IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 95
5429518

	BETWEEN	JARON COOPER Applicant
	AND	RESENE SANTANO LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Simon Scott, Counsel for Applicant Murray French, Advocate for Respondent
Investigation Meeting:	11 & 12 February 2014 at Hamilton
Submissions received:	12 February 2013 from Applicant and from Respondent
Determination:	14 March 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Jaron Cooper, claims that he was unjustifiably dismissed from his employment with the Respondent, Resene Santano Limited (RSL).

[2] RSL denies that Mr Cooper was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct.

Issues

[3] The issue for determination is whether Mr Cooper was unjustifiably dismissed by RSL.

Background Facts

[4] Mr Cooper was employed by RSL in a Store Support position for Resene Automotive & Light Industrial (RALI) which is the trading name of RSL.

[5] RALI is one of four companies which are part of the Resene Group and employs approximately 70 employees in New Zealand. It specialises in selling and supporting a range of automotive and industrial coatings.

[6] Mr Kevin Johnson, Northern Area Sales Manager of RALI, explained that RALI is run independently of the other three Resene companies, and receives no support from the Head Office of Resene Paints which is the largest of the four Resene Group companies.

[7] RALI has 14 branches in New Zealand, including a branch based in Hamilton and one based in Tauranga. At the time of Mr Cooper's employment the employees at the Hamilton branch were Mr Andy Pryor, Technical Sales Representative, Mr John McGee, Store Sales Representative, and two Sales Representatives.

[8] The Tauranga branch was less busy and the employees at the time of Mr Cooper's employment included Mr Paul Fretwell, Sales Representative, Mr Dave Agnew, Store Sales Representative, and Mr Brett Paul, Technical Sales Representative.

[9] Mr Kevin Johnson said that following two interviews with Mr Cooper he had appointed him to the new position of Store Support for the Hamilton and Tauranga branches.

[10] Mr Cooper was appointed in accordance with an individual employment agreement (the Employment Agreement) which he confirmed he had read. The Employment Agreement set out that:

- Mr Cooper was employed to work a 40 hour week: clause 3;

- the notice period to be provided by either party was one month, however: "*This shall not prevent the Company from summarily dismissing an employee for serious misconduct":* clause 8(a);

- Mr Cooper was employed subject to a 3 month probationary period: clause 8 (c);

- Mr Cooper agreed to abide by the "*House Rules, Policy Manuals and safety requirements of the Company":* clause 15(d);

[11] Schedule A of the Employment Agreement entitled Misconduct Rules listed as *Misconduct- Serious:*

> *(10) Unauthorised absence from work*

(17) Refusal to carry out the lawful instructions of Supervisors or refusal to perform work as required.

[12] Listed under the heading of Misconduct was:

(3) Leaving an assigned place of work without authority

(12) Continual lateness or lack of application to an assigned task

(13) Unauthorised extension to lunch/smoko breaks

[13] Mr Cooper commenced employment with RALI on 2 April 2013. In his position of Store Support, Mr Cooper, who lived in Hamilton, was to work under the supervision of each branch Store Sales Representative as the Technical Sales Representatives were visiting clients during the majority of each day.

[14] Mr Cooper was therefore to work Monday and Tuesday each week at the Tauranga branch under the supervision of Mr Agnew, and Wednesday to Friday each week at the Hamilton branch under the supervision of Mr McGee.

[15] On the first day of Mr Cooper's employment Mr Johnson said he had introduced him to the Hamilton branch employees and then had driven him to the Tauranga branch in order that he could meet the employees there.

[16] During the drive, Mr Johnson had provided Mr Cooper with a copy of the RALI induction manual and asked him to read through it. Mr Cooper confirmed at the Investigation Meeting that he had done so, and that they had discussed it together during the drive.

[17] The RALI expectations in regard to appearance are set out on page 14 of the Induction Manual under the heading 'Code of Conduct' which states:

Appearance and Dress Standard
A high level of personal grooming is important and your clothing should reflect your role and the duties that you are performing at that particular time. These standards reflect the professionalism of RALI as a company in the eyes of our customers.

