IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 504
5460176

	BETWEEN	CLAYTON COCHRANE Applicant
	AND	KINGS TRANSPORT & LOGISTICS (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Thuzar Henry-Win for the Applicant Rowan Bilkey for the Respondent
Investigation Meeting:	25 September 2014
Determination:	8 December 2014

DETERMINATION OF THE AUTHORITY

A. The dismissal of Clayton Cochrane by Kings Transport & Logistics (NZ) Limited (Kings) on 4 March 2014 was unjustified.

B. In settlement of Mr Cochrane's personal grievance Kings must, within 14 days of the date of this determination, pay him the following remedies (which have been reduced by 15 per cent due to actions by him that contributed to the situation giving rise to his grievance):

(i) $7956 as lost wages; and

(ii) $5100 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved.

Employment relationship problem

[1] Kings Transport & Logistics (NZ) Limited (Kings) dismissed Clayton Cochrane from his job as a truck driver at a disciplinary meeting held with him on 4 March 2014. Written reasons for the dismissal, read out to Mr Clayton during the meeting, said a decision had been made to terminate his employment "*under the ground of serious misconduct*" because he breached road safety rules on 18 February and had used "*aggressive and offensive language*" toward a client on 20 February 2014.

[2] Kings has a cartage contract with Bunnings, the building supplies and home improvement products retail chain. Mr Cochrane lives in Paeroa and his truck driving job for Kings mostly involved delivery work to Bunnings customers in the Waikato.

[3] During a work break on 18 February Mr Cochrane drove his partner Melissa Donoghue and their baby daughter (who was aged three months at the time) on a short trip in Paeroa to pick up some medicine from the chemist and to make an appointment at the WINZ office. They travelled in his work vehicle – a Kings truck with Bunnings livery. At the WINZ office he initially parked on the opposite side of the road but, after Ms Donoghue had taken the baby out of its car seat, he then decided it would be more convenient to park on the same side of the road as the office. He drove the truck across the road with Ms Donoghue still in the cab and holding the unrestrained child on her lap. An unknown person saw and reported the incident to local Police. A police officer telephoned a manager at the Bunnings Paeroa store who contacted Kings major account manager Mike Lawrence. Mr Lawrence asked Kings operations manager Dave Hoffman to look into the matter. Mr Hoffman spoke to Mr Cochrane and then contacted Paeroa Police to advise them that Kings was following up the matter. Mr Hoffman's evidence was that he told a police officer that he would "*take the necessary corrective action*" and that the officer said the Police would take no further action as Kings management had addressed the matter so promptly. Mr Lawrence also let the Bunnings Paeroa manager he spoke to earlier know that Kings had spoken to Mr Cochrane and the Police.

[4] On 20 February, at Mr Hoffman's direction, Mr Cochrane drove to the Bunnings Cambridge store to pick up an order of damaged decking timber. Mr

Cochrane had delivered the timber to a Bunnings customer in December 2013 but the order was returned because the timber had chain marks from the chains Mr Cochrane had used when lifting the timber on and off the truck. Mr Cochrane did not agree that he was responsible for the damage – saying his use of chains (rather than soft straps) followed Kings' safety procedures for a load of that weight. Bunnings had sent Kings an invoice for $634.56 for the damaged timber and Kings had provided Bunnings with a 'credit' for it. Mr Hoffman gave the invoice to Mr Cochrane on 12 February, saying that he would have to pay that amount. Mr Cochrane understood the money would come from his wages. Mr Hoffman also told Mr Cochrane that he might know a builder who would buy the damaged timber from Mr Cochrane to help cover his cost.

[5] However when he went to the Bunnings Cambridge store on 20 February Mr Cochrane was told the timber had been re-sold. The Bunnings trade supervisor and Mr Cochrane then had an argument about whether Bunnings was entitled to do that. The argument became heated and the supervisor said he would make a complaint to Mr Lawrence about Mr Cochrane's conduct. Mr Cochrane's account of events was that the supervisor had "*spat the dummy*" after he said it was "*illegal*" to have re-sold the timber for which Kings had paid a credit.

[6] After Mr Cochrane left the store the trade supervisor spoke by telephone to Mr Lawrence, told him he felt threatened by Mr Cochrane and he did not want Mr Cochrane back on the site because of his behaviour. Mr Lawrence arranged for Mr Hoffman and Kings' personnel manager Chris Tapili to investigate the incident.

