted a

significant breach of the employer's obligations of fair and reasonable treatment to him.

[3] In addition to reinstatement, A seeks compensation and reimbursement of lost wages from the date of his dismissal to the date of reinstatement, less the four weeks' notice he received from his employer.

[4] The respondent denies all of A's claims and says that at all times it acted lawfully and in good faith towards A. It denies that A was dismissed and says he chose to resign voluntarily and on his own initiative in the course of a disciplinary investigation. He was paid four weeks' salary by way of notice in lieu, rather than being summarily dismissed.

[5] In the event the Authority finds that A was dismissed, the respondent says its actions were justified. It says it had sound reasons for dismissing A and it acted fairly in that process. The respondent also says A was not suspended from his employment but agreed to take special leave on full pay.

**The Authority's investigation**

[6] The investigation of A's grievances took place over four days during which evidence was given by 16 witnesses. Orders previously granted for suppression of the name and occupation of the applicant and other employees of the respondent were continued. At the conclusion of the hearing a further order was made prohibiting the publication of the identity of the respondent.

**Background**

[7] At the time A's employment ended he had enjoyed ten years of employment with the respondent during which time he had received no warnings and had not been the subject of any disciplinary action. By all accounts A was a highly valued and well respected member of the employer's staff.

[8] On 24 May 2014 an incident occurred which directly involved A and two other employees, whom I will identify as C and D. A fourth person, whom I shall refer to as E, who was not employed by the respondent, had acted aggressively towards A who had, with the assistance of employees C and D, restrained him. That person (E) was later alleged by C and D to have been punched by A in the course of

the incident. Neither C nor D made any comment to A, or alerted any other staff member to the alleged punch, at the time.

[9] On 28 May 2014, however, during the course of a conversation with a more senior employee, C alluded to what he had seen four days earlier. That employee filed an incident report and brought the matter to the attention of her Team Leader. The Team Leader took steps to ascertain whether E wished to make a complaint about the matter. Having satisfied himself E did wish to make a complaint, he took steps to facilitate that complaint being laid with the Police who began their investigation on 29 May 2014.

[10] This resulted in proceedings in the District Court. A was acquitted of the charge of assault laid against him and permanent name suppression was ordered by the District Court Judge in respect of A's name and occupation.

[11] The Team Leader telephoned A on Friday 30 May 2014 to inform him what had occurred. A was shocked by this news as he had continued to work following the incident. No one who had been involved in the incident had suggested to him that he had behaved inappropriately or overly aggressively. He had completed his work on 24 May and had returned to work on the following two days without being informed that anything was amiss. He then had three days off work and was due to return to work when he received the Team Leader's telephone call. As a result of that telephone call A was placed on special leave on full pay and was instructed not to return to the workplace or to discuss the matter with any other member of staff.

[12] An internal review process was commenced into the incident in the course of which employees C and D were interviewed separately on 3 June 2014. A's interview took place on 9 June 2014. He was shown two incident reports that had been lodged, one in relation to the incident and the second in relation to the subsequent complaint E had confirmed he wished to pursue. A was not shown the statements that had been made by C and D 6 days earlier. On 16 June 2014 he received a letter from the respondent's Acting Operations Manager, informing him that the initial review of the event had satisfied her there were sufficient grounds for initiating disciplinary procedures in respect of the allegation that he had assaulted E on or about 24 May 2014 by punching him in the face.

[13] A was informed that this constituted a possible breach or breaches of the employer's Code of Conduct; that it was a potentially serious matter; and that if a breach was disclosed then disciplinary action up to and including termination of A's employment could result. The Acting Operations Manager informed A that a meeting would be held with him on 20 June 2014 to discuss the matter formally with him and to give him the opportunity to respond. He was advised to have a Union representative or other support person with him.

[14] A's Union representative had several communications with the respondent, including requesting various documents, before the meeting that was originally scheduled for 20 June was actually held on 27 June 2014. That meeting was attended by A and his Union representative; the respondent's Operations Manager who had recently returned from leave; and a Human Resources (HR) consultant.

[15] A had drafted and signed a statement which he submitted to the meeting and which he talked through. He made several key points including his employment history with the respondent and his recollection of the incident of 24 May. He denied the allegation that he had punched E in the course of the incident. Asked for his reaction to the allegations made against him, A responded that his first thought was that the allegations were defamatory and that he had no reason to punch E. He referred to the fact there were plenty of people around when the incident occurred and he named some whom he specifically recalled being present. He described the incident and gave one possible explanation for the allegation.

[16] Following a short adjournment, the Operations Manager advised A that, as his account "*differed from the statement*", further information would need to be sought. Accordingly, terms of reference would be established and A would be consulted over them. The Operations Manager said that the Team Leader and the HR Consultant would undertake the investigation. A was asked if there was anyone he would want the investigators to speak with and he responded with the names of five people who had been present at the time.