[18] Mr Cooper was also provided with a copy of the position description for the Store Support position on 2 April 2013. The position description stated that the position objectives

included: "*To provide a professional and personal link between RALI and its customers"* and under the heading '*Principal Accountabilities':*

1. *To act and represent the Company in an professional and ethical manner.*

2. *Customers are provided with an excellent standard of service.*

Facial Jewellery

[19] Mr Johnson said that Mr Cooper had worn ear hoops at his two job interviews, however as these were not noticeable being covered by his hair, there had been no objection to Mr Cooper wearing them during his employment with RALI. Mr Cooper did not wear any other facial jewellery at his job interviews.

[20] On 2 April 2013 the first day of Mr Cooper's employment with RALI, Mr Johnson said he had noticed that Mr Cooper was wearing two rings through his lip, one on either side. Mr Johnson said he had been concerned about this, but prior to speaking to Mr Cooper he had telephoned his General Manger and asked for his opinion.

[21] As a result of their discussion Mr Johnson said he had advised Mr Cooper that if RALI received any comments or complaints about his facial piercings, he would have to remove them whilst at work.

[22] At the Investigation Meeting Mr Cooper confirmed that this discussion had taken place, and said that he agreed it would be appropriate to remove the piercings when serving customers.

Hours of work

[23] The standard working day for RALI employees was 8.00 a.m. to 4.30 p.m. Monday to Friday.

[24] Mr Cooper said that during his three days a week at the Hamilton branch he had been expected to work 8.00 a.m. to 4.00 p.m. However Mr McGee said that Mr Cooper's hours at the Hamilton branch were the standard hours of 8.00 a.m. to 4.30 p.m. and that he had been expected to work these hours.

[25] As Mr Cooper would be travelling to Tauranga on a Monday morning and back to Hamilton on a Tuesday afternoon, Mr Johnson said he had advised Mr Agnew that when setting the working hours for Mr Cooper whilst at the Tauranga branch, he should to take the traveling time into consideration.

[26] Mr Agnew said that he had therefore agreed with Mr Cooper that his commencement time at the Tauranga branch would be 8.30 a.m. on a Monday, with the standard finish time of 4.30 p.m., and that on Tuesdays he would commence work at the standard time of 8.00 a.m. but would be allowed to finish at 3.00 p.m.

[27] Mr Agnew said that if the work had been completed by Tuesday, he would give Mr Cooper permission to leave earlier than 3 p.m. Mr McGee agreed that this was also the normal practice at Hamilton; not only in respect of Mr Cooper but of all the employees should the workload permit an early finish time.

[28] Mr Cooper said he recalled the hours he was expected to work on Mondays whilst at the Tauranga branch; however Mr Agnew had not confirmed his finish time on Tuesdays.

[29] Mr Fretwell, who supervised Mr Cooper in Mr Agnew's absence, confirmed Mr Cooper's finish time in Tauranga on a Tuesday as 3.00 p.m.

[30] It is clear from the evidence of both Mr Agnew, Mr McGee and Mr Andy Prior, Technical Sales Representative based at the Hamilton store, that there had been concerns about Mr Cooper's time-keeping from the outset, however during Mr Cooper's first month of employment Mr Agnew said he had allowed some latitude until Mr Cooper became familiar with the travel between Hamilton and Tauranga.

[31] Mr Agnew said that he had received comments about Mr Cooper's appearance from the outset of Mr Cooper's employment from Mr Ross Harris of Nationwide Transport Refinish (NTR) who was a major customer of RALI, and from a colleague in Resene's Colour Shop which was based adjacent to the RALI operation.

[32] Mr Agnew said that the comments had been about Mr Cooper's headwear, his low-slung trousers, and his facial piercings, and consequently he had informed Mr Johnson about the comments.

[33] Mr Prior said he had spoken to Mr Cooper early on in his period of employment about his appearance and the facial piercings, and he had spoken to Mr Johnson about his concerns.

[34] It is also evident that the supervisors at both the Hamilton and Tauranga branches had experienced frustrations with Mr Cooper's constant lateness, and he had been spoken to on several occasions about it.

Raising of the issues in May 2013

[35] Mr Johnson said that on 1 May 2013 he had spoken by telephone to Mr Cooper and had raised with him various issues including:

- Turning up late for work;
- His clothing
- His habit of wearing his cap backwards; and
- The wearing of facial jewellery

[36] During the telephone call Mr Cooper had agreed that he would improve in the area of his time-keeping and that he would address what he wore to work. Mr Johnson said he had agreed that Mr Cooper could wear a cap to work if he wished to do so; however it needed to be worn with the brim to the front.