[7] By telephone Mr Cochrane told Mr Tapili that he had made "*the odd smart remark*" but said another Bunnings staff member had witnessed the conversation and said to him before he left the store that the trade supervisor had "*overreacted to the situation*".

[8] The trade supervisor's account of events was recorded in an email he sent Mr Lawrence on 27 February 2014. He did not refer to the timber having been sold but said Mr Cochrane had asked for a credit for the timber, referred to Kings making him pay for it, disputed the amount of timber damaged and had demanded to see it. He said he told Mr Cochrane to leave the store or "*I will trespass you*" and, on being asked to leave again, Mr Cochrane had asked if the supervisor (a man) had his period

and called him "*an idiot*". Mr Cochrane later confirmed to Mr Hoffman that he had asked the supervisor: "*Are you on the rags?*"

[9] Mr Hoffman telephoned Mr Cochrane to arrange for him to attend a disciplinary meeting in Auckland on 4 March 2014. Mr Hoffman said he made that telephone call on Friday, 28 February 2014. Mr Cochrane said the call was on Monday, 3 March. A letter about the meeting, dated 3 March, was sent to Mr Cochrane on 3 March. It was sent by fax to the Bunnings Paeroa store and he collected it from there.

[10] Following his dismissal Mr Cochrane raised a personal grievance. It was not resolved in mediation and proceeded to an Authority investigation.

The Authority's investigation

[11] The Authority received written witness statements from Mr Cochrane, Ms Donoghue, Mr Lawrence, Mr Hoffman, Mr Tapili and Kings general manager Rowan Bilkey. At the investigation meeting the witnesses, under oath or affirmation, confirmed their statements and answered questions from the Authority member and the parties' representatives. The representatives also provided closing submissions on the issues for determination.

[12] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[13] The primary issue for determination by the Authority was whether Kings' actions in investigating its concerns about Mr Cochrane's conduct on 18 and 20 February 2014 met the standard set by the statutory test of justification.

[14] Section 103A of the Act required the Kings manager or managers who made the decision to dismiss Mr Cochrane to have done so only after sufficiently investigating their concerns, providing Mr Cochrane with relevant information and a

reasonable opportunity to respond to those concerns, and then genuinely considering his explanations before making any disciplinary decision.

[15] If any defects of process identified in how Kings went about making its decision were more than minor and resulted in Mr Cochrane being treated unfairly, his dismissal could be found to be unjustified. His claim for remedies of lost wages and distress compensation could then be considered.

[16] However any remedies awarded to Mr Cochrane could be reduced if blameworthy behaviour by him contributed to the situation giving rise to his grievance.

[17] The last issue for consideration was whether either party should contribute to the reasonably incurred costs of representation of the other party.

Kings investigation and decision

[18] Although Mr Cochrane's evidence differed from that of the four Kings managers on some important points – on matters such as when he was told of the disciplinary meeting and whether he had been properly informed of Kings 'no unauthorised passengers' policy – it was not necessary to resolve those differences. The written and oral evidence of Mr Hoffman, Mr Lawrence, Mr Tapili and Mr Bilkey alone revealed significant inadequacies and unfairness in Kings disciplinary investigation of Mr Cochrane and the decision to dismiss him. Kings failed to act as a fair and reasonable employer could have done in all the circumstances in the following ways:

(i) Mr Cochrane was not given reasonable notice that dismissal was a potential outcome of the disciplinary meeting; and

(ii) Its inquiry into the events of 20 February was inadequate and failed to fairly balance Mr Cochrane's interests with the commercial interests of Kings; and

(iii) It did not fairly weigh some relevant, contextual factors (about actions of Kings and Bunnings that contributed to Mr Cochrane's behaviour); and

(iv) The outcome of dismissal was pre-determined, with some of the managers involved not hearing directly from Mr Cochrane and with no proper consideration given to disciplinary alternatives to dismissal; and

(v) The available information did not adequately support findings of serious misconduct in respect of events on 18 and 20 February.

(i) Inadequate notice of the potential disciplinary consequences

[19] Mr Hoffman's evidence established that Mr Cochrane was not properly advised that he could be dismissed at the disciplinary meeting. He said he telephoned Mr Cochrane on 28 February about the meeting and mentioned that Mr Cochrane could bring a representative. However, asked if he had said Mr Cochrane could be dismissed, Mr Hoffman answered: "*No, probably not*".

[20] That is likely to be correct because the letter sent to Mr Cochrane on 3 March asked him to "*attend a disciplinary meeting due to performance*", identified the natures and dates of the two incidents for discussion, and advised that he "*may have a representative*" but gave no indication of any potential disciplinary outcome.