[17] The notes of the meeting taken by the HR consultant, and subsequently typed, recorded an agreement that A would remain on special leave until 6 July. It was noted that he had applied for annual leave over the school holidays from 7 – 21 July 2014 and this leave was confirmed. The HR consultant stressed the confidentiality of the matter and that A should have no contact with staff about it. EAP support was offered to A during this process.

[18] Following the meeting on 27 June 2014 the HR Consultant emailed draft terms of reference to A's Union representative. Final terms of reference were signed by the Operations Manager on 1 July 2014. He was named in the terms of reference as the decision maker.

[19] At that time the investigation was anticipated to be completed and a report compiled within 10 working days. As events panned out, the first interview did not take place until after the expiry of that timeframe. Interviews were carried out from 16 July to 1 August 2014. On 4 August an employee made a statement about a conversation she had had with E a day after the incident in which he had allegedly been punched. Her statement also referred to a conversation she had subsequently had with other employees who had told her of the allegation against A. The employee's statement, and some clarification of it that she provided to the investigators, was referred to in the investigation report.

[20] Six people were interviewed in the course of the investigation's initial timeframe including C and D who had already given statements as part of the initial review of the incident. A draft investigation report was sent to A's Union representative on 8 August 2014 following which the Union made submissions in writing on A's behalf on 25 August. No changes were made to the draft investigation report as a result of those submissions. However, two further employees were interviewed by the investigators as a result of the Union's submissions and one of the investigators had a telephone conversation with C.

[21] The HR consultant emailed the investigation report and attachments to the Operations Manager (the decision maker) on 2 September 2014. The attachments were the Union's submissions and the notes of meetings with interviewees during the investigation. The HR consultant's email noted that she and the other investigator (the Team Leader) considered the information provided by the two additional interviewees was consistent with that covered in the investigation report and did not negate that report's finding that on the balance of probabilities the punch had occurred.

[22] The HR consultant's email also recorded she had followed up on a submission made by the Union with regard to C's possible motivation for making the allegation

that A had punched E. The HR consultant had telephoned C and she relayed to the decision maker C's belief that he had a good relationship with A. Her email concluded by asking the decision maker if he wished her to draft correspondence regarding a preliminary decision once he had reviewed the statements.

[23] The HR consultant also provided the decision maker with a document she had compiled headed *Detailed Assessment* in which she had listed in tabular form the submissions made by the Union on A's behalf accompanied by her assessment of the submission. Each of her assessments were prefaced by the words "*You need to decide if you consider (A's) explanation for the complaint is plausible and/or requires further investigation*".

[24] On 4 September 2014 the decision maker wrote to A informing him that, having studied both the findings of the report and A's response, he had accepted the investigation findings that, on the basis of probabilities, the alleged incident did occur and that on 24 May 2014 A had punched E. He said such actions constituted a breach of the Code of Conduct in respect of serious misconduct where an employee was physically or verbally violent against any person on R's premises and misconduct where an employee was negligent or careless or failed in the duty of competence in the performance of their duties.

[25] He noted his preliminary decision was to terminate A's employment. Before he finalised the penalty however he said he would like A to have a reasonable opportunity to provide him with his final submission "*to this proposed penalty*" which he would take into account before making his final decision. A was given four days in which to make a written submission or, alternatively, he had the opportunity to make submissions in person.

[26] A meeting occurred on 10 September 2014 between A, his Union representative, a support person, the HR Consultant and the decision maker. In the course of that meeting submissions were made by, and on behalf of, A. An adjournment then took place following which the decision maker advised he had considered the points raised by and on behalf of A. However, he had decided to confirm his preliminary decision and to dismiss A.

[27] At that point a further adjournment was sought by A's Union representative. The respondent's notes of that meeting record that, following the adjournment, A

advised he wished to resign giving four weeks' notice. The decision maker accepted his resignation and, following yet another adjournment, stated that the employer was willing to waive the four weeks' notice requirement and would pay out four weeks' pay in lieu of notice.

[28] The decision maker wrote to A on 11 September 2014 confirming the arrangements that had been agreed. He stated that "*in noting your resignation I wish to advise you that, having considered the representations made by yourself and (the Union representative), my final decision would have been to proceed with termination of your employment*". He confirmed that the employer would waive the requirement for notice and that A's resignation would be effective immediately.

[29] A notified his personal grievances through his Union on 19 September 2014. Following that notification the parties attended mediation in October 2014 but were unable to resolve their differences.

**Issues**

[30] The issues for determination are:

(i) Whether A was suspended from his employment on 30 May 2014 or at any time before 10 September 2014; and
   a. if so, whether that suspension was justifiable; or
   b. if his suspension was unjustifiable.

(ii) If A was suspended unjustifiably, whether he was disadvantaged in his employment by the suspension.

(iii) Whether A was dismissed from his employment on 10 September 2014 or whether he resigned; and

(iv) Whether he is estopped from claiming that he was dismissed;
(v) If he was dismissed, and is not estopped from claiming to have been dismissed, whether that dismissal was unjustifiable;
(vi) If he is not estopped, and his dismissal was unjustifiable, whether he should be reinstated to his employment.