[37] Mr Johnson said he had also instructed Mr Cooper not to wear facial piercings as there had been customer comments about them, although he did not inform Mr Cooper who had made the comments, nor did he speak to Mr Harris or the Resene Colour Shop employee himself as he had no reason to doubt what Mr Agnew had told him.

[38] Mr Johnson said that following this conversation with Mr Cooper he had received further feedback from Mr Agnew concerning Mr Cooper's performance whilst at the Tauranga store. As a result he had met with Mr Cooper on 9 May 2013 and had discussed the various issues with him.

[39] Following this meeting, Mr Johnson sent a letter to Mr Cooper dated 10 May 2013. In the letter Mr Johnson had written:

> *We spoke on the phone on 1st May in regards to some issues raised to me. …*
>
> *It was discussed that you would improve and not be late for work. The correct clothing was to be worn in future and that it was fine to wear a cap but was to be work to the front. Facial jewellery was not to be worn anymore and this was due to customer comments.*
>
> *On Thursday 9th May I had another talk to you in person in regards to the following complaints that have occurred after our first talk.*
>
> - *Turning up late to work*
> - *Taking more time that the normal break times*

- *Mop floor with hot water*
- *Need to be reminded to empty bins, put sign out, remove empty tins from tint room*
- *Using cell phone during work hours*
- *Internet for work purpose*
- *Taking initiative to find work*

> *I regard this as extremely serious and it cannot be allowed to continue.*

[40] Mr Cooper said that he felt that the issues regarding his taking extended breaks, and using his mobile telephone and accessing the internet during work hours were issues only associated with the Tauranga branch, however both Mr McGee and Mr Prior said that they had had occasion to raise these issues with Mr Cooper whilst he was working at the Hamilton branch, and they had raised these concerns with Mr Johnson.

[41] Mr Cooper said he had not had any issue with the instruction on 10 May 2013 from Mr Johnson about his not wearing facial jewellery, and he had removed his facial piercings when attending for work, but that on occasion he had forgotten to do so.

[42] On 27 May 2013 Mr Agnew sent an email to Mr Johnson stating: "*Had another customer make reference to Jaron's lip rings today. He didn't wear them last week. Have you spoken to him about these?*

[43] Mr Johnson said that in response he had sent an email to Mr Agnew confirming that Mr Cooper had been instructed on 10 May 2013 not to wear facial jewellery whilst at work anymore, asking Mr Agnew to ask Mr Cooper to remove the lip rings, and to let him know if this occurred again.

[44] Ms McGee said he had also received an email from Mr Johnson and accordingly he had asked Mr Cooper to remove his lip rings when he wore them thereafter, and Mr Cooper had removed them on those occasions.

[45] On 17 June 2013 Mr Agnew emailed Mr Johnson stating:

> *Our lad has turned up with his facial jewellery in today. It's only a matter of time before Ross from NTR comes in and has a moan. I haven't said anything to him yet.*

> *Just walked around the corner and he's dropping full boxes of masking tape from a great height into the floor and potentially denting it.*
>
> *Don't want him here to be honest and don't have anything for him to do.*

[46] Mr Cooper's probationary 3 month period finished on 2 July 2013. On 3 July 2013 Mr Johnson had met with Mr Cooper and reviewed his performance. Whilst there had been some negative feedback, Mr Johnson said that he had noted there had been some improvement during the period.

[47] Mr Johnson said he had also perceived that Mr Cooper had potential, noting that on 29 April 2013 he had sent him an email outlining his ideas for a website for RALI.

[48] Mr Johnson said that just prior to the meeting on 3 July 2013 he had become aware that Mr Cooper had been late for work at the Tauranga branch on 25 June 2013, so he had telephoned Mr Cooper and advised him that he wanted him to commit to resolving the ongoing lateness issue and to write to him with an indication of what he was prepared to do to remain an employee of RALI.