[21] Mr Hoffman said the letter was checked by Kings human resources advisor Kyoko Boyce, based in Australia, before it was sent. The letter was based on a template but he could not explain why no indication of possible disciplinary outcomes, including dismissal, was given in it. The omission was important for two reasons.

[22] Firstly, Mr Hoffman's account of the disciplinary meeting confirmed that Mr Cochrane had said he knew he was in trouble but did not expect to be dismissed. Mr Cochrane's expectation was not unsurprising or unreasonable given that the letter had referred to his "*performance*" and had not referred to either incident actually or potentially amounting to "*serious misconduct*". Kings' Employee Manual refers to performance issues resulting in counselling and, where failure to adhere to a policy is repeated or there is insufficient improvement, a written warning being issued. Termination on performance matters is referred to as something that may occur after a written warning has not resulted in sufficient improvement or if the offence is repeated. The Manual does refer to termination resulting in cases of "*serious misconduct*". However, because the letter did not use that phrase or any other indication of the prospect of dismissal, he was not properly alerted to the real danger to the continuation of his employment.

[23] Secondly, properly advised of that prospect, Mr Cochrane may have sought representation for the meeting. In turn that may have affected the outcome by, for example, resulting in requests for further and better inquiries about the interaction between Mr Cochrane and the trade supervisor on 20 February or for more account to be taken of what had caused the argument and whether Mr Cochrane was solely responsible for it.

(ii) an inadequate inquiry about 20 February incident

[24] Neither Mr Tapili nor Mr Hoffman spoke with the Bunnings Cambridge trades supervisor about his account of the argument with Mr Cochrane on 20 February. Instead they relied on what Mr Lawrence relayed of the supervisor's concern, the supervisor's 27 February email and what Mr Cochrane said about it.

[25] When interviewed by telephone by Mr Tapili about the 20 February incident, Mr Cochrane identified a Bunnings employee who had a different view of the conversation than that relayed by the supervisor. Mr Tapili's reason for not making any attempt to contact or speak with that employee – who could have provided another perspective on whether Mr Cochrane's behaviour was aggressive, offensive or threatening – was that Mr Cochrane did not know the employee's name and that Mr Cochrane did not deny he had an argument with the supervisor. It was an inadequate reason. A simple request for a physical description of that employee and a phone call to the store (either directly or through Mr Lawrence) would likely have readily identified that employee.

[26] Instead the supervisor's account was accepted uncritically – at least as it was given in his 27 February email – although it made no reference to the 'spark' for the argument, that Bunnings had sold the timber Mr Cochrane was there to collect.

[27] In my assessment, the limited nature of the inquiry conducted by Mr Tapili and Mr Hoffman at Mr Lawrence's direction, was too strongly influenced by the 'commercial imperative' of Kings relationship as a service provider to Bunnings. At the time of the disciplinary meeting, Bunnings was also in the process of reviewing Kings' cartage contract. Mr Bilkey denied that was a factor in Kings' disciplinary decision about Mr Cochrane but his evidence was inconsistent with that of Mr Hoffman who agreed it was a factor. Its influence was plain from this passage in a

prepared written statement Mr Hoffman read to Mr Cochrane at the 4 March disciplinary meeting:

> *Although no formal complaint was lodged your behaviour has made the Kings Group be perceived in a negative way with one of our largest NZ clients (Bunnings) which in turn has caused immense problems for the business at a time of being review for our contract renewal.*

[28] There was no information or evidence that confirmed any problems caused by the 20 February argument between Mr Cochrane and the Bunnings supervisor were "*immense*" (which means extremely large or great) in the sense of having any actual or lasting effect on the commercial relationship between the two businesses but the phrase showed that the apprehension of such consequences was to the forefront of the minds of managers involved with the disciplinary investigation.

[29] As observed in the recent Employment Court decision in *Harris v The Warehouse Limited* good relations with a customer may be a paramount consideration for a business but such commercial imperatives must, in employment relations situations, yield if necessary to the requirements of the law.[1] In many cases over the years the Authority and the Court have recognised the difficult circumstance for an employer where a third party customer or client does not want a particular employee on that party's premises. However the decisions in such cases also confirm that an employer must follow a fair procedure and properly investigate the situation before acting on that party's demand for the removal (or banning) of a worker.[2] The failure of Mr Hoffman and Mr Tapili to speak with the Bunnings supervisor to test and check his account of events and to speak to at least one other identifiable and locatable witness to those events meant, I concluded, Kings failed to conduct a sufficient investigation in terms of the requirements of s103A(3)(a) of the Act.