**Was A suspended from his employment?**

[31] A's evidence is that the Team Leader telephoned him on 30 May 2014 and advised him of the allegation that he had punched E in an incident at the workplace on

24 May and that E had made a complaint to the Police. He says he had been preparing to go into work immediately before that phone call. The Team Leader told him not to come into work and advised that his pay would continue while the employer carried out its process. A says he had no choice in the matter and he was simply told what would happen. He recalls the Team Leader referring to special leave as if that was a normal part of the process and says he did not realise until after the phone call that he had "*effectively been stood down*".

[32] The Team Leader says when he, with the then Acting Operations Manager (who did not give evidence to the Authority) in attendance, telephoned A he told him that a serious allegation had been made against him which they needed to discuss. He says he asked A if he was available to attend a meeting with them but A said it was difficult to come in to work at that time and that he was happy to discuss the matter over the phone. A says he does not recall being asked to come in to a meeting and says he would not have said it was difficult to come in, as he had been preparing to go to work when he received the telephone call.

[33] The Team Leader says he then put the allegation of assault to A and informed him that the Police had been called. He says A denied having assaulted anyone and was unhappy that his employer had called the Police, asking why that had been done. The Team Leader says he explained it was standard procedure to inform the Police when any allegation of a criminal nature occurred. He also informed A there were witnesses to the alleged assault. A says the Team Leader told him of the assault but did not ask him for a response to the allegation during the telephone conversation.

[34] The Team Leader says suspension had been discussed before the telephone call and it had been decided it would not be the best approach to take. A decision had been made that special leave should be offered as it was "*less punitive and more considerate of* (A)". He says when he offered special leave to A, A sought clarification on two matters: that it would be on his usual full pay and that he was not suspended.

[35] Mr Lawrie submits that A agreed to neither suspension nor special leave. He notes there is no provision in the employer's Disciplinary Policy, Code of Conduct or in its terms of employment with A for "*special leave*" to apply in the situation put to A by the Team Leader on 30 May 2014. In his submission those documents mandate suspension in such a situation but the respondent failed to satisfy the obligations under

its Disciplinary Policy before suspending A. Those obligations included asking the employee for his response to the allegations against him.

[36] Mr Kynaston submits that A was not suspended and that he agreed with the Team Leader on 30 May 2014 to take special leave on full pay while his employer investigated the allegation against him. He notes that A had numerous opportunities to dispute the special leave but never did so, either personally or through his Union representative. To the contrary, the Union had sought assurance from the employer that A's special leave on full pay would continue and notes of a disciplinary meeting on 27 June 2014 had recorded agreement over its continuation.

[37] I doubt that A was able to focus on the mechanics of how his pay would continue during his telephone conversation with the Team Leader on 30 May 2014 although he was concerned that he would continue to be paid. I accept his evidence of being shocked by the allegation that he had assaulted a person in the workplace and that he did not question the Team Leader's words about being placed on special leave at that time.

[38] However, A had ample opportunity after receiving his employer's letter of 30 May confirming the telephone discussion to raise an issue over special leave if he believed it to be inappropriate. Neither he nor his Union representative raised an objection to his being placed on paid special leave, but actively sought assurance it would continue. This, and the agreement over continuation of A's paid special leave that was recorded in disciplinary meeting minutes, strongly suggests that A was content for such leave to continue until his employer's investigation was complete.

[39] Mr Lawrie is correct that suspension was mandated under the employer's Disciplinary Policy and Code of Conduct for the situation A faced. Whichever mechanism was applied, A would not have been present at the workplace until the employer's investigation was completed. I accept that the employer offered special paid leave to A during this time as a preferable alternative to what it viewed as the more punitive provision of suspension. It is clear to me that A acquiesced to this and raised no issue about it either personally or through his Union representative.

[40] I find A was not suspended from his employment but was on special paid leave by agreement with his employer from 30 May 2014 to the completion of the employer's investigation of the allegations made against him.

**Was A dismissed or did he resign?**

[41] Mr Lawrie submits that the weight of evidence indicates the respondent's claim that A was not dismissed at the meeting of 10 September 2014 is simply not credible. He refers to the decision maker's evidence to the Authority where he stated "*I was confirming my preliminary decision to dismiss (A)*". Mr Lawrie submits the context of that meeting was one in which the employer had notified A by letter of 4 September of its preliminary decision to dismiss and had invited A to a further meeting for the purpose of making submissions on that proposed penalty before he made his final decision.

[42] Mr Lawrie says the respondent's own record of the meeting has the decision maker stating, after a 40 minute adjournment:

"*Therefore it is my intention to confirm my preliminary decision and to dismiss*".

[43] In Mr Lawrie's submission the only real issue for determination is whether a resignation following the fact of dismissal in any way serves to militate against the remedies as claimed. In his submission this should not properly be a factor in the determination of appropriate remedies. He points to the lack of evidence to suggest A would have tendered his resignation but for the dismissal.