[49] Mr Johnson said he had subsequently received a letter from Mr Cooper in which he apologised for his lateness, but had also raised complaints about Mr Agnew. During the review meeting on 3 July 2013 Mr Johnson said he had asked Mr Cooper if he would like him to pursue the complaints with Mr Agnew; however Mr Cooper had advised that he did not want Mr Johnson to do so as his relationship with Mr Agnew had improved.

[50] At the Investigation Meeting Mr Cooper agreed that he had advised Mr Johnson he did not want the complaints pursued, and that his relationship with Mr Agnew was variable, being good on some days and not so good on other days.

[51] Mr Agnew who said that he had been unaware of the complaints until the Authority process had begun, said he believed Mr Cooper had become weary of his constant need to reprimand him about his lateness, the wearing of facial jewellery and his work performance.

Leaving early on 30 July 2013

[52] During the week commencing 29 July 2013 Mr Agnew had been absent on annual leave and Mr Fretwell had assumed responsibility for running the Tauranga branch as was usually the case in Mr Agnew's absence.

[53] On Monday 29 July 2013 Mr Fretwell said that Mr Cooper had arrived late for work and he had spoken to him about it, after which he had instructed Mr Cooper about the work to be done that day. Although he had had to leave the branch to visit customers, he had kept popping in throughout the day to ensure Mr Cooper did not need assistance.

[54] On Tuesday 30 July 2013 Mr Cooper was again late for work and Mr Fretwell had spoken to him again about this, however Mr Cooper had not appeared concerned by the issue. Mr Fretwell said he had given Mr Cooper instructions regarding the work to be done that day before leaving for his weekly delivery run to Whakatane, and that there had been plenty of work for Mr Cooper to do as a large delivery had arrived that week.

[55] Mr Fretwell said he arrived back at the Tauranga branch at 2.45 p.m. on 30 July 2013, and had been surprised to find that Mr Cooper was no longer at work, especially as there were still 3 pallets of new stock to be unloaded and put way, and that a paint mix he had asked him to do for a customer had not been done.

[56] He asked Mr Paul about Mr Cooper's whereabouts who advised him that Mr Cooper had told him that he was leaving at 2.30 p.m. Mr Fretwell said he had asked if Mr Cooper had requested permission to leave early, but Mr Paul had replied no, and that if he had, he would have checked with Mr Fretwell first as he would not have known whether or not it was acceptable for Mr Cooper to leave at that time.

[57] The following day, 31 July 2013, Mr Fretwell telephoned Mr Johnson and told him that Mr Cooper had been late on the two days he had worked at the Tauranga branch, and that he had left early the day before at 2.30 p.m. rather than 3.00 p.m. despite there being work still to be done.

[58] Mr Johnson said he had been disappointed to hear that Mr Cooper's time-keeping was still an on-going problem, however he had found the fact that he had left work early of more concern. Mr Fretwell had also mentioned recent customer complaints about Mr Cooper's appearance; however these were concerned with his ear hoops and not specifically facial jewellery.

[59] Mr Johnson said he had questioned Mr Fretwell about whether Mr Cooper had asked for permission to leave early. Mr Fretwell said he personally had not given such permission, and upon finding Mr Cooper absent he had questioned Mr Paul who had confirmed that he also had not given Mr Cooper permission to leave early.

[60] Following that telephone conversation, Mr Johnson spoke directly to Mr Paul who confirmed that Mr Cooper had just told him he was leaving and, as he had no knowledge of what hours Mr Cooper worked, he had not realised this was not correct.

[61] Before he had taken any action in the matter, Mr Johnson said he received an email from Mr Agnew on Monday 5 August 2013. Mr Agnew, who had just returned from leave, stated in the email that Mr Cooper had been wearing a nose ring whilst at work that day.

[62] After he had received Mr Agnew's email Mr Johnson said he had also received a telephone call from Mr Harris, a customer, in which he complained about Mr Cooper's poor attitude and the fact that he was allowed to wear facial jewellery at work.

[63] Mr Johnson was aware that Mr Cooper had been experiencing medical problems, and so delayed dealing with the issues until he had received confirmation that Mr Cooper's medical problems were unrelated to his workplace.