(iii) Failure to fairly weigh relevant, contextual factors

[30] Part of Mr Tapili's evidence was to the effect that no further inquiry into the allegations about Mr Cochrane's conduct was necessary because Mr Cochrane admitted he had driven his truck with an unrestrained child in the cab and he had argued with the trades supervisor at Bunnings Cambridge. However that admission of

[1] [2014] NZEmpC 188 at [226].
[2] See, for example, *G & H Training Limited v Crewther* [2002] 1 ERNZ 513 (EC) at [42].

the basic facts was not sufficient for a fair and reasonable employer to conclude what happened was therefore serious misconduct. Particularly in respect of the 20 February incident, genuine consideration of Mr Cochrane's explanation required a proper evaluation of the context, including the way in which the employer's actions contributed to the situation in which the alleged serious misconduct occurred.

[31] Mr Cochrane was under particular, personal pressure to get a credit for Kings for the damaged timber or to collect the timber. Failure to do so would, according to what Mr Hoffman had told him, put Mr Cochrane out of pocket to the tune of more than $634. Mr Bilkey's account of the rationale for this was that Mr Cochrane would have signed a Kings form that authorised deduction of up to $2000 where some faulty action or conduct of the driver caused loss or cost to the company (such as damaging goods carried in transit). The evidence of Mr Hoffman and Mr Bilkey differed on whether the fault of Mr Cochrane had in fact been conclusively decided. He was, however, clearly given the impression by Mr Hoffman that he would have to pay. That impression was a factor in his persistence in seeking to collect the timber that day – on behalf both of Kings and himself. He was 'incentivised' to push to get the timber but was ultimately punished for having pushed too hard to do so. A fair and reasonable employer could not have ignored the extent to which it contributed to that situation. But the Kings managers involved, I concluded, did give less weight than they fairly should have to that factor in the assessment they made of his conduct.

[32] They also had the view at the time that Bunnings' action of reselling the timber was wrong. In that sense Mr Cochrane was quite right (as Kings understood the position) to challenge the trades supervisor about what had been done. Mr Lawrence's evidence confirmed that, as he understood it, the damaged timber properly belonged to Kings at the time of Mr Cochrane's visit to the store because Kings had already provided Bunnings with a credit for it. Mr Lawrence said the issue of the ownership of the timber was raised later with Bunnings at a national level. He described the response of Bunnings representatives to the Kings query as "*unhelpful*" although they did agree to arrange for another pack of timber.

[33] A fair and reasonable employer could not have ignored the extent to which what it considered to be a wrongful action by the customer or client contributed to the disciplinary situation it was investigating. But the Kings managers involved, I

concluded, did give less weight than they fairly should have to that factor in the assessment they made of Mr Cochrane's conduct.

(iv) A decision made before any explanation could be genuinely considered

[34] Before the 4 March disciplinary meeting Mr Hoffman – in consultation with Ms Boyce in Australia and Mr Bilkey – prepared a two page summary of information and a decision about the disciplinary consequences for concerns raised about Mr Cochrane's conduct on 18 and 20 February. Mr Bilkey said he had read it through before it was delivered and Mr Hoffman, asked if Ms Boyce had cleared the wording beforehand, replied: "*Yes. Absolutely.*"

[35] The statement Mr Hoffman had prepared was set out on a Kings template form with the heading "*Written Warning*" but included a check mark in a box at the top of the form labelled "*Final Warning/Dismissal*". In addition to extracts cited earlier in this determination it included conclusions that Mr Cochrane breached safety procedures (on 18 February) and breached Kings harassment management policy by threatening behaviour towards a client (20 February). It described those breaches as "*failure to comply with company policy and practice on multiple occasions*" and said that *"[d]ue to the serious nature of those breaches … the decision has been made to terminate your employment effective immediately under the ground of serious misconduct.*"

[36] Mr Hoffman's oral evidence was that Mr Cochrane was given a copy of this statement at the start of the disciplinary meeting and Mr Hoffman said that he had to read it out to him. He said Mr Cochrane appeared to accept much of what was included but interrupted him when he got to the part of the statement that referred to the decision to dismiss him for serious misconduct. Mr Hoffman did not finish reading out the written statement at that point but the form provided in Kings evidence included the following final paragraph:

> *Clayton, your actions have been considered to be serious misconduct and breach of conditions within your Employment Agreement. You have not only breached company policy, but the act of having an unrestrained minor in the vehicle whilst driving is in breach of New Zealand driving laws. Your behaviour and lack of judgement has placed the Kings Group in a vulnerable situation and it is because of this that we have no alternative but to terminate your employment*

> *effective immediately under the conditions of Summary Dismissal as outlined above.*

[37] After Mr Cochrane interrupted Mr Hoffman reading out the statement, Mr Hoffman took a break in the meeting and spoke by telephone with Mr Bilkey. Mr Bilkey's written witness statement gave this account of what he understood and recalled had happened:

> *It was reported back to me that [Mr Hoffman] went through the brief of evidence of the two incidents with [Mr Cochrane] including incident report forms, signed training documents and his initialled employment agreement stating he was to abide by all traffic laws. After going through the documentation [Mr Hoffman] provided [Mr Cochrane] with an opportunity to respond. [Mr Hoffman] then left the room and discussed with me what he believed was a fair and reasonable action to take. Throughout the process we consulted with HR and I agreed that a summary dismissal was appropriate given the serious and illegal nature of the misconduct. [Mr Hoffman] then returned to the room and informed [Mr Cochrane] that he had been dismissed."*

[38] Mr Bilkey's phrase about 'the brief of evidence of the two incidents' was a reference to the written statement Mr Hoffman had prepared on the form given to Mr Cochrane at the start of the meeting.

[39] Both Mr Bilkey and Mr Hoffman denied that a final decision to dismiss Mr Cochrane was made before the meeting began or before hearing any further explanation from Mr Cochrane in the disciplinary meeting. In answer to questions about the express references to dismissal in the written statement Mr Bilkey said that indicated a "*viable option*" rather than a decision firmly and finally made.

[40] I have not accepted that evidence, on the balance of probabilities, accurately represented the actual state of mind and decision of the Kings managers involved at the time. More likely than not the written statement represented the conclusion that Mr Hoffman, Mr Bilkey and Ms Boyce had already reached from their conversations before the disciplinary meeting. Consequently Mr Cochrane was unfairly put in the position that any explanation that he could or did give was not genuinely considered (including the factors I have already identified as not sufficiently investigated or fairly weighed) before the decision was made.

[41] The discussions and decision reached before the disciplinary meeting also meant that Mr Cochrane's opportunity to respond was heard directly only by Mr

Hoffman. Mr Bilkey and Ms Boyce participated in making that decision without hearing directly from Mr Cochrane about the incidents – to assess whether his behaviour during them did amount to serious misconduct – and, if so, what disciplinary consequence was appropriate for it.

[42] The reality on that last aspect – the level of sanction (whether counselling, warning or dismissal) – was Mr Cochrane did not get a real chance to say anything about that before the decision was made. He should, for example, have had an opportunity to address factors such as length or quality of his prior service and whether such incidents were likely to ever occur again (including whatever assurances he might have been able to give about avoiding repetition). He was not and the Kings managers did not have the opportunity to weigh any such responses before making their decision.

(v) Insufficient foundation for findings of serious misconduct

[43] Mr Cochrane's behaviour – in moving the truck with an unrestrained child in the cab and his rude comments to the Bunnings supervisor – was plainly misconduct. What was at issue was whether a fair and reasonable employer, in all the circumstances at the time, could have found that one or both incidents amounted to serious misconduct.

[44] The definition of serious misconduct in his employment agreement included the examples of "*harassment of a … customer*" and "*actions which seriously damage the Employer's reputation*".

[45] For reasons already given I was not satisfied that Kings investigation of the 20 February incident was sufficient for a fair and reasonable employer to conclude Mr Cochrane's argument with the trade supervisor amounted to harassment (despite his rude comments) or had seriously damaged Kings reputation. While some remedial action was necessary in respect of the accepted or undisputed aspects of what Mr Cochrane had said at the end of the argument, the evidence about exactly what had occurred (and why) was not established to the convincing level required for such a grave charge as serious misconduct.[3]

[3] *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* (1990) Sel Cas 855, 858 .

[46] Neither was I satisfied that a fair and reasonable employer could have concluded – as Kings said it had no alternative but so to do – that Mr Cochrane's breach of road safety rules on 18 February was, in all the circumstances, so serious an instance of misconduct that it warranted summary dismissal.

[47] An external measure of the seriousness of the incident was the willingness of the Police to take no further action on the basis of Mr Hoffman's assurance that Kings would take the necessary corrective action. He was emphatic in his oral evidence that he had not said or implied to the Police that such correction would be dismissal of the driver involved.