[44] Counsel for the respondent submits there was no dismissal of A on 10 September 2014. He invites me to consider the totality of the events that occurred that day, noting that discussions continued to take place between the parties after the decision maker indicated his intention to dismiss. A indicated an indication to resign which was discussed further and ultimately agreed to by the employer and confirmed by both parties in writing. On that basis, and acceding to a request by A's representative, the employer agreed to pay four weeks' pay in lieu of notice. In Mr Kynaston's submission, when one stands back and looks at the outcome of the meeting and what occurred, it is clear A resigned.

[45] He further submits that to find now that A was dismissed would contradict the clear intentions of the parties and would undermine the ability of other employers and employees to have, and rely on, such discussions.

[46] I agree with Mr Kynaston that it is necessary to consider the totality of the events that occurred on 10 September 2014. Having done so, I disagree with his

conclusion. I find that the words used by the decision maker clearly conveyed dismissal to A. According to the respondent's own notes of the meeting of 10 September, A gave his response to the proposed penalty after which there was a 40 minute adjournment, presumably for the employer to consider submissions on penalty made by, and on behalf of, A. That was the purpose of the meeting as stated in R's letter of 4 September 2014 to A. When the meeting reconvened the decision maker is noted as saying the following:

"*.....We acknowledge the length of service that* (A) *has and we do this with a very heavy heart. However, we have a duty .....and this incident is about as serious as it can get. Therefore it is my intention to confirm my preliminary decision and to dismiss*". (underlining added)

[47] In the context of the day's events, although couched as an "*intention to confirm*" the decision maker's preliminary decision, there can be only one meaning taken from those words in conjunction with the subsequent "*and to dismiss*". The decision maker was not signalling that at some time in the future he would dismiss A. He had heard A's submissions on penalty; had considered those submissions during the adjournment; and was delivering his decision. That decision was to confirm the preliminary decision he had conveyed in his letter of 4 September "*to terminate* (A's) *employment*".

[48] The decision maker's written evidence to the Authority's investigation included the following statement:

"*I told him that given* (the employer's) *duty of care....,I intended to confirm my preliminary decision. In saying this I don't recall exactly what I said and whether I used the word* 'intended' *or not. The point was that I was confirming my preliminary decision to dismiss*". (underlining added)

[49] Immediately following this, A's representative requested an adjournment, at the end of which A advised he wished to resign giving four weeks' notice.

[50] I find that the respondent had effectively dismissed A before A indicated his wish to resign.

[51] If I were wrong about the decision maker's words constituting an actual dismissal, I would find that his words were couched in such a manner as to convey to A that he was being given the choice between dismissal and resignation. I would therefore find his resignation to have been brought about by the actions of his

employer and to have been a constructive dismissal. While A has not claimed to have been constructively dismissed, the Authority has the discretion under s.122 of the Employment Relations Act 2000 (the Act) to find that a personal grievance is of a different type from that alleged. I would exercise that discretion were I to be wrong about the nature of A's dismissal.

[52] In *Commissioner of Police v Hawkins1* the Court of Appeal considered the question of whether voluntary disengagement under s. 128 of the Police Act 1958 precluded an employee from bringing a personal grievance based on constructive dismissal. In finding that it did not bar the employee the Court referred favourably to findings made by Judge Shaw in the judgment under appeal which included the following:

*Claims for constructive dismissal do not require an analysis of the method of the dismissal because the employee invariably makes the decision to leave in such cases. The focus of such claims is on the employee's motivation for that decision; whether the motivation arises from the breach of the employer's duty or other actions by the employer; and whether the leaving was reasonably foreseeable to the employer.*

[53] While the factual situation differs from that of A, Judge Shaw's words would be relevant to his situation if I were wrong that he had been dismissed before he tendered his resignation. However, I am satisfied from the evidence, particularly that of the decision maker cited above, that this was an actual rather than a constructive dismissal.

**Is A estopped from claiming to have been dismissed?**

[54] The respondent submits that A is estopped and cites Chief Judge Colgan in a recent case describing the doctrine of estoppel in the following terms:2

*The equitable doctrine of estoppel applies where it would be unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to omit to act, in a manner which is now compromised. Estoppel can operate as a sword (cause of action) as well as a shield (a defence to a cause of action).3*

*An estoppel may provide a remedy to prevent unconscionable conduct by another party including the enforcement of that party's*

*representations made to the claimant.*

1 [2009] NZCA 209; [2009] 3 NZLR 381 (CA).

2 *Harris v. TSNZ Pulp & Paper Maintenance Limited* [2015] NZEmpC 43 at [75].

3 *Clark v. NCR (NZ) Corporation* [2006] NZEmpC 112; [2006] ERNZ 401 (EmpC) at [38].

[55] Mr Kynaston cites four elements identified in *Harris4* all four of which he submits have been established in the situation of A's resignation. He says A's actions and those of his representatives created a belief or expectation in the employer that A was choosing to resign. That belief or expectation was reasonably held by the employer as demonstrated in the documentary evidence of its notes of the meeting of 10 September, the signed resignation letter and the decision maker's letter to A the following day.