[64] On 6 August 2013 Mr Johnson wrote and sent a letter to Mr Cooper outlining the issues he wished to address with him at a formal disciplinary meeting to be held on 8 August 2013 specifically:

- Why he was late on 29 and 30 July 2013;
- Why he had left work early on 30 July 2013: "*and without any apparent authority";*
- Whether he expected to be paid for the time he was required to work on 30 July 2013;
- Why he appeared: "*not to have followed my instruction about your personal appearance and wearing facial jewellery at work";*
- Why the work which had been identified as expected to be done over 29 and 30 July 2013 had not been done or completed; and
- Any other issue that might arise from the above

[65] Mr Johnson concluded the letter by advising Mr Cooper that he had the right to have a support person or representative at the meeting and that:

> *To ensure that you are fully aware of the serious nature of my concerns, and what the possible consequences might be, I need to tell you that an outcome could be further disciplinary action which could include your dismissal.*

[66] After he had sent the letter to Mr Cooper, Mr Johnson said he had received a letter dated 5 August 2013 from Mr Robin Ali, a customer who worked at Doug Gerrard Ltd. In the letter Mr Ali complained about the service he had received at the Tauranga branch from an employee he described as wearing a nose ring and having trousers which almost fell down when he stood up. Mr Johnson said he had realised from the description that the employee was Mr Cooper.

Disciplinary Meeting 8 August 2013

[67] Mr Cooper had been accompanied by Mr McGee at the disciplinary meeting on 8 August 2013 which was chaired by Mr Johnson with Mr Pryor in attendance. During the meeting the various allegations had been put to Mr Cooper who said he had responded:

- In relation to being late on the days in question, on the first day the friend he had being staying with in Tauranga had moved home, which had made it difficult for him to travel to work, and on the second day he had experienced problems with the car he had been driving;

- In relation to leaving early on 30 July 2013 he had asked Mr Paul if he could leave early as he believed he was his superior and he thought it was appropriate especially as such arrangements were fairly relaxed;

- In relation to the wearing of facial jewellery whilst at work, he had not been provided with details of the customer complaints, so he did not know how it could be confirmed that he was wearing facial jewellery on the days alleged; and

- In relation to not completing his work on 30 July 2013 he had been alone in the Tauranga branch and was unable to complete all the tasks in the time available to him.

[68] Mr Johnson said that although Mr Cooper had not been given details of the specific customer complaints he had been aware that the basis of the concern raised with him was that he was continuing to wear facial jewellery in breach of the instruction given to him not to do so.

[69] Significantly, Mr Johnson said that Mr Cooper had been wearing a nose ring at the disciplinary meeting which he had explained he was unable to remove unless it was 'cut out' with expert assistance, and which he said he had had inserted a couple of Sundays before 8 August 2013. Mr Johnson said he had regarded this information as: "*a kick in the guts"*.

[70] Mr McGee, Mr Cooper's support person at the disciplinary meeting, said he had been surprised to see that Mr Cooper was wearing a nose ring at the disciplinary meeting on 8 August 2013, and at Mr Cooper's statement that it could not be removed by Mr Cooper whilst at work.

[71] Mr McGee confirmed that Mr Johnson had given Mr Cooper every opportunity to respond to the concerns raised with him.

[72] Following an adjournment during which Mr Johnson considered the explanations provided by him, Mr Cooper had been informed that his employment was being summarily terminated on the grounds of serious misconduct. Mr Johnson set out in detail the grounds for his decision in a letter dated 09 August 2013. The letter concluded:

> ***My Decision***
>
> *Although the matter of your ongoing lateness was a concern the most serious issues were you leaving work at 2.30 pm on 30th July without approval and action which amounts to refusing to follow my specific instruction to not wear facial jewellery when at work, and indeed seem to have shown a complete disregard for what you were told to do and had no intention to follow this instruction. Because of these two issues I decided that both, either in their own right or in combination, were serious misconduct and therefore I elected to terminate your employment with immediate effect. Accordingly your employment with our company ended on 8th August 2013.*

[73] Mr Cooper raised a personal grievance with RSL on 12 August 2013. The parties subsequently attended mediation however this did not resolve matters and on 26 September 2013 Mr Cooper filed a Statement of Problem with the Authority.

