

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 539  
5347302**

BETWEEN                      GRAHAM CORNES  
   Applicant  
  
AND                                NEWMONT WAIHI GOLD  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:             Diana Christensen, Advocate for Applicant  
   John Rooney, Counsel for Respondent  
  
Investigation Meeting:        11 & 12 October 2011 at Tauranga  
  
Submissions received:        21 October 2011 from Applicant  
   25 October 2011 from Respondent  
  
Determination:                19 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Graham Cornes, claims that he was unjustifiably dismissed from his employment by the Respondent, Newmont Waihi Gold Limited (“Newmont”) on 6 May 2011.

[2]     Mr Cornes also claims that he was unjustifiably disadvantaged in his employment as a result of his being subjected to bullying and harassment over a period of time.

[3]     Newmont deny that Mr Cornes was unjustifiably dismissed, claiming that Mr Cornes was justifiably dismissed after he was found to have committed serious misconduct.

[4]     Newmont further deny that Mr Cornes was unjustifiably disadvantaged in his employment, and claim that it provided Mr Cornes with a safe working environment.

## **Issues**

[5] The issues for determination are:

- Whether Newmont had substantive justification for finding that Mr Cornes had committed gross/serious misconduct
- Whether the disciplinary process carried out by Newmont was procedurally fair and reasonable
- If there was serious misconduct, whether a fair and reasonable employer could have considered dismissal to have been within the range of reasonable penalties
- Whether Mr Cornes was unjustifiably disadvantaged in his employment with Newmont.

## **Background Facts**

[6] Newmont is a mining company with approximately 120 employees. Mr Cornes was employed as a Mill Operator at the extraction site, working in a crew of 6 employees, of which Mr Malcolm Phillips was the Leading Hand. Mr Brett Twidle, Senior Process Operator, was Mr Cornes's Manager.

[7] Mr Cornes's crew worked closely with other crews in Newmont, and a member of one crew might provide cover for an employee in another crew from time to time. Mr Cornes was a member of the New Zealand Amalgamated Engineering Printing and Manufacturing Union ("the Union") which was party to the collective agreement with Newmont which covered Mr Cornes's employment.

### *Unjustifiable Disadvantage: 15 March 2009 Incident*

[8] On 15 March 2009 Mr Cornes said that he had reported to Ms Kirsty Hollis, Newmont's Processing Plant Manager, that another employee, Mr Shaun Bardin, had reported for work in an intoxicated state. At that time Mr Bardin was the Leading Hand for the team in which Mr Cornes was then working, and Mr Cornes said he had been concerned for the safety of the other employees.

[9] Ms Cornes stated that Ms Hollis did not investigate the matter but had instead instructed Mr Pete Johnson, the Union Delegate, to address the matter. Mr Cornes said that Mr Johnson had subsequently made enquiries as to who had reported Mr Bardin to Ms Hollis, and that he (Mr Cornes) had admitted that it was him who done so.

[10] Mr Cornes explained that Mr Johnson had asked Mr Bardin if he wanted Mr Cornes sent home, but that Mr Bardin had responded that he required Mr Cornes to work that day. Mr Cornes said that Mr Johnson had then asked him if he required Mr Bardin to take an alcohol test, to which Mr Cornes had responded that that was a decision for Mr Johnson. Mr Cornes said that Mr Bardin had continued to work that day.

[11] Ms Nicola McNeil, Human Resources Co-ordinator, stated that Ms Hollis had also reported the incident to her, and told her that she had spent approximately 30 minutes with Mr Bardin, but had not been aware that he had been either showing impairment or been smelling of alcohol.

[12] Ms McNeil said that Ms Hollis had told her she had asked Mr Johnson to see Mr Bardin and to make his own evaluation. Mr Johnson having reported that he was unaware of any alcohol-related problem, Ms Hollis had concluded that Mr Bardin had not been intoxicated. It had not therefore been considered necessary to take any further action

*Unjustifiable Disadvantage: March 2010 Incident*

[13] Mr Cornes said that just prior to March 2010 he had been informed by another employee that Newmont was considering introducing a drug and alcohol policy as a direct result of Mr Cornes's complaint about Mr Bardin, which the employees did not want, and that they blamed Mr Cornes for this policy being considered.

[14] Mr Twidle stated that Newmont had been considering the introduction of a drug and alcohol policy for at least 10 years, and that this consideration had no connection with the Mr Bardin/Cornes incident.

*Unjustifiable Disadvantage: 5 March 2010 Complaint*

[15] In an email dated 5 March 2010 which had been sent to Ms Hollis and Mr Twidle, Mr Cornes stated that he had been harassed by Newmont employees Mr Bruce McKenzie, Mr John Crawford and Mr Jock Fleming. Mr Cornes explained these particular employees had ostracised him and they had attributed the reason for their action to Mr Cornes's reporting of Mr Bardin as being intoxicated and the possible introduction of a drug and alcohol policy.

[16] Mr Cornes said that Newmont had taken no action in response to this email, and that Ms McNeil had told him that she and Ms Hollis would leave it to the Union to resolve the matter as they did not want the Union members to dislike them.

[17] Mr Twidle said that as the email dated 5 March 2010 had started with a request that it be kept confidential, he had understood that to mean that Mr Cornes did not want him to talk to anyone about it, or to pass the information it contained to other employees. Mr Twidle said that he had therefore respected Mr Cornes's request and had kept the matter confidential. Mr Twidle further explained that Ms Hollis had taken over responsibility for dealing with the complaint and that he had had no further involvement.

[18] Ms McNeil explained that she and Ms Hollis had discussed the issue and they had decided to involve the Union as it was clearly a personality issue between the male employees, and in her view there was little action Newmont could take to make the men like each other, although a formal process would have been instituted if the Union had failed to resolve the matter.

[19] At a Union meeting held on 25 March 2010, Mr Cornes said that he had apologised for possibly causing Newmont to have a drug and alcohol policy introduced. However Mr McKenzie, Mr Crawford and Mr Fleming had refused to shake his hand afterwards.

[20] There is no evidence that Mr Cornes raised this complaint further with the management team and no formal process ensued in the absence of a further complaint being raised by Mr Cornes.

*Unjustifiable Disadvantage: August 2010 Complaint*

[21] Mr Cornes said that the harassment had continued after the date of the Union meeting. In August 2010 Mr Cornes said that Mr McKenzie had made a complaint that Mr Cornes had harassed him and that Newmont had carried out a two week investigation which had exonerated him. Mr Cornes stated that Mr McKenzie had left Newmont's employment following the investigation.

[22] Mr Twidle explained that Mr McKenzie and Mr Cornes had met with him in August 2010 following an incident between the two men during a shift handover. Mr Twidle said that Mr McKenzie had been very upset and accused Mr Cornes of harassment and verbally abusing him.