[56] He submits the respondent acted to its detriment by concluding the meeting without further discussion (which, in his submission, would have occurred had the Union or A alleged unfairness or challenged the employer's reasons) and by agreeing to pay, and paying, notice in lieu. It would be unconscionable for A in all those circumstances to now be permitted to go back on his word and claim he was dismissed.

[57] I have considered those submissions in the context of the finding I have made that the decision maker dismissed A in the course of the meeting of 10 September. A tendered his resignation after that had occurred. That being so, I do not accept Mr Kynaston's submission that the respondent accepted A's resignation in the belief that he was *choosing* to resign.

[58] The respondent's notes of the 10 September meeting record that A expressed his love for his job and his desire to retain it. It would have been obvious to the employer that, had the decision maker not just conveyed the fact of his dismissal to him, A would not have resigned from his employment. His resignation, which by A's evidence was proposed by his Union representative, in context could be seen as an attempt to salvage some dignity for A. The fact that the employer allowed A's resignation to substitute for his dismissal made no essential difference to the employer, other than its agreement to pay A's contractual period of notice.

[59] I agree with Mr Lawrie that this is a matter to be considered in relation to remedies rather than as an estoppel to A's claim to have been dismissed. I find A is not estopped by his resignation from claiming to have been dismissed.

4 N.2 at [76].

**Was A's dismissal unjustifiable?**

[60] Whether an employer's actions are justifiable must be determined on an objective basis by considering 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 action occurred.5
[61] The Act sets out a number of factors to be considered by the Authority in applying this test and constrains the Authority from determining a dismissal or an action to be unjustifiable 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.6*

[62] There was no issue between the parties over the seriousness of the allegation made against A or that, if proven, it would constitute serious misconduct under the respondent's Code of Conduct and Disciplinary Policy.

[63] In submitting that A's dismissal was unjustifiable, Mr Lawrie focuses on the investigation. Firstly he submits that the respondent did not sufficiently investigate the allegation against A and, secondly, that it followed a defective process in the conduct of its investigation. Mr Lawrie says that the employer failed to conduct the investigation in a timely manner as required by its Disciplinary Policy. Its process took approximately 93 days in contrast to the 10 days cited in the respondent's Terms of Reference for the investigation.

[64] Mr Kynaston submits that, given the gravity of the allegations against A, the respondent did not wish to rush the investigation or take any shortcuts. In his view an investigation process of approximately three months was not unreasonable taking into account the numbers of employees involved in the investigation. In any event in his submission the delay was not prejudicial.

[65] The HR consultant (and investigator), who gave evidence to the Authority for the respondent, attributed the delays to staff leave, illness and rosters. I acknowledge it was unfortunate that there were delays in undertaking and completing the investigation. Memories inevitably become less sharply focussed over time and this

5 Section 103A Employment Relations Act 2000.

6 n5 s. 103A (5).

can be problematic. However, I agree with Mr Kynaston that the time frame was not unreasonable in the circumstances. The 10 day time frame cited in the terms of reference was clearly overly optimistic in hindsight.

[66] Notwithstanding that, I am not convinced that the investigation was as thorough as was required or that it was consistent in its treatment of personnel who were interviewed in relation to the incident. One concern is that, in the course of the interviews with the two witnesses to the alleged assault, the investigators had taken them "*through each step of the restraint and alleged incident*". Those witnesses "*were also asked to physically demonstrate various aspects of the event to enable the investigators to be clear as to what was being described*"7.
[67] A was not given that opportunity in the course of his disciplinary interview of 27 June 2014. His Union representative gave evidence that, when A asked during that interview (at which she was present) if he could demonstrate the restraint incident, he was denied the opportunity. The Union representative's evidence is that one of the investigators (the HR consultant) said she had seen it demonstrated by D and C so it was unnecessary for A to demonstrate it. The investigator could not recall this and I make no finding on that aspect. However, she did confirm that A had not been asked to demonstrate the restraint. In her view he could have asked to do so after the investigation report had been sent to him but he did not.

[68] I do not find that response to be satisfactory. If the witnesses who alleged an assault had taken place were offered the opportunity to demonstrate their version of what had occurred, then in fairness the investigators should have offered the same opportunity to A. Not to have done so implies they accepted those witnesses' perspectives and either did not, or were unwilling to, contemplate that A's perspective might differ or that it could shed further light on the alleged assault.

[69] It was insufficient to claim that A could have requested the opportunity to demonstrate the incident after the investigation report was issued. It was not clear from the respondent's letter to A enclosing the report whether the investigators contemplated him providing a written or oral response to it. A's Union representative initially requested a meeting to discuss the report but, as events transpired, withdrew that request and provided a written response to the report. At that time A had no

7 Investigation Report at page 270.

reason to believe that, if he had attended a meeting to present his response, he would be offered the opportunity to demonstrate how the restraint incident occurred from his perspective.