[48] An internal measure of how road safety breaches would normally be dealt with was found by looking at the terms on which Mr Cochrane and other employees were engaged. While Kings' statement in reply said "*the severity of performing an illegal act no matter how great or small is something our organisation will not and cannot accept, especially when considered to be a breach in safety*", its actual terms of employment plainly contemplated situations where employees stayed on the payroll if they breached road rules (and were required to pay fines) because those terms provided for deductions from their wages. Its Employee Manual included these requirements:

> *"You must at all times obey all traffic and road rules and regulations. Failure to do so may result in counselling or, in serious cases, dismissal.*
>
> *You agree that you will pay all fines, tolls, costs, penalties and infringements arising out of your use of a vehicle for business use which contravenes any traffic and/or road rule and regulation.*
>
> *You further agree that you will indemnify Kings for any such fine … Should you fail to so indemnify Kings, Kings shall be entitled to deduct the amount incurred by it from your pay.*

[49] In that context Kings' submission that Mr Cochrane's breach of road rules was such a "*severe breach of policy and law*" that it warranted dismissal for serious misconduct was unconvincing. The discretion reserved by Kings' employment term to dismiss in 'serious cases' of failure to obey road rules was one that had to be exercised fairly and proportionately. Kings did not – as far as I could establish from Mr Bilkey's evidence – routinely dismiss every driver who broke a road rule (even

ones that went much further and incurred a fine) so could not fairly impose that sanction on Mr Cochrane for a single, albeit careless and unnecessary, breach.

Remedies

Lost wages

[50] For his personal grievance of unjustified dismissal Mr Cochrane sought lost wages. The period of loss was for the five months from 4 March to when he started a new job on 5 August 2014. His evidence on the extent of his endeavours to mitigate that loss was patchy. By early August he had two job offers – one that involved travelling to Auckland, the other (which he took) was in Hamilton. Before then he had done some casual work washing trucks in Paeroa while on an unemployment benefit and had sought work by word of mouth. In light of the limited evidence of his job search and earnings in that five month (or 22 week period), I concluded an award of lost wages under s123(1)(b) and 128 of the Act could not fairly be made for more than three months ordinary time remuneration. For the purposes of calculation that amounted to 13 weeks wages, at the amount of $720 a week gross that Mr Cochrane said he earned at Kings. The total value of the lost wages awarded was $9360.

Compensation under s123(1)(c)(i) of the Act

[51] Mr Cochrane also sought compensation for humiliation, loss of dignity and injury to his feelings as a result of his unjustified dismissal.

[52] Ms Donoghue gave evidence that Mr Cochrane appeared shocked by his dismissal and because depressed and lacking in motivation as a result. Mr Cochrane's evidence was that he was embarrassed by his dismissal – particularly in the small town where he lived where "*everyone talks and you can't get away from it*" – and was distressed by the resulting pressure on him over whether he could provide for his family. While limited evidence, the effects of his dismissal on Mr Cochrane, in his particular circumstances and considered against the general range of awards in cases of this type, warranted an award under s123(1)(c)(i) of the Act of $6000.

Contribution

[53] Mr Cochrane accepted throughout that, on 18 February, he had driven the truck with the baby out of its car seat, and on 20 February he "*could have handled it better*" during his argument with the Bunnings trades supervisor. He accepted his comment to the supervisor about a period was not appropriate.

[54] On both occasions his actions – what he did and he said – contributed towards the situation that gave rise to his personal grievance.

[55] As he accepted in answer to a question at the Authority investigation, he did not need a company policy to know not to drive with the baby out of the car seat. He sought to minimise the event to some extent by suggesting it occurred on a quiet country or small town road with little real danger, but I concluded it was blameworthy conduct that, under s124 of the Act, required a reduction of the remedies awarded.

[56] Similarly a reduction was required for his intemperate comment to the Bunnings supervisor. While he was not solely responsible for the argument and may have been provoked and frustrated by what he saw as an unreasonable and unlawful stance, he made what appeared to be unnecessarily offensive comments.

[57] Taken together I concluded the required reduction of remedies that would otherwise have been awarded was 15 per cent – with the result being an award of $7956 as lost wages and $5100 as distress compensation.

Costs

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[59] If they are not able to do so and an Authority determination on costs is needed Mr Cochrane may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination.

[60] From the date of service of that memorandum Kings would then have 14 days to lodge any reply memorandum.

[61] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors required an adjustment upwards or downwards.[4]

Robin Arthur
Member of the Employment Relations Authority

[4] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.