[23] Mr Twidle said that he had not been involved in the investigation of this incident, but knew that the refresher harassment training had taken place as a result of the incident.

[24] Mr Bruce Schollum, Senior Mechanical Manager, said that he had become involved in the investigation of the incident because Ms Hollis had been absent at the time. Mr Schollum said he had carried out a long and thorough investigation, interviewing all the shift employees and everyone who had been in the area when the alleged altercation had occurred, however there had been no eye witnesses.

[25] Mr Schollum said that although no formal disciplinary action had been taken in connection with the incident, Newmont had instituted the refresher harassment training as a result. Mr Schollum explained that Mr McKenzie, who had not been involved in any other harassment matter, had taken stress leave after the incident and investigation and had resigned in January 2011 after 23 years service.

*Unjustifiable Disadvantage: late November 2010 Incident*

[26] Mr Cornes explained that in late November 2010 he had been physically intimidated by Mr Rex Gilbert, a Maintenance Fitter, and a close friend of Mr McKenzie. Mr Cornes stated that there had been an altercation between himself and Mr Gilbert in the Control Room, and that he had asked Mr Gilbert to leave, opening the door as he did so. However Mr Gilbert had slammed the door into him when walking out of the Control Room.

[27] Mr Gilbert explained that he had regarded Mr Cornes as a trouble-maker who upset the crew members of every shift he was on, and that he spoke to him only when it was necessary to do so. Mr Gilbert said that prior to the incident Mr Cornes had been waving at him and smiling sweetly at him, and when he had been in the Control Room he had told Mr Cornes to stop doing this. After this Mr Gilbert said he had walked out of the Control Room and Mr Cornes had tried to follow him, so he had shut the door. Mr Gilbert said that Mr Cornes had then followed him outside and accused him of assaulting him with a door.

[28] Mr Cornes said he had spoken to Mr Phillips, his Leading Hand, and then Mr Twidle had approached him and asked that Mr Cornes email him about the complaint. Mr Cornes said that he did so, but to his knowledge no action had been taken by Newmont.

[29] Mr Twidle said that he had received the email from Mr Cornes on 26 November 2010, which had been sent on a confidential basis and he had treated it as such. However he had carried out an investigation into the matter, and had spoken to Mr Dave Crookston of Porter Hire about the incident. Mr Crookston had been in the Control Room at the same time as Mr

Cornes and Mr Gilbert but had left the Control Room before the incident. However Mr Crookston said he had heard a heated exchange between Mr Cornes and Mr Gilbert on the steps outside the Control Room, in which Mr Cornes had been participating fully.

[30] Mr Twidle said he had reached the conclusion that Mr Cornes and Mr Gilbert been equally to blame, and had advised Mr Cornes to contact an harassment officer if he wished to do so, and to inform him (Mr Twidle) if he experienced any further trouble. Mr Twidle had also observed at the Investigation Meeting that as the door referred to by Mr Cornes was on a slow-closing safety fastening, it would not have been possible for Mr Gilbert to have slammed it shut as alleged by Mr Cornes.

*Unjustifiable Disadvantage: post- November 2010 Refresher Harassment Training*

[31] Mr Cornes said that subsequently Newmont had held refresher harassment training, and that he had attended the same session as Mr Gilbert, because he was unable to arrange to attend an alternative session. Mr Cornes said that attending the training had been “horrible” with Mr Gilbert continuing the harassment.

[32] Mr Gilbert denied that he had harassed Mr Cornes during the refresher harassment training and said that as the employees had the option of which sessions to attend, there had been no need for Mr Cornes to attend the same session as he had done.

[33] Ms McNeil said that she had run all the refresher harassment training sessions, including the one attended by Mr Cornes and Mr Gilbert, and that she had not been aware of Mr Gilbert saying anything to Mr Cornes, and that Mr Cornes had given her no reason to think that he had been uncomfortable. Ms McNeil also explained that employees had been able to book themselves into sessions, and that she believed Mr Cornes could have arranged to have attended an alternative session had he preferred to do so.

*Unjustifiable Disadvantage: April 2011 Incident*

[34] At the end of April 2011 Mr Cornes stated that Mr Gilbert and another employee had come into the Control Room and asked that some paperwork be signed. There was a discussion in progress and Mr Cornes said that Mr Gilbert had taken the clipboard holding the paperwork to be signed out of the other employee’s hand and had hit it across Mr Cornes’s arm. Mr Cornes said he had retaliated with some words to Mr Gilbert, and that Mr Twidle had reprimanded him.

[35] Mr Twidle explained that Mr Gilbert had entered the Control Room in a hurry to get some paperwork signed off and had asked if someone could please sign it for him, however

no one had responded. Mr Twidle said that Mr Gilbert had then tapped Mr Cornes on his upper arm with the clipboard to attract his attention in order to pass the clipboard to Mr Cornes to be signed.

[36] Mr Twidle said that in his opinion it had been a tap and not a blow, nor was it intentional. Having heard Mr Cornes verbally abuse Mr Gilbert, Mr Twidle had reprimanded Mr Cornes as he believed Mr Cornes's action in abusing Mr Gilbert to have been completely inappropriate.

*Unjustifiable Disadvantage: Ongoing Harassment*

[37] Mr Cornes said that he was also subjected to obscene gestures, and called 'gay' and a 'nark' during this period, the 'nark' comment being found on the lid of his hydrogen safety mask container.

[38] Both Mr Twidle and Mr Schollum stated that Mr Cornes had not raised any complaints concerning ongoing harassment to them, and they were unaware that there was a problem, Mr Twidle adding that he would have expected Mr Cornes to have raised the matter with him.

[39] Ms McNeil stated that during the investigation into the August 2010 harassment complaint made by Mr McKenzie, Mr Cornes had raised other complaints and had shown her a photograph of the work "nark" on the lid of his hydrogen cyanide mask container. Mr Cornes had told her that he did not know who was responsible, but he had assumed it was Mr McKenzie.

[40] Ms McNeil said that she had explained to Mr Cornes that her primary task was to investigate what had happened between him and Mr McKenzie on the day of the alleged incident, and that once that was concluded, the other incidents could be investigated. Ms McNeil said that Mr Cornes had not however wanted the other incidents investigated.

[41] Ms McNeil stated that during the same meeting, they had discussed Mr Cornes having hung a sign saying "I'm gay" on the back of Mr Twidle's truck, which Mr Cornes had admitted he had done.

*Unjustifiable Dismissal May 2011*

[42] On 4 May 2011 there was a Union meeting which Mr Cornes, who was on mill operation duty that day, was unable to attend. After the meeting Mr Phillips, a leading hand, spoke to Mr Cornes about the meeting; specifically Mr Phillips told Mr Cornes that Mr

Gilbert had talked about employees reporting matters to Ms Nicola McNeil, Senior Human Resources Coordinator, rather than dealing with the issues internally within the Union.

[43] Mr Phillips said it had been obvious to him, and to the meeting in general, that Mr Gilbert had been referring to Mr Cornes, and that this had led to a heated discussion. Mr Phillips said that in order to stop the discussion, he had told the meeting that he would talk to Mr Cornes.

[44] Mr Phillips said that he and Mr Cornes had had a long discussion about what Mr Cornes should do about the situation, and that Mr Cornes had as a result telephoned Ms McNeil.

[45] Ms McNeil said she had advised Mr Cornes that she could not become involved in what had happened at a Union meeting, but had offered to call Mr Myles Leeson, the Union representative, on Mr Cornes's behalf. Mr Cornes agreed to this suggestion and accordingly Ms McNeil said she had called Mr Leeson who suggested that Mr Cornes call him. Ms McNeil said she had advised Mr Cornes of this suggestion; however Mr Leeson had subsequently told her that Mr Cornes did not make contact with him.

#### *5 May 2011 Incident*

[46] Mr Cornes said he had been at work in the Control Room at 6.40 a.m. the following morning, 5 May 2011. Mr Cornes said he had asked Mr Russell Sharpe and Mr Russell Croker, two members of another crew who were present, if they had attended the Union meeting and were aware of Mr Gilbert's comments in relation to himself. Mr Sharpe and Mr Croker confirmed what had been said by Mr Gilbert at the Union meeting and advised Mr Cornes to ignore it.

[47] Mr Cornes stated that at 7.10 a.m. he had gone down the stairs to the Laboratory, and had met Mr Gilbert. Mr Cornes had asked Mr Gilbert what he had said about him at the Union meeting and that Mr Gilbert had responded by telling him to "*F... off*". Mr Cornes said he had again asked what Mr Gilbert had said, whereupon Mr Gilbert stated that he did not want to talk to him.

[48] Mr Gilbert said he had continued to walk up the stairs to the Control Room where he wanted to report on the fact that he could not complete a job at that time. Mr Gilbert said that he had not seen Mr Cornes come into the Control Room after him, although he had been aware of someone walking into the Control Room after him.

[49] Mr Gilbert said he had left the Control Room. At the Investigation Meeting Mr Cornes agreed that he had deliberately followed Mr Gilbert out of Control Room, because he

had been angry and wanted to have an answer from Mr Gilbert about what Mr Gilbert had said about him at the Union meeting.

[50] Mr Cornes stated that Mr Gilbert was close to the bottom of the stairs and he was about half-way down the stairs when he asked Mr Gilbert again what he had said at the Union meeting. Mr Gilbert had responded "*F ... off*" and Mr Cornes said he had said "*F...ing c...*" to Mr Gilbert.

[51] Whilst they were still moving down the steps, Mr Cornes stated that Mr Gilbert had turned around, run at him, and hit him twice in the face with his left hand. Mr Cornes said he had grabbed Mr Gilbert's jersey and felt a sharp feeling on his head, with his safety hat and glasses being forced off his head. Then Mr Cornes explained that he and Mr Gilbert had tussled and he had ended up on the ground with Mr Gilbert on top of him, punching him in the face. Mr Cornes said that he was holding a pen in his hand and he had pushed it into Mr Gilbert's leg, whereupon Mr Gilbert had released him.

[52] Mr Gilbert said Mr Cornes had followed him out of the Control Room and as he was going down the stairs he heard "*Got you now c..*", he had not recognised the voice at the time although he knew it was familiar. Mr Gilbert stated that he was on the third step from the top of the stairs when he was hit between the shoulder blades; he lost his footing and ended up down the ramp at the bottom. Mr Gilbert said he had managed to grab the stair rail to break his fall, and he had stood up and yelled at Mr Cornes that he had pushed him down the stairs.

[53] Mr Gilbert stated that Mr Cornes grabbed his jersey and stabbed him with his pen in the top of his shoulder, whereupon Mr Cornes had bent down to grab his leg. Mr Gilbert said he managed to push Mr Cornes down to the ground and rolled him on to his back, Mr Cornes was still clutching his jersey. Mr Gilbert said he had told Mr Cornes to release his jersey and had put his fist up to punch Mr Cornes, but stated that he did not in fact punch him.

[54] Mr Gilbert said that Mr Cornes was grinning up at him, there was blood on his head and he said "*I got you now for assault you f...ing c...*". Mr Gilbert said he stood up, Mr Cornes still holding his jersey, but he had managed to release his jersey just as Mr Phillips came out on to the landing at the top of the stairs.

[55] Mr Phillips said that when he had come out on to the landing he saw Mr Gilbert picking himself up off the ground. Mr Gilbert had told him that Mr Cornes had pushed him down the stairs and stabbed him with a pen.

[56] Mr Phillips said he had carried on down the steps and had seen Mr Cornes around the corner where he had been looking for his safety hat and glasses. Mr Phillips said that Mr

Cornes was covered in blood and had told him that Mr Gilbert had “*gone mental*” and attacked him. However Mr Phillips said that he had formed the opinion that it was Mr Gilbert who had been telling him the truth.

[57] Mr Cornes said he had gone to the Laboratory to get some paper towels to deal with the blood, and then he had walked to his car in order to go home and clean himself. However he had decided instead to go to the police station to lay an assault charge against Mr Gilbert as he thought he had been seriously hurt.

[58] Mr Phillips said he had accompanied Mr Gilbert to Mr Twidle’s office. Mr Twidle said that Mr Gilbert’s jumper had been screwed up, he had blood over one of his hands, and he seemed shaken and distraught. Mr Twidle said Mr Gilbert told him he had just been assaulted by Mr Cornes. Mr Twidle accompanied Mr Gilbert to report to Mr Schollum who had been in his office, and that they had told Mr Gilbert to go and get himself cleaned up. Mr Schollum was also Mr Gilbert’s Manager, and Acting Mill Manager at the time of the incident

[59] Prior to this, Mr Phillips had tried to locate Mr Cornes, but had been unable to do so. After meeting with Mr Schollum, Mr Twidle said he had also looked for Mr Cornes, but he could not find him anywhere, adding that Mr Phillips had told him that he had looked for Mr Cornes in the car park, but had been unable to find him. At this point Mr Twidle and Mr Phillips had been informed by security that Mr Cornes had left the Newmont site.

[60] Mr Twidle said he had telephoned Mr Cornes’s mobile telephone number, and was told by Mr Cornes that he was at the police station.

[61] At the police station Mr Cornes said he had been told to wait to see a Detective and that whilst waiting, Mr Twidle, Mr Schollum, and Ms McNeil had arrived, after which they had all moved into an interview room.

[62] Mr Twidle said that he and Mr Schollum had gone to the police station and had had a quick chat with Mr Cornes before Ms McNeil had arrived. Mr Twidle said that Mr Cornes had said to them that he wanted to lay an assault charge in relation to the incident, but that they had not discussed this with him.

[63] Ms McNeil said that she had been telephoned on 5 May 2011 by Mr Greg Grindley, General Manager of Newmont, and informed that Mr Schollum was trying to contact her regarding an incident. Ms McNeil said she had telephoned Mr Schollum, who updated her on

the incident, and told her that Mr Cornes was at the police station. Ms McNeil agreed to meet Mr Schollum and Mr Twidle at the police station.

[64] When Ms McNeil had arrived at the police station, Mr Schollum said he had left the interview room briefly to talk to her, and then they had returned to the interview room. Mr Twidle said that during Mr Schollum's absence, he had started to go through the incident with Mr Cornes, making notes in his diary.

[65] When Mr Schollum and Mr McNeil returned to the interview room, Ms McNeil said that she could see that Mr Cornes required medical attention. Ms McNeil said that Mr Cornes had asked her whether he should lay an assault charge, to which she had responded that that was entirely his choice and she could not advise him.

[66] Ms McNeil said that Mr Cornes then started to tell her his version of events, but she had stopped him and advised him that due to the seriousness of the incident, a formal meeting would be required; and that he should wait until the meeting to tell them what had happened and that he could have representation at the meeting.

[67] Ms McNeil also stated that she had informed Mr Cornes that either he or Mr Gilbert, or both of them, could lose their job as a result of the incident. Mr Schollum agreed that Ms McNeil had provided with Mr Cornes with this verbal information.

[68] Mr Cornes said that whilst they were talking, it was agreed that he should go to the Medical Centre accompanied by Mr Twidle, and that after Mr Cornes had received treatment, Ms McNeil had said that he and Mr Twidle should report back to the Newmont Moresby Avenue Offices

[69] Ms McNeil said that she had asked Mr Cornes if he would be available to come back to the Newmont Moresby Avenue Offices after he had been to the Medical Centre, and he had agreed to do so. Ms McNeil stated that Mr Cornes had not stated, either then or later, that he did not feel well enough to do so.

[70] Mr Twidle said he had followed Mr Cornes in a separate vehicle to the Medical Centre. Whilst waiting for medical treatment Mr Cornes said that Mr Twidle had asked him questions and had taken some photographs of his injuries.

[71] Mr Cornes said that he had informed the nurse at the Medical Centre that the laceration in his head had been caused by his hard hat, and that he had done so because he did not want to create a fuss.

[72] Mr Cornes said that after receiving treatment the doctor and the nurse filled out a form which stated that he was fit to return to work, and he had driven himself back to the Newmont Moresby Avenue Offices.

[73] Mr Twidle said that when he and Mr Cornes had arrived at the Newmont Moresby Avenue Offices, he had finished taking the notes when Ms McNeil had telephoned to explain that she and Mr Schollum were on their way to the meeting. Ms McNeil had asked Mr Twidle to ascertain if Mr Cornes wanted to have Mr Fleming present at the meeting. Mr Twidle said he had asked Mr Cornes, who had confirmed that he had wanted Mr Fleming to be present, and Mr Twidle passed this information on to Ms McNeil.

#### *The Investigation Process*

[74] Ms McNeil said that she and Mr Schollum had started the investigation process upon their arrival at the Processing Plant. Ms McNeil said that Mr Gilbert had been interviewed first and had been informed how serious the matter was and that it could result in the termination of his employment. Mr Gilbert had chosen to have Mr Greg Gourley, a contractor on the site and past Union delegate, as his representative.

[75] Mr Gilbert had given his explanation of what had happened, and had been informed that he was to be suspended on full pay because of the seriousness of the incident and the health and safety concerns it raised.

[76] Ms McNeil said that she and Mr Schollum had interviewed Mr Phillips next, who had told them that he had not seen anything of the incident as he had been in the smoko room when it had occurred.

[77] Ms McNeil said that Mr Phillips had informed her and Mr Schollum that he had seen Mr Gilbert approaching the Control Room and had decided to observe what might happen as he knew Mr Cornes was agitated about the comments which had been made at the Union meeting the previous evening. However Mr Phillips had not observed what had occurred after Mr Gilbert had left the Control Room.

[78] Ms McNeil explained that she and Mr Schollum had interviewed separately Mr Roy Little and Mr Dave Fordyce, Mill Operators, as they had been in the Control Room when Mr

Gilbert and Mr Cornes had entered. However their evidence did not assist the investigation as they had not seen or heard anything of the incident.

[79] Ms McNeil said that she had earlier telephoned Mr Twidle to confirm that she and Mr Schollum were on their way to the Moresby Avenue Office, and as Mr Cornes was with him, to ensure that he (Mr Cornes) was informed that he was entitled to have a representative present, and if he would like Mr Fleming, who was the only official Union delegate, to represent him.

[80] Ms McNeil stated that although she and Mr Schollum had arrived at 9.00 a.m., because Mr Cornes had confirmed that he would like Mr Fleming to represent him, the start of the meeting was delayed until Mr Fleming arrived as he had had to travel from the Processing Plant.

[81] Mr Cornes said that Mr Fleming was present at the meeting, that Ms McNeil had asked if he was happy to have Mr Fleming represent him, and he had agreed to this because he felt he had no choice in the matter.

[82] Ms McNeil confirmed that she had checked with Mr Cornes prior to the start of the meeting if he was happy to have Mr Fleming represent him, and that he had again confirmed he did want Mr Fleming to represent him.

[83] Mr Cornes said that Mr Twidle had been asked to leave the meeting prior to it starting and he had felt it inappropriate that Mr Twidle, his manager, had been asked to leave whilst Mr Schollum, Mr Gilbert's manager, remained.

[84] Ms McNeil explained that she and Mr Schollum had decided to ask Mr Twidle to leave before the meeting commenced as they had thought that it might have been necessary to interview him at a later stage in the investigation, and that Mr Schollum had remained as he had previous experience in disciplinary matters.

[85] Mr Schollum explained that he had been involved in the investigation and the disciplinary process because he had been involved on previous occasions in disciplinary matters, including that involving Mr Cornes and Mr McKenzie. Additionally he had been the Acting Mill Supervisor at the time.

[86] Mr Cornes also said that he had not been informed at the beginning of the meeting that summary dismissal was a possible outcome. Ms McNeil stated however that when Mr

Fleming arrived at the meeting, she had informed Mr Cornes of the seriousness of the incident, and that it might result in the termination of his employment. At the Investigation Meeting Mr Schollum confirmed Ms McNeil's version of events.

[87] Mr Cornes stated at the Investigation Meeting that he did recall that Ms McNeil had said at some stage during the day, possibly at the police station, that dismissal could be the outcome for either himself or Mr Gilbert.

[88] Mr Cornes said that he had been asked for his version of events, which had been taken down in writing, but that he was not given a copy of the notes until much later when he had requested it.

[89] Mr Gilbert said he was told to go home at the conclusion of the meeting and to write down his version of events, but not that he was being suspended on full pay in regards to health and safety issues. Ms McNeil and that she had informed Mr Cornes that he was being suspended on full pay, and Mr Schollum confirmed that Mr Cornes was also told that Mr Gilbert had been suspended.

[90] Mr Cornes stated that he was informed that Mr Fleming would bring his bag to his home, and would collect his written version of events. Mr Cornes explained that Mr Fleming had arrived at his home almost immediately following the meeting but he had not had time to prepare and write down his version of events, and Mr Fleming had forgotten his bag. It had therefore been agreed that Mr Fleming would collect Mr Cornes's bag, and then return to collect his statement.

#### *Re-enactment*

[91] Ms McNeil explained that after the meeting with Mr Cornes, she and Mr Schollum had updated Mr Grindley on the different versions of events provided by Mr Gilbert and Mr Cornes, and that Mr Grindley had queried whether Mr Cornes's version of events had been realistic given the steep incline of the steps and the differences in the two men's heights.

[92] Ms McNeil said that she and Mr Schollum and Mr Grindley went to the site of the incident where they were joined by Mr Twidle, and a re-enactment of both versions of events was carried out.

[93] On the basis of the re-enactments Ms McNeil stated that the conclusion had been reached that Mr Cornes's version of events was unlikely to have occurred because Mr Gilbert would have been unable to reach Mr Cornes comfortably and strike him twice in the face

from where he was standing on the lower step, and that a blow to Mr Cornes's lower body would have been more likely to have occurred.

[94] Ms McNeil explained that they had also held that it was not realistic that Mr Cornes, who was apparently standing on the higher step, would not have defended himself if Mr Gilbert was approaching him from further down the stairs.

[95] On this basis, Ms McNeil said that she, Mr Schollum, Mr Grindley and Mr Twidle had formed the preliminary view that Mr Cornes had been the aggressor, both verbally and physically, and that Mr Gilbert had been acting in self-defence.

[96] Ms McNeil explained that whilst the enactment was being carried out, she had realised that there was a line of sight to the HWE maintenance area, and that there may have been witnesses to the incident. Upon investigation, Ms McNeil said that she had discovered that there were three Stevenson contractors ("the contractors") who had witnessed part of the incident.

[97] Ms McNeil said that she and Mr Schollum had met with the contractors. The contractors explained that they had arrived at the Processing Plant to work on the Jumbo, which was a large underground machine used at the face of the underground mine to load charges, drill holes and scale walls. From the place where they were authorised to be, they said that they had seen the latter part of the incident.

[98] The contractors had stated that they had seen two men tussling, and that the 'little guy', Mr Cornes, had ended up on the floor with the 'bigger guy', Mr Gilbert, over the top of him, with the 'little guy' hitting and grabbing the 'bigger guy'. The contractors had told Ms McNeil and Mr Schollum that in their opinion Mr Gilbert could have hit Mr Cornes if he had wanted to do so, but that he had been just holding Mr Cornes on the ground.

[99] The contractors had told Ms McNeil and Mr Schollum that they had seen Mr Cornes hit something into Mr Gilbert and that both men then stood up. At that point they said that Mr Gilbert had raised his arm, but it was only to let Mr Cornes go free. Ms McNeil said that the contractors had confirmed that they had not seen Mr Gilbert hit Mr Cornes at all. The contractors had not become involved in trying to stop the incident as they had not been inducted to enter that part of the site.

[100] Ms McNeil said that she had found the contractors evidence to be supportive of Mr Gilbert's version of events and inconsistent with Mr Cornes's version of events. On this basis

she stated that it had confirmed for her that Mr Gilbert's version of events was far more likely to have been the correct one.

[101] Ms McNeil said that following the discussion with the contractors, she had reported to Mr Grindley what they had said and her view that it was more likely that Mr Cornes had been the aggressor in the incident. Ms McNeil said she had then telephoned Mr Michael Bisset, the Regional Human Resources Director in Perth, to whom she reported, and that Mr Bisset had confirmed that he was happy for her to make the decision in the matter.

[102] Ms McNeil explained that Mr Fleming had delivered Mr Cornes's written statement at approximately 2 p.m. that same day, but it did not contain any additional information to that provided by Mr Cornes at the investigation meeting. Ms McNeil said it had however confirmed that at the very least, Mr Cornes had subjected Mr Gilbert to verbal abuse and acted provocatively, persistently challenging Mr Gilbert about what had been said about him at the Union meeting the previous evening.

[103] Ms McNeil said that she had telephoned Mr Cornes to ask him to attend a disciplinary meeting the following morning at 10.30 a.m. Ms McNeil said that she had suggested to Mr Cornes that he should bring a support person with him to the meeting, and had then called Mr Fleming to let him know that there was to be a disciplinary meeting the next morning, and that Mr Fleming might want him to attend.

[104] Ms McNeil explained that she had then updated Mr Grindley, who had agreed with her view that unless new information was provided at the disciplinary meeting to be held the following day, Mr Cornes was facing dismissal. Ms McNeil said that she had checked with Mr Grindley the next morning, just prior to the meeting with Mr Cornes, to check that he was in accordance with her approach and he had again confirmed that he was in agreement.

[105] Mr Cornes said that he did not receive a call from Ms McNeil until 6 May 2011, when Ms McNeil had asked him to return to work for a meeting at 10.30 a.m., and he did not recall this being referred to as a disciplinary meeting. Mr Cornes also stated that at Ms McNeil's request, he had telephoned Mr Fleming and asked him to join the meeting.

#### *Disciplinary Meeting 6 May 2011*

[106] Present at the disciplinary meeting were Ms McNeil, Mr Schollum, and Mr Fleming and Mr Cornes. Mr Cornes said that the meeting was very short and he had been immediately informed by Ms McNeil that his employment was being terminated summarily.

[107] Mr Cornes said that he had not been informed how the decision to dismiss him had been reached, although he was informed that there were three independent witnesses who had supported Mr Gilbert's version of events and that Newmont had found 51% in favour of Mr Gilbert. However Mr Cornes said he had not been told who the witnesses were, what they had seen, or where they were located.

[108] Ms McNeil said that she had told Mr Cornes at the start of the meeting that it was a disciplinary meeting. Ms McNeil and Mr Schollum both stated that Mr Cornes had been informed of the re-enactment and about the information the contractors had provided, and given the opportunity to comment on this information. However Mr Schollum stated that Mr Cornes had denied that there had been other witnesses to the incident, and had provided no further information.

[109] Ms McNeil said that she had explained to Mr Cornes the concepts of the balance of probability and beyond reasonable doubt to Mr Cornes, and that to be satisfied on the balance of probability meant that Newmont had to be at least 51% satisfied that the version they were relying on was correct.

[110] Ms McNeil said that she had then proceeded to inform Mr Cornes that what Newmont had discovered during the investigation supported Mr Gilbert's version of events, especially in respect of the evidence of the three independent witnesses who did not know either party, and that she was more than 51% certain that Mr Gilbert's version of what had occurred was the correct one. However Ms McNeil said that she had not relied on any percentage figure when making the decision to dismiss Mr Cornes.

[111] Ms McNeil stated that when Mr Cornes had failed to offer anything new by way of an explanation, she had confirmed her preliminary decision, which was that Mr Cornes's employment was being terminated for gross misconduct, and she had given Mr Cornes his dismissal letter. Ms McNeil said that she had advised Mr Cornes that the notes taken during the investigation were being compiled and that he could have a copy of these once they were compiled.

[112] Mr Cornes stated that he was then asked to sign a piece of paper saying he had been verbally and physically abusive, which he had refused to do. Ms McNeil said that she had asked Mr Cornes to sign the dismissal letter to indicate that he had received it and that he had refused to either sign it or to take it with him, however he had asked what would happen next, and she had explained that his final pay would be calculated and paid to him.

## Determination

### The Law

[112] Mr Cornes was dismissed on 6 May 2011. The amended statutory test applicable with effect from 1 April 2011 therefore applies. The new Test as set out in s 103A of the Employment Relations Act 2000 (“the Act”) states::

#### *S103A Test of Justification*

1. *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
2. *The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
3. *In applying the test in subsection (2), the Authority or the court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
  - (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[113] The new Test of Justification still requires that the employer acted in a manner that was substantively and procedurally fair. Newmont must show that it carried out a full and fair investigation into the issue of whether Mr Cornes's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. Newmont must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[114] Although Mr Cornes's claim that he was unjustifiably disadvantaged through incidents which primarily occurred prior to 1 April 2011 and therefore it is the previous statutory Test of Justification which is applicable to those incidents, I find similar considerations of substantive and procedural fairness to be valid.

**Did Newmont have substantive justification for finding that Mr Cornes had committed gross misconduct?**

[115] The Employment Court in *Housham v Juken New Zealand Ltd*<sup>1</sup> considered the issue of physical violence between employees, and held that an employer is entitled to regard assault, physical aggression and fighting as serious misconduct for which the employees involved may be dismissed.<sup>2</sup>

*...an employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed*

[116] The circumstances of the workplace in which the incident took place are relevant to any consideration of an issue regarding fighting. Newmont is a mining company engaged in metallurgical and maintenance operations which involve the use of heavy and dangerous equipment, and operates an extremely safety-sensitive site.

[117] Mr Cornes would have been aware of the standards expected of employees at Newmont. Mr Cornes was a member of the Union and his letter of appointment which he signed on 13 August 2007 referred to attachments which had been provided to Mr Cornes at the time of his appointment including the Collective Workplace Agreement between

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<sup>1</sup> [2007] ERNZ 183

<sup>2</sup> Ibid at para [23]

Newmont and the Union, and the Newmont Mining Corporation Code of Business Ethics and Conduct.

[118] Clause 34.0 of the Collective Workplace Agreement is headed “Code of Conduct” and states at sub-clause 34.1 that: “*The employer has the right to summarily dismiss an employee for serious misconduct*” and at sub-clause 34.7: “*All employees are expected to conduct themselves in a socially acceptable manner. Specifically threats, abuse or physical violence are not permitted. Provocation will not be accepted as an excuse.*” The Newmont Disciplinary Procedure categorises fighting as a serious dismissible offence.

[119] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*<sup>3</sup>. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:<sup>4</sup>

*Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[120] Newmont had concluded, based on the evidence available to it which included the statements of both Mr Cornes and Mr Gilbert, the re-enactment, and the witnesses’ evidence of which the most significant was that of the contractors, that it was more probable that Mr Cornes had been the aggressor in the incident on 5 May 2011.

[121] I find this conclusion to have been reasonable in circumstances in which:

- Mr Cornes himself had admitted that he had repeatedly questioned Mr Gilbert about what had been said at the Union meeting after he had been advised against that course of action;
- Mr Cornes had admitted following Mr Gilbert out of the Control Room to continue questioning Mr Gilbert when Mr Gilbert had made it clear to him that he did not want to discuss the matter with Mr Cornes, and when Mr Cornes was angry about Mr Gilbert’s lack of response to his questions;
- A re-enactment had supported Mr Gilbert’s version of events as being the more credible based on the physical factors; and

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<sup>3</sup> [1992] 3 ERNZ 483

<sup>4</sup> Ibid at p.487

- There had been three witnesses of the incident who were completely independent and whose evidence supported Mr Gilbert's version of events.

[122] I find that Newmont had substantive justification for finding that Mr Cornes had committed serious misconduct, and that this had the effect of destroying the basic trust and confidence between the parties.

### **Was the process carried out by Newmont procedurally fair and reasonable?**

[123] The Newmont Disciplinary Procedure sets out at clause 7 that in a case of serious misconduct, instant dismissal cannot occur but that certain procedural steps must be followed.

#### ***7. Summary Dismissal (Gross Misconduct)***

*There must be an action or conduct, such as gross misconduct, that is a clear breach of the employment contract which requires immediate removal from the workplace. An employee cannot be instantly dismissed. In fairness to the employee, the summary dismissal steps must be followed.*

[124] At clause 8 the summary dismissal steps are set out as follows:

#### ***8 Summary Dismissal Steps***

- 1. Suspend the employee away from their immediate work area, eg by placing the employee in a crib room or office.*
- 2. Contact your Department Head or General Manager.*
- 3. Inform the employees'(sic) Union representative, if relevant.*
- 4. Conduct a thorough investigation of the circumstances.*
- 5. Prove on the balance of probability that the misconduct was done by the employee.*
- 6. Check whether there are any mitigating circumstances.*
- 7. Ensure during the investigation that the employee has an opportunity to be heard on all allegations.*
- 8. Ensure that the offence does not warrant a final written warning rather than a summary dismissal.*
- 9. Should the employee be dismissed, then they should be removed from site immediately.*

[125] These summary dismissal steps accord with the factors which the Authority must consider pursuant to s 103A (3) of the Act.

*Mr Cornes's Fitness to attend the investigation meeting*

[126] The investigation meeting took place immediately following the incident and Mr Cornes's medical treatment. Mr Cornes stated that he had been in a state of shock throughout this period. Ms McNeil said that it had not been evident to her that Mr Cornes was in a state of shock.

[127] Mr Cornes said that he had intended immediately following the incident to go home to clean himself up, however he had decided to go to the police station instead. Mr Twidle had spent time with Mr Cornes at both the police station and the medical centre, and stated at the Investigation Meeting that in his opinion Mr Cornes had seemed absolutely calm and well during that time. A view with which Ms McNeil and Mr Schollum concurred.

[128] Mr Cornes had driven himself to the police station, and although Mr Twidle said he had offered to drive Mr Cornes to the medical centre, he said Mr Cornes had wanted to drive himself there. Mr Cornes also drove himself to the Moresby Avenue Offices.

[129] Following his visit to the medical centre Mr Cornes had been cleared as fit to attend work by a doctor and nurse.

[130] I accept that if Mr Cornes had been in a state of shock, it was not apparent to the members of the Newmont management team. The evidence of Ms McNeil, Mr Schollum and Mr Twidle was that Mr Cornes had been keen to discuss what had happened with them at the police station, Mr Cornes had clearly considered himself as fit to drive, and he had been medically cleared as fit to attend work.

[131] Mr Cornes spent quite some time with Mr Twidle, at the police station, at the medical centre and at the Moresby Avenue Offices whilst waiting for Ms McNeil and Mr Schollum to arrive. I consider that there had been ample opportunity for Mr Cornes to have asked Mr Twidle, with whom he said he had had a good relationship, for an adjournment had he felt unable to attend the investigation meeting.

[132] On the basis of the facts available to them, I find that it was reasonable on the part of Ms McNeil and Mr Schollum to proceed with the investigation meeting.

[133] Mr Cornes said that he had not been aware that he had been suspended following the investigation meeting. Both Ms McNeil and Mr Schollum said that Mr Cornes had been informed of this fact. I note that Mr Gilbert had also been suspended following the investigation meeting. Newmont was a highly safety sensitive workplace and regarded incidents of physical violence as serious misconduct attracting a summary dismissal outcome. In cases of summary dismissal, the first step as outlined in clause 8 of the Newmont Disciplinary Procedures is suspension.

[134] In the circumstances I find that suspension was appropriate and had been carried out in accordance with Newmont's own procedures. I further accept Ms McNeil's and Mr Schollum's evidence on the subject of whether or not Mr Cornes had been informed that he had been suspended as credible, and consider that had Mr Cornes given consideration to the matter, he would have been aware that it was in accordance with Newmont's Disciplinary Procedure.

*Inclusion of Mr Schollum in the process*

[135] Mr Cornes had stated that he believed it was inappropriate that Mr Schollum who was Mr Gilbert's Manager, take part in the investigation and disciplinary meetings and process.

[136] Ms McNeil had explained that she was the decision-maker in the process and that she had asked Mr Schollum to assist her in the process as he was experienced in the disciplinary process and had taken part in previous disciplinary matters.

[137] Mr Schollum explained that although he had been Mr Gilbert's Manager, he did undertake the role of Acting Mill Supervisor from time to time, as indeed he had on the day of the incident on 5 May 2011, and in that capacity the whole plant reported to him.

[138] Mr Cornes claimed that Mr Schollum was biased because he had seen Mr Gilbert shortly after the incident; however Mr Schollum had also seen Mr Cornes himself shortly after the incident.

[139] There is an expectation that managers in disciplinary processes will act with professionalism and without bias, and in this case I find no grounds for considering that Mr Schollum behaved otherwise, especially in the circumstances in which I accept that Ms McNeil was the orchestrator of the process and the decision-maker of the outcome.

### *Representation*

[140] Mr Cornes said that having Mr Fleming to represent him had been a choice forced upon him by Ms McNeil.

[141] I note that informing an employee's Union representative is a step in the Disciplinary Procedure steps regarding summary dismissal matters, and Mr Twidle stated that it was the usual procedure for a Union representative to be present at investigatory and disciplinary meetings.

[142] Mr Cornes had been asked by Mr Twidle before Ms McNeil and Mr Schollum had arrived at the meeting if he wanted to have Mr Fleming attend the meeting and he had confirmed that he did want to have Mr Fleming. I consider that it was open to Mr Cornes to have asked Mr Twidle, with whom he said he had had a good relationship, for alternative representation had he not wished to have Mr Fleming represent him..

[143] The start of the meeting had been delayed while Mr Fleming joined them, I consider in that time, Mr Cornes could have discussed the matter with Ms McNeil and Mr Schollum. Ms McNeil said that she had again checked with Mr Cornes before the meeting commenced that he was happy to have Mr Fleming represent him, and he had again confirmed that he was happy.

[144] Mr Cornes stated that he had invited Mr Fleming to represent him at the disciplinary meeting on 6 May 2011 at Ms McNeil's request. Ms McNeil said that she had called Mr Cornes and strongly advised him to have a support person at the meeting and had called Mr Fleming to advise him that Mr Cornes might call him, however she had not insisted that Mr Cornes have Mr Fleming to represent him. I find Ms McNeil's evidence credible as supported by the handwritten notes she had made of her conversation of the telephone call to Mr Cornes.

[145] Mr Cornes was a Union member and Mr Fleming was the only official Union delegate, however I find that this fact would not have presented Mr Cornes from having alternative representation had he wished to do so given that Mr Gilbert had done so. I find that Mr Cornes choice of Mr Fleming as his representative in the meetings was freely made.

### *Investigation*

[146] It was incumbent on Newmont to carry out a full and fair investigation in accordance with s103A (3)(a) of the Act and the Newmont Disciplinary Procedure. I find that Newmont did so, having interviewed all possible witnesses and having carried out a re-enactment.

[147] I find that Mr Cornes was aware of the allegations against him and that his continued employment might be jeopardy, Mr Cornes did have a recollection of being told this by Ms McNeil at the police station and I accept the evidence of Ms McNeil as supported by that of Mr Schollum that she had informed Mr Cornes of this again at the commencement of the investigation meeting.

[148] I find that Mr Cornes was given a full opportunity to provide his explanation, both at the investigation meeting on 5 May 2011 and by way of his written explanation and version of events provided later that day.

[149] I also accept that Mr Cornes was informed at the disciplinary meeting on 6 May 2011 about the re-enactment and the evidence of the witnesses and provided with the opportunity to comment on this information, but that he had chosen not to do so.

[150] The letter of dismissal had been pre-prepared prior to the disciplinary meeting. Ms McNeil explained this as being attributable to the fact that Mr Grindley was to sign it and as he had to leave the site, she had prepared the letter and asked Mr Grindley to sign it.

[151] I consider that it would have been more appropriate for Ms McNeil to have confirmed in writing her decision to dismiss Mr Cornes at some time following the termination of the disciplinary meeting to have avoided any appearance of pre-determination.

[152] However, whilst a defect in the process, I do not find it to render the dismissal decision unjustifiable as I consider that Ms McNeil had reached her decision on a preliminary basis and I accept as credible her assertion that she was open to changing this preliminary view had Mr Cornes offered any further explanation at the meeting on 6 May 2011.

[153] I also address the issue of Mr Twidle having made notes during his time with Mr Cornes at the police station, the medical centre, and whilst waiting for Mr McNeil and Mr Schollum, during which time Mr Cornes had no representation. The existence of these notes was not known to either Ms McNeil and Mr Schollum prior to the decision to dismiss Mr Cornes having been made, and consequently they could not have influenced that decision.

#### *Disparity of Treatment*

[154] Mr Cornes claimed that it was inappropriate that Mr Gilbert only received a caution following his part in the incident on 5 May 2011.

[155] Newmont had reached the conclusion that Mr Gilbert had been acting in self-defence. As observed by the Employment Court in *Housham v Juken New Zealand Ltd*<sup>5</sup>, whilst an employer is entitled to regard matters of physical aggression as serious misconduct for which the employees involved may be dismissed “*that cannot reasonably extend to every participant in such a confrontation under any circumstances*”. The Chief Judge expanded at para [25]:

*An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run (especially if operating dangerous machinery) or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all of the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.*

[156] Newmont had accepted from the evidence revealed during the investigation, that Mr Cornes had persistently questioned Mr Gilbert when Mr Gilbert had made it very clear that he did not wish to speak to Mr Cornes, and that an angry Mr Cornes had followed Mr Gilbert out of the Control Room. Newmont had further accepted from the evidence that Mr Gilbert had not been the aggressor in the incident.

[157] I find that Newmont as a fair and reasonable employer would be entitled to reach and accept a conclusion of self-defence in mitigation of a serious misconduct offence attracting a dismissal outcome, and did so in the case of Mr Gilbert.

**If there was gross misconduct, would the fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?**

[158] Mr Cornes had stated that there had been previous harassment complaints both made by him and against him, and that these, and the adverse comments allegedly made about him at the Union meeting, should have been taken into consideration by Ms McNeil as mitigating factors against reaching a dismissal decision.

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<sup>5</sup> [2007] ERNZ 183

[159] Ms McNeil explained that she had given consideration to these factors prior to reaching her decision to dismiss, but that had reached the conclusion that none of these factors excused Mr Cornes having assaulted Mr Gilbert, a fellow employee. Moreover Ms McNeil observed that she considered that all of these incidents had been properly investigated and no conclusion reached in respect of them, consequently they had no impact on her decision that dismissal was the appropriate outcome.

[160] I find that Newmont, having concluded that Mr Cornes had committed an act of gross or serious misconduct as a result of this incident, lost the requisite degree of trust and confidence in Mr Cornes that an employer must have in an employee, and consider that this loss of trust and confidence was irreparable. I further consider that Mr Cornes had no trust and confidence in the Newmont management team, noting that he had chosen to take his concern about the incident on 5 May 2011 to the police rather than to his manager, Mr Twidle. In these circumstances, I find that Newmont's decision that dismissal was the appropriate outcome to have been within the range of reasonable penalties available to it.

[161] I determine that the decision taken by Newmont to dismiss Mr Cornes was one which a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

[162] For the above reasons I find that Mr Cornes was not unjustifiably dismissed from his employment with Newmont.

**Was Mr Cornes was unjustifiably disadvantaged in his employment with Newmont?**

[163] I find it significant that Mr Cornes did not raise a personal grievance in connection with any of the alleged instances of unjustifiable disadvantage within the 90 day time period pursuant to s.114(1) of the Act.

[164] The Newmont Waihi Gold Collective Agreement which covered Mr Cornes's employment set out at clause 29.2 the procedure to be followed in respect of raising a personal grievance, stating at sub-clause 29.2.2:

*29.2.2 Time limit on raising a personal grievance*

*An employee who believes that he/she has a personal grievance must make the employer aware of the grievance within 90 days of the grievance arising (or the employee becoming aware that he/she has a grievance).*

[165] I find that Mr Cornes did not however raise a personal grievance in respect of the alleged instances of unjustifiable disadvantage until 17 May 2011, which was outside the statutory time limit.

[166] Irrespective of this finding, I address the claim of unjustifiable disadvantage based on the incidents stemming from 15 March 2009 until 6 May 2011 when Mr Cornes's employment was terminated.

[167] To be successful in a claim for unjustifiable disadvantage, pursuant to s 103(1)(b) of the act, an employee must show:

*That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer*

[168] There are two limbs to the test for unjustifiable disadvantage as set out in s 103(1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[169] What becomes apparent in analysing the incidents stemming from 15 March 2009 until 6 May 2011 is that there was a personality clash between Mr Cornes and some of his fellow employees. This is a difficult situation for an employer to address, as it is not possible for the employer to enforce a mutual liking between employees.

[170] I also observe that Mr Cornes in at least one incident prior to the incident on 5 May 2011, that involving Mr McKenzie, was alleged to have been the instigator of the incident. Further that whilst Mr Cornes complained of harassment, specifically of being called a 'nark' and 'gay' he provided no specific evidence of this, other than a photograph of the word 'nark' on his hydrogen cyanide mask container, which made it difficult for Newmont to investigate these matters. Significantly, Mr Cornes had admitted to hanging a sign on Mr Twidle's truck accusing Mr Twidle of being gay, an incident which had only been brought to Mr Twidle's attention during the Investigation Meeting.

[171] However, irrespective of the difficulties involved, which included Mr Cornes making some of the complaints on a confidential basis, I find that in the incidents as described, Newmont investigated and took appropriate action as necessary to ensure that Mr Cornes was provided with a safe working environment. The refresher harassment training provided is demonstrative of Newmont's commitment to this end.

[172] I find that Newmont acted as a fair and reasonable employer would and could have acted in respect of Mr Cornes's disadvantage claims and I determine that Mr Cornes was not unjustifiably disadvantaged by Newmont.

**Costs**

[157] 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**