[70] Another aspect of the investigation which I find problematic is the investigators' failure to follow up on statements made by both C and D that indicated a lack of goodwill towards A. In C's interview with the investigators he had made an emphatic and derogatory comment about the way in which A conducted himself at work. The HR consultant acknowledged the investigators did not pursue this at the time. She says it was followed up after A's union representative had raised the issue after receiving a copy of the draft report, which had attached the notes of interviews the investigators had conducted.

[71] At that point the HR consultant spoke by telephone with C about his relationship with A. She recorded in an email to the decision maker that C "*considered they had a good relationship and can't recall any problems*". That statement appears to have been accepted by the respondent without enquiry being made as to the cause of the derogatory statement made by C in the course of his interview with the investigators.

[72] In D's interview with the investigators he responded to a question about the reason for not raising his concern over the alleged assault by referring to the difficulty of an employee in his situation do so. He said "*You can do it*

*but rather not especially with (A) as he would find a way to take it out on you*". This suggests that D had, in the past, been subjected to retribution from A for suggesting some deficiency in his conduct or practice. The investigators did not follow up on this.

[73] The HR consultant, when cross examined over this, said she did not take the comment as an expression of ill will by D towards A. She inferred that D thought he needed to be cautious around A. I do not find that inference should have allayed any query over D's motivation for making such a statement. It raises questions of why he thought he had to be cautious around A and why he couched that need to be cautious in a way that implied A was vindictive. The other question it raises is why the investigator made an assumption about D's motivation instead of questioning him about a statement he had made that appeared to show some animosity towards A.

[74] I find this aspect of the investigation to be deficient. The decision maker stated in his letter of 4 September 2014 to A that he accepted the investigation finding that A had punched E. He said he had considered what A had said regarding the motivation of the two witnesses but found no good reason to question their credibility.

[75] In his evidence to the Authority the decision maker referred to the consistency of the stories of the two employees who claimed A had punched E. He also referred to not finding it credible that those employees had deliberately made false claims about A's conduct stating "*there was no evidence to suggest they had, other than (A's) speculation*".

[76] I doubt the decision maker could fairly make that statement in the absence of a proper consideration of the concern raised by A. However, there is little evidence of such consideration being given. The investigators preferred the version of events given by C and D for a number of reasons, which included that both witnesses told a similar story. Without properly investigating the adverse comments made about A in their interviews with the investigators, I question whether the investigators, or the decision maker, could rely on the similarity of the stories of those two employees.

[77] I note also the report found corroboration of the allegation that E had been hit in the statement one interviewee, whom I will refer to as K, had made to the investigation. K, who did not give evidence to the Authority, told the investigators she had overheard C say "*he hit him*" shortly after the restraint had occurred. The investigation report states that after the restraint C and D spoke briefly about A punching E. "*The statement* "he hit him" *was made*" in the course of their brief conversation according to the report followed by "(K) *has independently corroborated this in her interview...*".

[78] However, it is clear from the notes of the investigators' interview with C, which took place after K had had her interview with them, that one of the investigators had asked C if he had said "*he hit him*" during his brief conversation with D after the incident. It is also clear that C was equivocal about whether or not he had said those words. In D's interview six days later, D was equally equivocal. Neither had included evidence of one of them saying "*he hit him*" to the other in their statements to the interval review.

[79] I find the statement in the investigation report that K had "*independently corroborated*" that the words were used in the course of D and C's conversation to be inaccurate. I also find the question put by one of the investigators (and recorded in notes of the interview) to C undermines the evidence of that investigator regarding the manner in which the investigation was conducted. In her written evidence to the Authority she stated that the investigators:

"*..used open ended questions and essentially allowed the witnesses to walk us through their recollection. We wanted to avoid asking leading questions or placing ideas in their minds.*"

[80] Unfortunately, in this instance a leading question was asked and an idea may have been placed in a key witness's mind.

[81] This leads to another aspect of concern about the investigation findings. Mr Lawrie's submission is that the imprecise recall by some witnesses resulting from the delay in their statements being taken would not have been a significant cause for objection if the respondent "*had been even-handed in its allowance for the vagaries of memory on the part of all the witnesses.*" In his view the respondent was not even- handed in its treatment of witnesses' memories. He cites its adoption of evidence by K over the "*he hit him*" matter referred to above.

[82] In the notes of her interview with the investigators, which took place almost two months after the incident, K made it clear that her focus was not on the restraint but on helping to move another person away from the incident. Her recall of who had been present at the time of the incident other than A was imperfect. In Mr Lawrie's submission the respondent accepted K's comments which were considered supportive of the allegation against A without considering whether her lack of precise recall brought other aspects of her statement, for example her recollection of overhearing "*he hit him*", properly into doubt.

[83] In contrast, Mr Lawrie submits that the evidence of a witness who was interviewed by the investigators nine weeks after the incident and whose version of events supported A's denial to have punched E, was discounted on the grounds that his recollections were unclear about certain factors. That, despite the witness being very clear that he had been present during the incident and had arrived marginally before D and C did.