Determination

[74] Mr Cooper was dismissed on 8 August 2013. The Test of Justification in s103A Employment Relations Act 2000 (the Act) states:

> ***S103A Test of Justification***
>
> *i. 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).*

> ii. *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.*

[75] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. RSL must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[76] In accordance with s 103A (3) of the Act the Authority must also consider whether:

> *(a) ... the employer sufficiently investigated the allegations against the employee ...*
>
> *(b) ... the employer raised the concerns that the employer had with the employee ...*
>
> *(c) …the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*
>
> *(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[77] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*[1]. The Employment Court stated:[2]

> *The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.*

[78] Mr Cooper was found to have committed serious misconduct in respect of two issues: leaving work early without authorisation on 30 July 2013, and the wearing of facial jewellery, specifically a nose ring, in breach of an instruction not to wear facial jewellery.

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[1] [2011] NZEmpC 160
[2] *Angus at para [23]*

[79] Schedule A of the Employment Agreement specified that both: *"Unauthorised absence from work"* and "*Refusal to carry out the lawful instructions of Supervisors"* were serious misconduct offences, and clause 8 (a) clarified that the Company could dismiss an employee summarily in the case of serious misconduct.

Unauthorised Absence from Work

[80] Mr Cooper said that he had believed on several grounds that he could leave work early on 30 July 2013, one reason was that he was not aware of his finishing time on Tuesdays at Tauranga.

[81] Mr Agnew's evidence was that he had made it clear to Mr Cooper that he could finish work at 3 p.m. on a Tuesday, and Mr Fretwell confirmed Mr Agnew's evidence on this point.

[82] Whilst Mr Agnew allowed Mr Cooper to leave work before 3.00 p.m. on some Tuesday afternoons, Mr Cooper confirmed that this was only with Mr Agnew's permission. Mr Cooper also confirmed that on the occasions he was allowed to finish work early whilst in Hamilton, this was with Mr McGee's permission.

[83] I therefore consider that Mr Cooper was aware that his finish time whilst at the Tauranga branch was 3.00 p.m. on a Tuesday, and that he needed permission for an earlier finish time.

[84] Mr Cooper also said that Mr Agnew had allowed him to leave work before 3.00 p.m. early if the work was finished, and that on 30 July 2013 Mr Paul had given him permission to leave because he had finished all the tasks allocated for that day.

[85] Mr Cooper accepted at the Investigation Meeting that all the allocated work had not been finished on 30 July 2013, in fact there were 3 pallets still to be unloaded, however he said the existence of the 3 pallets had: "*slipped my mind by the afternoon".*

[86] I find it difficult to accept as credible the explanation that Mr Cooper had failed to realise the 3 pallets were waiting to be unloaded given the small physical area of the Tauranga branch. Moreover Mr Cooper would have been aware that with Mr Agnew on leave, the Tauranga branch was short-staffed. I therefore conclude that Mr Cooper left before 3.00 p.m. on 30 July 2013 in the full knowledge that there was still work for him to do.

[87] Mr Cooper further explained that he had believed Mr Paul had authority to give him permission to leave work early on the basis of his seniority and age.

[88] Mr Paul denied that he had given Mr Cooper permission to leave work early on 30 July 2013 and said that Mr Cooper had merely advised him he was leaving.

[89] The person who directed Mr Cooper's work when Mr Agnew was not at the branch was Mr Fretwell, a fact known to Mr Cooper, especially as it was he who had allocated the work to Mr Cooper on 30 July 2013 before leaving for Whakatane.

[90] I do not accept that Mr Cooper, being aware that Mr Fretwell had allocated work to him that day, and knowing he could contact Mr Fretwell by telephone on his mobile phone for which he had the number, and on which he had contacted Mr Fretwell on other occasions, would have been unable to contact Mr Fretwell and obtain permission to leave early had there been grounds to do so.

[91] I also find Mr Cooper's explanation for believing Mr Paul had authority to grant him permission to leave unconvincing in circumstances in which he knew: (i) Mr Paul had been employed at RSL less time than he had, (ii) Mr Paul had undergone extensive training before being based at the Tauranga branch, and thereafter spending a minimal amount of time at the branch, and (iii) Mr Paul had never allocated him work or directed him in the work he did undertake.

[92] On this basis I find Mr Johnson's conclusion that Mr Cooper had left his place of work without authorisation on 30 July 2013 to have been reasonable. I find that this had been a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

Breach of an instruction not to wear facial jewellery

[93] On 10 May 2013 Mr Johnson had issued Mr Cooper with an instruction not to wear facial jewellery at work. The instruction was made on the basis of information provided by Mr Agnew that there had been comments and/or complaints made by customers.