[84] He had seen the incident and said he had not seen A punch E. That witness' recollection (and that of one other witness) was described in the investigation report as "*either vague or inconsistent with other information*". It referred in particular to that witness stating that the incident occurred in the afternoon, whereas the investigators found it had occurred at 9 p.m. The investigators did not make any reference in the report to C's statement to the internal review that "*it was still light outside*" when the incident occurred. It was late May at the time which makes that statement inaccurate but there is no evidence of C being questioned by the investigators about this discrepancy. I accept Mr Lawrie's submission that the investigation did not deal with the issue of recall in an even-handed manner in relation to the witnesses I have referred to above.

[85] I also find it problematic that A's first disciplinary interview was conducted by the Operations Manager who was, immediately afterwards, designated the decision maker, and the HR consultant. All other interviews in the course of the disciplinary investigation were conducted by the Team Leader and the HR consultant. A had only two meetings throughout the disciplinary process: the first being that of 27 June, which I have just referred to, and the second being that of 10 September. The purpose of the latter meeting was, according to the decision maker's letter of 4 September 2014, for A to provide the respondent with his submission on the proposed penalty of dismissal. Accordingly, both disciplinary meetings that A attended were with the decision maker, and without the Team Leader being present.

[86] This was an inconsistency that was not conducive to a fair investigation. The value of having a separate decision maker is that he or she will be at arm's length from the investigation and in a better position to come to an objective decision. As the decision maker had been involved in A's initial disciplinary meeting, he did not have the distance he otherwise would have enjoyed in his role as the person tasked with making the decision over the future of A's employment. Additionally, A was deprived of the consistency of having the same two investigators hear and evaluate his statements and those of others interviewed during the investigation process.

[87] I note also that no evidence was obtained during the respondent's investigation of any injuries sustained by E. During the Authority investigation medical evidence was given of the almost immediate physical signs of swelling and contusion that would result from a hard punch to the mouth or environs. One of the two witnesses

who alleged A had punched E described the punch as "*hard*" in the internal review process. The HR consultant stated in her evidence that the information given by that witness to the investigation was consistent with what he had said in his statement during the internal review.

[88] That being so, it could reasonably have been expected that the investigators would have sought any medical information that may have been available about E's condition on the day of, and in the days following, the alleged assault. In the investigation report they referred to notes taken by a medical practitioner approximately one hour after the incident which recorded that there was no evidence of injury. The investigation report says it was unclear whether that medical practitioner had been in a position to identify any injuries. When each of the investigators was asked in cross examination whether that had been followed up with the medical practitioner, each confirmed that had not happened.

[89] From the interviews recorded by the investigators A and the two witnesses who claimed to have seen a punch all mentioned the presence of some blood. There is no doubt that E had been physically restrained after he had acted aggressively towards A and that, in the course of that restraint, he had been taken to the floor by A and the two witnesses. Before concluding that the blood had resulted from a punch, it is reasonable to expect the

investigators to have made greater enquiry about what else may have caused blood to be present, such as whether an accidental contact in the initial part of the restraint, as acknowledged by A could have occurred, could have been the cause.

[90] An employer's investigation should not be "*put under a microscope and subjected to pedantic scrutiny*"*8*. In holding that, former Chief Judge Goddard said that:

*What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-mined but not over-indulgent person.9*

[91] I am not convinced for the reasons given above that the respondent's investigation met that standard. I have other concerns about the investigation which it is unnecessary to go into as the defects I have found are sufficiently significant to justify a finding that the investigation was not up to the standard required. The

8 *NZ (with exceptions)Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR, 35.

9 n8 at 46.

respondent is a substantial employer with access to human resource and legal advice and therefore no question arises of it having adequate resources to carry out a sufficient investigation.

[92] The investigation findings were accepted by the decision maker as he stated in his letter of 4 September 2014 to A. I have found the investigation to have been inadequate, and it follows that the decision maker could not rely on its findings in arriving at his decision to dismiss A.

[93] I find that decision to be flawed and A's dismissal to have been unjustifiable. I do not consider A contributed in any way to that situation.

**Should A be reinstated?**

[94] Reinstatement is a discretionary remedy that the Authority may provide where it is practicable and reasonable to do so.10 It has no more or less prominence than the other statutory remedies for unjustifiable dismissal and, where sought, needs to be assessed on a case by case basis.11
[95] The Court of Appeal in *Lewis v Howick College Board of Trustees12* cited its judgment in the 1994 case of *NZEI v Auckland Normal Intermediate School* in which it upheld the Employment Court's decision not to reinstate a deputy principal on the grounds of practicability. In referring to the Employment Court's approach to that matter it quoted a passage from that court's judgment including the following excerpts:

*As has been said before, practicability is not the same as possibility...Whether the respondent has established on the balance of probabilities that it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future....Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[96] In *Angus* the Employment Court noted that reasonableness had now been legislated for in addition to practicability and this invoked a "*broad inquiry into the*

10 n5, s.125.

11 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [61].

12 [2010] NZCA 320, (2010) 7 NZELR 539.

*equities of the parties' cases so far as the prospective consideration of reinstatement is concerned*".13

[97] The respondent opposes reinstatement and says it is neither practicable nor reasonable to put him back into the work environment. It notes that A made serious allegations that co-workers colluded in making the complaints against him. This, in its submission, would make reinstatement extremely difficult, particularly given the nature of the workplace and the need for employees to have a high degree of trust in one another.

[98] The two employees who had made the allegation that A had punched E had both expressed concern about his possible reinstatement. Other witnesses who gave evidence to the Authority on behalf of the respondent expressed their opposition to his reinstatement.

[99] In seeking reinstatement A has referred to his long career in the area of his expertise and to his family's tradition in that area. He has expressed his desire to continue contributing to his chosen field. On his behalf Mr Lawrie referred to the length of time A had been a highly valued employee and how his dismissal had effectively resulted in him being an outcast in his professional career.

[100] Many of the witnesses who gave evidence on A's behalf talked of the respect they accorded him professionally and their enthusiasm for his return to the workplace.

[101] There was no evidence that A conducted himself during the employer's investigation in other than a cooperative manner. He was respectful towards his employer throughout the Authority's investigation and his conduct gave no cause for concern regarding his attitude in the event of reinstatement. It was obvious that A was very disappointed over the loss of his employment but he displayed no animosity towards the witnesses who gave evidence for the employer or towards the decision maker.

[102] While there may be difficulties with some employees in reintegrating A back into the workplace, I do not believe those difficulties would be insurmountable. As in all such reinstatement situations, where employees have aligned themselves with one viewpoint or another, there would need to be careful management to achieve

13 n11 at [65].

successful reintegration. I do not believe this situation is intrinsically more difficult to manage than any other reinstatement.

[103] I have considered Mr Kynaston's submissions regarding the Team Leader's opposition to reinstatement. As I have previously noted, all witnesses who gave evidence spoke of their respect for the Team Leader, including A. As one of the two people who carried out the employer's investigation, the Team Leader upheld its findings and supported A's dismissal. He impressed me as a fair-minded and rational person whom I would expect to accept A's reinstatement if that were ordered. I do not consider it would be reasonable to deny reinstatement on the basis of his disagreement with it.

[104] Overall I find it both practicable and reasonable to reinstate A.

[105] Mr Kynaston has noted that the professional body to which members of A's profession belong intends to investigate the incident that resulted in his dismissal. It had been awaiting the outcome of the criminal and employment matters before interviewing witnesses. In his submission, if reinstatement were deemed appropriate, it should be conditional upon the outcome of that process. I decline that request. The timing and length of any such investigation is unknown and, if the professional body makes adverse findings against A, that will be a matter for the respondent and A to deal with at that time.

[106] Mr Kynaston also requested in oral submissions that, if A were to be reinstated, the order should not take effect for at least a month and the parties should be directed to mediation. Reinstatement should be to a position no less favourable than A's former position in his view. Mr Lawrie indicated that A would be happy to engage in mediation. I agree that mediation is a sensible approach which I will address in Orders below.

**Other remedies**

[107] A seeks reimbursement of wages lost from the date of dismissal to that of reinstatement. He has given evidence of his financial situation including the income he earned between dismissal and the investigation meeting. I am satisfied he has made diligent efforts to mitigate his losses by taking on a number of small jobs and contracts.

[108] I find A is entitled to reimbursement of lost wages from the expiry of the four week notice period for which he was paid to the date of reinstatement. That is the only aspect of A's post-dismissal resignation that needs to be considered with regard to remedies.

[109] A's earnings during that period are to be deducted from the amount to be reimbursed. A has provided information regarding the nett amount of his fortnightly salary payments and his earnings to 14 July 2015. As those earnings are likely to have increased in the intervening period, I will leave it to counsel to calculate the outstanding wages to be reimbursed to A. They may come back to the Authority if required.

[110] A also seeks compensation for his unjustifiable dismissal and has given compelling evidence of the effect his dismissal has had on him. I accept his evidence of the considerable hurt and humiliation he has suffered. I find an award of $10,000 to be appropriate in the circumstances.

**Determination and summary of orders**

[111] A has been unjustifiably dismissed.

a. Under ss.123(1)(a) and 125 of the Employment Relations Act 2000 A is to be reinstated to his former employment or to a position no less favourable. The reinstatement is to be effective from 19 March 2016;
b. A and the respondent are directed to mediation to take place before 19 March 2016, to discuss and agree the position to which A will be reinstated and how the reinstatement will be managed;
c. Under s.123(1)(b) of the Employment Relations Act the respondent is to reimburse A the wages he has lost from the expiry of the period for which he was paid salary in lieu of notice to the date his reinstatement takes effect, less any sums he has earned during that period;
d. Under s.123(1)(c)(i) of the Employment Relations Act the respondent is to pay A compensation in the sum of $10,000 without deduction;
e. The orders prohibiting publication of the name and occupation of A and the names of other employees of the respondent who gave

evidence before the Authority are to continue in force, as is the order prohibiting the publication of the identity of the respondent.

**Costs**

[112] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority

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