[94] Mr Scott has suggested that there was a dysfunctional relationship between Mr Agnew and Mr Cooper with the inference that the customer complaints were not genuine.

[95] I observe that Mr Agnew made clear on a number of occasions that he had experienced frustrations with Mr Cooper's performance, a frustration shared to some extent by Mr McGee and Mr Pryor.

[96] However I note that on 14 May 2013 Mr Agnew had emailed Mr Johnson reporting positively on Mr Cooper stating: "*I will say there was a vast improvement in Jaron yesterday"* and at the Investigation Meeting Mr Agnew said that Mr Cooper's performance had improved after he began mixing the paints.

[97] Further it is clear that the customer complaints had been genuine as they were later confirmed by the telephone conversations with Mr Johnson and the customer emails in August 2013.

[98] Mr Cooper had agreed to abide by the instruction, and I accept that on the occasions when he wore the facial piercings following the instruction, these had been as the result of genuine forgetfulness, and he had removed them as soon as he was made aware of them.

[99] However Mr Cooper had had the nose ring inserted in the full knowledge that it could not be removed without expert assistance. I therefore find that Mr Cooper had decided to have the nose ring inserted knowing that by so doing he would undoubtedly be acting in breach of the instruction not to wear facial jewellery whilst at work. I find this action to have been at best "s*illy*", and at worst indicative of a dismissive and disdainful attitude towards his employer.

[100] Mr Johnson reached the conclusion that Mr Cooper had breached an instruction not to wear facial jewellery whilst at work. I find that this had been a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[101] In accordance with s 103A (3) of the Act, Mr Johnson was required to carry out a fair investigation and follow a fair procedure.

[102] Following the information from Mr Fretwell on 31 July 2013 that Mr Cooper had left early without authorisation the previous day, Mr Johnson had carried out an investigation into this allegation by questioning both Mr Fretwell and Mr Paul.

[103] The information Mr Johnson received from Mr Agnew on 5 August 2013 that Mr Cooper had been wearing a nose ring that day had been succeeded by a telephone call and confirmatory email from Mr Harris, and by an email from another customer of RALI, Mr Robin Ali, dated 5 August 2013 which referred specifically to Mr Cooper wearing a nose ring.

[104] Mr Cooper had been advised of the allegations against him by way of the letter dated 6 August 2013 which advised him of the details of the allegations. Although the complainants were not specifically named in the letter, I take into consideration s 103A(5) of the Act which states:

> *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.

[105] I am satisfied that the defects in the process were minor and did not result in Mr Cooper being treated unfairly as he was provided with sufficient detail to know what the basis of his employer's concerns were in respect of the wearing of facial jewellery whilst at work.

[106] Mr Cooper was also advised in the letter dated 6 August 2013 that the issues being raised with him were serious, could result in dismissal, and that he had the right to have a support person present at the disciplinary meeting to be held on 8 August 2013.

[107] At the disciplinary meeting held on 8 August 2013, Mr Cooper was supported by Mr McGee and was provided with the opportunity to respond to the allegations.

[108] I find that Mr Johnson had carried out a fair process in respect of the allegations against Mr Cooper, in particular he had carried out an investigation prior to initiating disciplinary proceedings, had provided Mr Cooper with the opportunity to provide explanations at the meeting held on 8 August 2013, and he had given consideration to those explanations before reaching a decision.

[109] Having completed the disciplinary process, taken full consideration of all the information and explanations provided, Mr Johnson had reached the conclusion that Mr Cooper's actions constituted serious misconduct.

[110] I find Mr Johnson's conclusion to have been one that might have been reached by a fair and reasonable employer in the circumstances.

[111] Dismissal was an option open to RSL in cases involving serious misconduct pursuant to clause 8 (a) of the Employment Agreement. Mr Cooper had not provided any satisfactory explanation to Mr Johnson that he accepted as grounds for mitigating the penalty of dismissal for the serious misconduct offences.

[112] I find that RSL's decision to dismiss Mr Cooper was a decision which a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

[113] I determine that Mr Cooper has not been unjustifiably dismissed.

Costs

[114] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority