

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 111
5360585

BETWEEN RICHARD JOHN DAVIS
 Applicant

AND KLEANA BINS (2002)
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Tim Braithwaite and Miranda Harvey, Counsel for
 Respondent

Investigation Meeting: 16 January 2012 at Tauranga

Submissions Received 18 January 2012 Applicant's submissions
 03 February 2012 Respondent's submissions
 08 February 2012 Applicant's reply submissions

Determination: 28 March 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Richard Davis was unjustifiably dismissed by Kleana Bins (2002) Limited (“Kleana”).**
- B. The manner in which Kleana suspended Mr Davis unjustifiably disadvantaged him in his employment.**
- C. Kleana is ordered to pay Mr Davis:**
- (i) Six weeks' lost remuneration;**
 - (ii) \$6,500 distress compensation;**
 - (iii) \$71.56 to reimburse his filing fee.**

Employment relationship problem

[1] Mr Richard Davis alleged that he had been unjustifiably dismissed from his employment as a truck driver with Kleana on 14 July 2011. Mr Davis also alleged that he had been unjustifiably disadvantaged as a result of his suspension on 24 June 2011.

[2] Kleana said that its suspension of Mr Davis and his subsequent dismissal were both justified because it believed he had negligently caused an accident on 24 June 2011, which resulted in one of its trucks being written off.

Relevant facts

[3] In 2006 Kleana employed Mr Davis as a truck driver pursuant to a written individual employment agreement (“IEA”). Clause 18.5 of the IEA stated:

“Where the employer terminates because of misconduct, incompetence, redundancy or any similar cause, the requirements of procedural fairness shall be observed, and in particular the employee will be given a proper opportunity to be heard.”

[4] Clause 18.6 related to suspension and it stated:

“The employer may suspend the employee during an investigation of the employee’s misconduct, or because the nature of the alleged misconduct demands suspension. Suspension shall be on pay, and for such period and on such circumstances as the employer thinks fit, and as are reasonable in the circumstances.”

[5] On 22 June 2011 the truck Mr Davis had been driving was involved in an accident which resulted in the vehicle being written off. Mr John Cruishank, one of Kleana’s directors and shareholders, told me the truck was insured so his concern was around what he believed were Mr Davis’ negligent actions, instead of the value of the damage caused.

[6] The accident occurred around 11.50am on Wednesday, 22 June 2011. Mr Davis remained at the scene of the accident which was attended by police and by Mr Cruickshank. Mr Davis returned to Kleana’s head office from the accident scene but from there left work for the remainder day at approximately 2.30pm.

[7] Mr Davis attended work on the morning of Thursday, 23 June 2011 to tell his employer he would not be returning to duty again until Monday, 27 June 2011. With his employer's agreement Mr Davis took sick leave on 23 and 24 June 2011. When he attended work on the morning of 23 June Mr Davis signed an insurance claim form, so it could be processed without delay.

[8] On Friday, 24 June 2011 Constable Matthews of the NZ police advised Mr Davis by telephone that the police would not be taking any action against him regarding the accident because they had attributed it to "*mechanical and not driver failure*".¹ Mr Davis immediately phoned Kleana with this information and left a message to that effect with the receptionist.

Details of accident

[9] Mr Davis' job involves emptying the rubbish bins of Kleana clients. On 22 June 2011 Mr Davis had reversed the truck as normal up the client's driveway, which he had done many times before, and parked with the handbrake on full. He had not previously experienced any problems doing this but on this one occasion the handbrake failed to hold the truck in its parked position.

[10] Mr Davis said he put the handbrake on as far as it would go, placed the power take off into gear and then proceeded to the rear of the truck. Mr Davis said that he had removed the top rubbish bag out of the rubbish bin (because the bin was too heavy to comfortably move) when he noticed that the truck had started to slowly move away. Although the truck had started moving slowly, it quickly picked up speed and as it did so, Mr Davis ran to the front of the truck and attempted to get back into the cab in an attempt to stop it. His attempt was unsuccessful and the truck proceeded to get away with Mr Davis hanging from the driver door.

[11] The truck proceeded down the client's sloped driveway, across an access road, and then down a grass verge between the access road and the footpath, which bordered onto a busy main road. The steep gradient between the access road and the main road meant that the front of the cab collided with the footpath, which broke the truck's descent preventing it from careering across the busy main road.

¹ The reference to "mechanical" was to the type of handbrake.

[12] Although uninjured, Mr Davis was badly shaken. He remained at the scene until it had been processed by police, then briefly returned to the office before taking the remainder of that day and the next two days off work.

Police involvement

[13] Constable Dan Matthews attended the scene of the accident and he gave evidence to the Authority. Mr Matthews took a number of photos of the accident scene, which he provided to the Authority together with a copy of the entries he made in his police notebook.

[14] The photos show a build up of dirt and grass on the tyres on one side of the truck. Constable Matthews told me this was consistent with the handbrake having been on in circumstances where it had failed to hold the truck which had then gained speed and moved away, despite the handbrake having been on. It was also evident from the police photos that at least one of the truck's wheels had been parked on the grass verge beside the concrete driveway because there was a long skid mark in the grass on one side of the drive. Constable Matthews said he had checked the handbrake and could confirm that it had been pulled on very hard.

[15] Constable Matthews said the police decided that it was not appropriate to file any criminal charges as a result of the accident because they believed that it had been caused by the particular type of brake used in the truck rather than by driver error. He explained that the truck had a carbon shaft handbrake which applied to the drive shaft, and unlike a passenger vehicle, not directly to the wheels.

[16] Constable Matthews explained that meant that the truck had to have all of its wheels on a hard, firm surface (i.e. the concrete driveway) in order for the handbrake to be 100% effective. In this case because one of the truck's wheels was on grass the handbrake, despite being fully on, was unable to hold the truck in the parked position. Although the slippage would have had started off slowly, because the truck weighed 4 tonne it quickly gained speed and as it did so the handbrake was unable to stabilise the vehicle.

[17] Constable Matthews told me he had discussed this case with his superior, who had vast experience in assessing road accidents, and they had both independently concluded that Mr Davis had not been negligent or careless so it was not reasonable or appropriate to pursue criminal charges against him.

Kleana's view

[18] Kleana's view of Mr Davis' culpability differed from that view taken by the police.

[19] Kleana said that Mr Davis was at fault because he had parked the truck partially on grass. Mr Davis said that he did not notice that the vehicle was parked on grass, and he did not know that the handbrake would not hold the vehicle if it had been parked on grass.

[20] Constable Matthews told me that the Police would not expect someone like Mr Davis to be familiar with the particular dynamics of the carbon shaft handbrake, so he was unlikely to have known the problems that partially parking on grass could cause for that particular make of truck. I accept that evidence.

[21] Kleana also alleged that Mr Davis had been negligent because he had not turned the wheels of the vehicle towards the concrete retaining wall beside the driveway. It said that if had he done so, the truck would have been likely to have moved into the retaining wall instead of having proceeded down the driveway towards the busy main road.

[22] Mr Davis said that whilst his usual practice was to turn the wheels of the truck towards the kerb when parking on a hill, in this case he did not do so because he was concerned that the truck would be likely to flip and roll because the retaining wall was curved.

[23] Mr Davis said he was concerned that if the truck had moved off, it could have flipped which would have presented a greater hazard because it may have flipped over the footpath onto the road. Mr Davis said that in this accident the steep gradient of the footpath had stopped the truck's fall because the angle at which the cab of the truck had hit the footpath had prevented it from crossing the main road.

[24] Constable Matthews told me that whilst drivers of private vehicles are expected under the road code to turn their vehicle wheels towards the kerb if they park on a gradient, the police did not expect drivers of commercial vehicles who had to get in and out of their vehicles regularly to do so.

[25] Constable Matthews acknowledged that the nature of Mr Davis' job required him to constantly embark and disembark the vehicle in order to empty rubbish bins so he told me the police would not have reasonably expected Mr Davis to have turned the wheels of the truck into the wall on this occasion, as Kleana believed he should have.

[26] In light of Constable Matthew's evidence I find that there was no legal requirement on Mr Davis to have turned the truck wheels into the wall when he parked.

Justification test

[27] Mr Davis was dismissed on 14 July 2011 so the current s.103A justification test as set out in the Employment Relations Act 2000 ("the Act"), which came into effect on 1 April 2011, applied to his dismissal and suspension.

[28] Section 103A requires the Authority to assess justification on an objective basis by assessing whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[29] Section 103A(3) sets out a number of statutory natural justice and procedural fairness considerations which the Authority must consider when assessing justification. These include:

- (a) Whether, given the employer's resources, it sufficiently investigated the allegations against the employee;
- (b) Whether the employer raised its concerns with the employee;
- (c) Whether the employee had a reasonable opportunity to respond to the employer's concerns;
- (d) Whether the employer genuinely considered the employee's explanation.

[30] Pursuant to s.103A(4) the Authority may also consider other factors which it considers appropriate. In this case, I find that other appropriate factors include;

- a. Kleana's compliance with its statutory good faith obligations²;
- b. Kleana's contribution (if any) to the circumstances/situation which gave rise to the accident.

[31] Section 103A(5) prevents the Authority from determining that a dismissal or action is unjustifiable solely because of procedural defects, if such defects were minor and did not result in the employee being treated unfairly.

Case law

[32] The Full Employment Court in *Angus v. Ports of Auckland Ltd*³ considered the s103A justification test which came into effect on 1 April 2011 and identified the following changes to the justification test:

- (a) The new s.103A(2) substituted the word "*could*" for the previous word "*would*";
- (b) Section 103A(3) introduced a number of considerations that must be taken into account when determining the s.103A(2) test;
- (c) Section 103A(4) makes it clear that the employment institutions are free to take into account other appropriate factors;
- (d) Section 103A(5) prohibits the employment institutions from determining that a dismissal or disadvantage is unjustified solely because of procedural defects if they were minor and did not result in the employee being treated unfairly.

[33] The Court made it clear that the Authority must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. The Authority is also still required to assess, objectively and carefully, the conduct of both the employee and the employer, and then the employer's response to the employee's conduct.

² S4(1A) ERA

³ [2011] NZEmpC 160

[34] As was the case pre the 1 April 2011 amendment, the Authority cannot substitute its own view of what it would have done in the circumstances. Rather, it must objectively assess whether what the employer did, and how the employer did it, were what a fair and reasonable employer in those circumstances could have done.

[35] The Employment Court in *Angus* expressly recognised that the new s.103A justification test did not alter the law regarding procedural fairness and acknowledged that s.103A(3)-(5) continued the same emphasis on substantial fairness and reasonableness which had applied under the previous justification test.

[36] However, the Court in *Angus* observed that failure by an employer to meet any of the s.103A(3) tests was likely to result in a dismissal or disadvantage being found to be unjustified because the considerations set out in that subsection were minimum standards to be adhered to by an employer. The Court also recognised that there would often be other factors that had to be taken into consideration having regard to the particular circumstances of a case.

[37] I recognise that the justification test now allows for more than one possible justifiable outcome and more than one possible justifiable methodology for arriving at that outcome. Pursuant to s.103A so long as the employer's decision and how it arrived at it is one of the outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then it will be justified.

[38] The Court in *Angus* also clarified that the notion of a "*fair and reasonable employer*" referred to in s.103A(2) is that of a fair and reasonable employer which is engaged in the business or enterprise of the particular employer in question.

[39] The Court in *Angus* stated that s.103A must be applied in practice by applying the following steps:

- (a) A factual determination must be made about what the employer did and how the employer did it. If material events are disputed, then this is likely to include factual findings about what had brought about the employer's concern;
- (b) Having regard to the evidence, legal provisions, relevant documents or instruments and specialist knowledge of employment relations, the Authority must determine what a fair and reasonable employer could

have done, and how a fair and reasonable employer could have done it, in all of the relevant circumstances at the time at which the dismissal or disadvantage occurred. Relevant circumstances include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3)-(5) must be applied when this exercise is undertaken;

- (c) The Authority must determine whether what the employer did and how it did it were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. This must be done objectively and the Authority may not substitute its own decision for that of a fair and reasonable employer in all of the circumstances.

Suspension

[40] On Saturday, 25 June 2011 Mr Davis received Mr Cruickshank's letter dated 24 June 2011 which advised him that he had been placed on paid suspension pending a meeting which had been scheduled for 4pm on 29 June 2011. The letter, signed by Mr Cruickshank, stated:

"Because of our serious concern about your apparent carelessness when in charge of a vehicle you are suspended from duty with immediate effect pending the outcome of this investigation. You will remain on full pay while you are suspended".

[41] Kleana accepted that it had imposed the suspension without first consulting Mr Davis. Ms Harvey submitted that Kleana was justified in suspending Mr Davis without consultation, and without following any sort of process because:

"[...] there had been a serious crash involving the respondent company truck and there was a real risk of danger so imminent (i.e. the applicant causing another crash) that suspension without consultation was justifiable in this case."

[42] I do not accept that submission because it contradicts the evidence before the Authority. Mr Cruickshank told me that there was no urgency around the suspension. He accepted that Mr Davis was not at work on the Thursday or the Friday and he

agreed he had Mr Davis' contact details readily available so was able to contact him to speak about a proposed suspension, had he wanted to do so.

[43] Mr Cruickshank said the only reason he did not consult Mr Davis about the suspension was because his legal adviser had not told him it was necessary to do so. Mr Cruickshank said that if he knew he had to consult Mr Davis, then he would have done that. Mr Cruickshank did not give any evidence about unilateral suspension being necessary to avoid imminent danger, so that was a matter raised for the first time by counsel in closing submissions.

[44] I find that Mr Davis returned to the office on the afternoon of the accident, he also went in to work at the beginning of the next day, and he called the office on Friday afternoon. Kleana knew he did not intend to return to his driving duties until Monday, 27 June 2011. In these circumstances I find that Mr Cruickshank had a number of reasonable opportunities during which he could have raised a proposed suspension with Mr Davis, but he did not do so.

[45] I find that Mr Davis should have been given an opportunity to provide feedback on his proposed suspension before Kleana made its final decision to suspend him.

[46] An employer's decision to suspend is normally only justifiable if it is made as the result of a fair process. The minimum requirement involves telling the employee of the proposed suspension and the reasons for it, and then providing the employee with an opportunity to be heard before a final decision regarding the suspension is made.⁴

[47] The natural justice and procedural requirements in s103A(3) of the Employment Relations Act 2000 ("the Act") apply to a decision by an employer to suspend an employee where suspension unjustifiably disadvantages the employee. I consider this new statutory obligation supersedes prior case law which did not involve consideration of the factors contained in s103A(3) of the Act.

⁴ *Singh v. Sherildee Holdings Ltd t/a New World Opotiki* 22 September 2005, Couch J, AC54/05

- [48] In this case I find s103A(3) required me to consider whether Kleana;
- a. Sufficiently investigated whether suspension was appropriate before it suspended Mr Davis⁵;
 - b. Raised the proposed suspension with Mr Davis before it suspended him⁶;
 - c. Gave Mr Davis a reasonable opportunity to respond to the proposed suspension before it suspended him⁷;
 - d. Genuinely considered Mr Davis' response to the proposed suspension before it suspended him⁸.

- [49] I make the following findings;
- a. Kleana proceeded directly to suspension without first properly considering whether it was reasonable, necessary or appropriate;
 - b. Kleana did not inform Mr Davis of his proposed suspension. It unilaterally suspended him;
 - c. Mr Davis had no opportunity to be heard on the proposed suspension before he was suspended;
 - d. Kleana did not consider Mr Davis' response to his proposed suspension because he was deprived of the opportunity to comment on it.

[50] Kleana was unable to satisfy me that it had complied with any of the natural justice and procedural fairness obligations set out in s103A(3) of the Act. Accordingly, I find that Kleana's unilateral suspension of Mr Davis unjustifiably disadvantaged him in his employment.

[51] In terms of s103A(4) "*other factors*", I find that there were no imminent health or safety issues which would have made consultation with Mr Davis over his proposed suspension unreasonable or inappropriate.

⁵ S.103A(3)(a) ERA.

⁶ S.103A(3)(b) ERA.

⁷ S.103A(3)(c) ERA.

⁸ S.103A(3)(d) ERA.

[52] Mr Davis attended work the day of and the day after the accident so his proposed suspension could and should have raised with him on either of those occasions. Mr Davis also called Kleana on Friday following the accident, whilst on sick leave, so a proposed suspension could reasonably have been discussed with him then. Mr Cruickshank could also have called Mr Davis over the weekend to discuss the proposed suspension or he could have waited and then raised it with Mr Davis in person, once Mr Davis reported to work on the Monday following the accident.

[53] I find that a fair and reasonable employer in all of the circumstances would have given Mr Davis an opportunity to be heard on its proposed suspension and it would have met all of the procedural requirements set out in s103A(3) of the Act.

[54] I find that this was not a situation where there were minor process defects which did not result in Mr Davis being treated unfairly. There was no process at all, which cannot be described as a minor defect. The complete lack of process did result in Mr Davis being treated unfairly. Accordingly, s103A(5) does not prevent me from finding that Mr Davis' suspension was unjustified.

[55] I accept Mr Davis' evidence that Kleana's failure to follow an appropriate process caused him hurt, humiliation and injury to his feelings and that he was genuinely distressed by it.

[56] I award Mr Davis \$500 pursuant to s.123(1)(c)(iii) of the Employment Relations Act 2000 ("the Act").

Disciplinary concerns

[57] Kleana's disciplinary concerns were recorded in its letter to Mr Davis dated 24 June 2011. Its conclusion to these disciplinary concerns was set out in its letter of 14 July 2011. The outcome letter also recorded that Kleana considered that Mr Davis' explanation that he did not believe he had done anything wrong and that he would not do anything differently with the value of hindsight was unacceptable.

[58] Mr Cruickshank concluded that Mr Davis had "*demonstrated a complete lack of care when operating the truck on the day of the accident*". He also recorded:

“I am very concerned about your clear view that you have not done anything wrong and you would not do anything differently. I conclude that you have no insight into the mistakes you made on the day of the accident. This troubles me as I consider there is extreme likelihood that you would cause an accident again given your approach and lack of insight. I cannot feel confident about you driving one of my trucks again.

I consider that your actions/inactions amount to serious misconduct and I am therefore dismissing you from your position effective immediately.”

[59] Mr Davis was paid one week’s pay in lieu of notice.

[60] Mr Cruickshank told me during the Authority’s investigation that the two issues that he had relied on as amounting to serious misconduct justifying dismissal were:

- (a) The parking of the truck’s wheels partially on wet grass; and
- (b) The failure to turn the steering wheel to the kerb when parking, so if the vehicle had moved it would have moved into a retaining wall and not off down the driveway.

Section 103A(3) factors

*Did Kleana sufficiently investigate its concerns?*⁹

[61] Mr Cruickshank was aware that the police had decided not to charge Mr Davis because they believed the accident was caused by mechanical issues, not driver error.

[62] Mr Cruickshank said that he asked his office manager and his legal adviser to contact Constable Matthews to find out what information the police could provide about the accident. Although both those people did call the Police station, Constable Matthews was not available when they did so and neither of them left him a message, so he had no way of knowing that Kleana wanted to speak to him about the accident.

[63] This meant that Kleana did not obtain any information from the police regarding the decision not to prosecute Mr Davis.

[64] Mr Cruickshank said that Constable Matthews indicated to him at the scene of the accident that it appeared it had been caused because the truck had been parked

⁹ S.103A(3)(a) ERA

with the right hand wheels on wet grass on a steep gradient. Mr Cruickshank said he believed that discussion had ruled out a mechanical cause for the accident. I find that was not a view a fair and reasonable employer could have arrived in all the circumstances.

[65] Mr Cruickshank's discussion with Constable Matthews at the accident scene was short and informal. Constable Matthews was merely sharing an early and preliminary view based on his initial examination of the accident scene. Constable Matthews had not at that point had an opportunity to consider what if any responsibility Mr Davis had for the accident and what if any mechanical issues may have been involved.

[66] It was obvious from what Mr Davis had told Mr Cruickshank that the police after properly investigating the accident had concluded he was not at fault. I find that Kleana was not justified in concluding that there were no mechanical issues involved with the accident and that Mr Davis was solely at fault without first having spoken to Constable Matthews about why he had formed a contradictory conclusion.

[67] I consider that Constable Matthews had relevant information which exonerated Mr Davis from blame for the accident and that Mr Cruickshank proceeded to dismiss Mr Davis without first considering that relevant information.

[68] I find that Kleana had sufficient resources available to it to enable it to have easily obtained relevant information from Constable Matthews about the police view of the cause(s) of the accident. Its failure to do so meant it did not sufficiently investigate its concerns before dismissing Mr Davis, in breach of s103A(3) of the Act.

Did Kleana raise its concerns with Mr Davis before it dismissed him?

[69] I find that Kleana did raise some disciplinary concerns with Mr Davis in its letter of 24 June 2011. However, it did not raise its key concern that he had no insight into the mistakes that he had made on the day of the accident so there was an *"extreme likelihood that [he] would cause an accident again given [his] approach and lack of insight"*.

[70] The alleged lack of insight was a critical factor in terms of Mr Cruickshank's decision to dismiss Mr Davis, so it should have been specifically put to Mr Davis. I find that did not occur, in breach of s103A(3)(b) of the Act.

Was Mr Davis given a reasonable opportunity to respond to Kleana's concerns?

[71] I find that Mr Davis was not given any opportunity to respond to Mr Cruickshank's belief that:

- a. There was "*an extreme likelihood*" that he would cause another accident if he remained employed;
- b. Mechanical issues had no bearing on the accident;
- c. The information conveyed by Mr Davis about the police view of the causes of the accident contradicted what he (Mr Cruickshank) believed Constable Matthews had told him at the scene of the accident regarding the cause of the accident.

[72] All of these matters went to the heart of Mr Cruickshank's decision to dismiss Mr Davis, so it was only fair that they be properly put to him so he had an opportunity to respond to each of these concerns before he was dismissed. Kleana's failure to do so breached s103A(3)(c) of the Act.

[73] Mr Davis was not aware that Mr Cruickshank had ruled out mechanical issues without contacting Constable Matthews in order to understand why the police held a contrary view. I am satisfied that had Mr Davis known this before he was dismissed then he would have contacted Constable Matthews himself and obtained additional information from the police to support his explanation that he did not cause the accident through driver error. He was unfairly deprived of the opportunity to do so.

[74] I also find that Mr Cruickshank had misinterpreted Mr Davis' explanation about the information given to him by Constable Matthews. Mr Cruickshank believed that Mr Davis was saying that the Police considered that there had been a mechanical failure with the vehicle. If Mr Davis had been aware of that he could have addressed it because it was not the point he had been making. Mr Davis' position was that the Police considered that the accident was caused due to the type of handbrake, not a mechanical failure. Mr Davis was deprived of the opportunity to clarify that point with Mr Cruickshank before he was dismissed.

[75] The evidence that Constable Matthews gave to the Authority clarified the police view of the cause of the accident. Constable Matthew's position was that

although there had not been a mechanical failure with the truck, the specific type of brake used had been unable to hold the truck because it had been parked partially on wet grass. Whilst that in itself was not a mechanical failure because there was nothing wrong per se with the handbrakes, the accident occurred because of the handbrake's inability to hold the truck due to the particular conditions that applied at the time.

[76] If Mr Davis had known that Mr Cruickshank was discounting a mechanical cause for the accident because of what Constable Matthews had said at the scene of the accident then he would have had an opportunity to correct Mr Cruickshank's misunderstanding about the relevance of his reference to mechanical issues. It was unfair that he was not given an opportunity to do so.

Was Mr Davis' explanation genuinely considered?

[77] I find that Kleana did not genuinely consider Mr Davis' explanation, in breach of s103A(3)(d) of the Act.

[78] Kleana approached its concerns with a closed mind because it did not follow up with Constable Matthews when Mr Davis had specifically relied on information from the police to support his defence of the allegations against him. Mr Cruickshank effectively ignored this aspect of his explanation.

[79] I also find that Mr Davis' allegation that the outcome of the disciplinary process was predetermined was established on the balance of probabilities. I accept Mr Davis' evidence that when he asked Sheree Park¹⁰ on the telephone on the afternoon of Friday, 24 June 2011 where the truck was so he could retrieve his wet weather gear he heard one of the other directors in the background saying "*I wouldn't worry Sheree because he won't be needing his wet weather gear any more*". Kleana disputed any such comment was made.

[80] I consider on the balance of probabilities such a comment was likely to have been made. That occurred prior to the disciplinary letter being sent to Mr Davis and I am satisfied such a comment indicated Kleana's intention from the outset to dismiss Mr Davis over the accident.

¹⁰ Kleana's Receptionist/Administration Assistant

[81] I also consider that the evidence that Mr Cruickshank gave the Authority supported Mr Davis' allegation of predetermination. Mr Cruickshank said that after returning to the office from the accident scene:

"I was thinking about how the vehicle could have got away. The more I thought about it the more convinced I was that the accident should not have happened. I could not see anything apart from driver error as the cause of the accident. So once I was convinced of that then I decided to initiate a disciplinary process."

[82] I find this early view of the cause of the accident coloured Mr Cruickshank's entire approach to the disciplinary process and meant that he did not fully or properly consider Mr Davis' response to the disciplinary concerns.

Other relevant factors

Good faith

[83] Section 4(1A) of the Act required Kleana to provide Mr Davis with:

- (a) Access to information relevant to the disciplinary concerns; and
- (b) An opportunity to comment on that information before the final decision was made in the disciplinary issues.

[84] I find that Kleana breached its s.4(1A) duty of good faith because it did not provide Mr Davis with access to all of the information it had which was relevant to the decisions it made about its disciplinary concerns. The failure to provide this information to Mr Davis meant he did not have an opportunity to comment on it before he was dismissed.

[85] Mr Cruickshank took a number of photos at the scene of the accident, none of which were provided to Mr Davis to comment on. These photos were relevant to Mr Cruickshank's assessment of what had occurred at the scene of the accident and they should have been put to Mr Davis to comment on, but were not.

[86] Mr Cruickshank also obtained information from one of the other directors regarding the type of handbrake used in the truck. This evidence appeared to have been consistent with what Constable Matthews told the Authority, namely that the

type of handbrake in the truck meant that it had to be on a hard, stable surface or the handbrake was unlikely to hold.

[87] That was relevant information which should have been put to Mr Davis to respond to, but was not. This failure contributed to Mr Davis' view that he would not do anything differently and I find that his response to that question during the disciplinary meeting fundamentally prejudiced the outcome of the disciplinary process.

[88] One of the major issues that Mr Cruickshank had with Mr Davis' explanation was Mr Davis' belief that he had not done anything wrong and that he would not do anything differently. When Mr Davis heard Constable Matthews give evidence to the Authority that the type of handbrake in that particular truck meant that the vehicle had to be parked on a hard surface for the handbrake to work, Mr Davis immediately told the Authority that he accepted that he had done wrong because the vehicle had been partially on the grass. He said that is something he would not have done again.

[89] This response, which was unsolicited and offered freely and voluntarily by Mr Davis as soon as he had heard Constable Matthews's evidence, undermines Mr Cruickshank's view that Mr Davis could not be trusted to operate the truck appropriately in the future. If Mr Cruickshank had passed on the information regarding the nature of the handbrake he had received from the other director then it is likely that Mr Davis would have made that admission during the disciplinary meeting, which I find was likely to have had a bearing on the ultimate outcome.

[90] Mr Cruickshank also obtained information from one of Mr Davis' colleagues, who had emptied the rubbish bin at the scene of the accident, which he believed had undermined Mr Davis' credibility. Mr Davis was not aware of his colleague's information, so had no opportunity to comment on it, which I find prejudiced him.

[91] A fair and reasonable employer would comply with its statutory good faith obligations. I find that Kleana failed to do so because it breached s4(1A) of the Act.

Kleana's contribution to the accident

[92] I find that a fair and reasonable employer in Kleana's situation could not have dismissed Mr Davis for serious misconduct in all of the circumstances because it had

substantially contributed to the cause of the accident due to its failure to comply with its health and safety obligations towards its truck drivers.

[93] At least one of Kleana's directors was aware that the type of handbrake in the truck meant that it would not work properly unless the vehicle was parked with all of its wheels on a hard surface. That was obviously a potential hazard, which the company knew about and ought therefore to have addressed.

[94] Mr Cruickshank told me that Kleana did not have a health and safety policy. It did not have an accident register and it did not undertake any hazard identification in its workplace. These failures meant that Kleana failed to inform staff of the potential handbrake hazard, so nothing had been done by Kleana to eliminate, isolate or minimise that potential hazard. This was a serious failure by Kleana which put Mr Davis and others at an unacceptable risk of harm.

[95] Kleana also failed to give Mr Davis any induction, training, rules, or instructions around its expectations of him when parking his truck. If Kleana required Mr Davis to always turn the truck's wheels to the curb when parked and to always ensure all of the truck's wheels were on a hard surface when he parked, then it had an obligation to clearly inform him of that.

[96] I find that it failed to do so, which meant it was unfair for it to dismiss him because of those issues in circumstances where he could not reasonably be required to know of these requirements without being told about them.

[97] I accept Mr Davis' evidence that he did not know that he was doing anything wrong and I find that Kleana did nothing prior to the accident that would reasonably have alerted him to the fact that his actions on this occasion could potentially have caused an accident or would be viewed by Kleana as serious misconduct. I find that Mr Davis was completely unaware that the truck had to be parked on a hard surface or the handbrake would not work effectively until he heard Constable Matthews's evidence during the Authority's investigation.

[98] I note that Mr Davis told Kleana during the disciplinary meeting that he did not know that having the truck wheels on the grass would make the truck move. He said that he had been told by other colleagues that if there was one set of wheels on a hard surface then that would be fine. Mr Cruickshank did not dispute that Mr Davis had never been given any information to the contrary.

[99] I also find that Kleana knew of situations where other drivers had parked on grass and had got stuck but that no disciplinary action had been taken against those drivers. This meant that Kleana had previously impliedly condoned the practice of its truck drivers parking on grass, so it was unfair to categorise Mr Davis' actions as serious misconduct without first informing him that such conduct would be viewed as serious misconduct.

[100] I find that it was unfair for Kleana to dismiss Mr Davis for an issue that it had never previously treated as even a minor disciplinary concern.

Were any process defects minor and, if so, did they result in Mr Davis being treated unfairly?

[101] I find that the process defects identified above do not amount to minor defects. They were all substantial and fundamental failures that went to the heart of the matter.

[102] I find that Mr Davis was treated unfairly as a result of these process defects and, as such, s.103A(5) of the Act does not preclude the Authority from determining that his dismissal was unjustified.

Substantive justification

[103] I find that Kleana's decision that Mr Davis had engaged in serious misconduct was not one that a fair and reasonable employer could have arrived at in all the circumstances that existed at the time that Mr Davis was dismissed.

[104] I find that Mr Davis did not act deliberately, wilfully or negligently and that he did not know that his actions in parking the truck with one set of wheels on the grass and by failing to turn the wheels to the kerb were wrong.

[105] I was also satisfied after hearing from Mr Davis that, had he been instructed by Kleana to ensure that the truck was only parked on a hard surface and/or if he had been instructed that he had to always turn the wheels to the kerb when he parked the vehicle on a gradient, that he would have fully and properly complied with those instructions.

[106] I find that a fair and reasonable employer could not have concluded that it had lost trust and confidence in Mr Davis because he had parked the truck with one set of wheels on grass in circumstances where he did not know that that would create a risk

of the handbrake not holding the truck and where he had not turned the wheels of the truck to the kerb when it had been parked on a gradient, in circumstances where the police told me there was no legal requirement for him to do so, and where Kleana had never told him to do so.

[107] I also consider that Kleana must bear a large measure of responsibility for the accident for failing to give Mr Davis a proper induction, for failing to give him any training around the handbrake issues, for failing to provide any instructions relating to his parking of the truck, for failing to identify the handbrake as a potential hazard and for failing to take steps to eliminate, isolate or minimise that potential hazard.

[108] The Court of Appeal in *Northern Distribution Union v. BP Oil NZ Ltd*¹¹ recognised that whilst a definition of serious misconduct was not possible, what was usually required was conduct that deeply impaired, or was destructive of, that basic confidence or trust that was an essential element of the employment relationship. I find that a fair and reasonable employer could not have reached that conclusion on the evidence available at the time that Mr Davis was dismissed.

Outcome

[109] I make the following findings:

- (a) The manner in which Kleana unilaterally suspended Mr Davis unjustifiably disadvantaged him in his employment.
- (b) Kleana did not properly investigate the disciplinary concerns it had as a result of Mr Davis' accident;
- (c) Kleana breached its s.4(1A) duty of good faith obligations under the Act;
- (d) Kleana was unable to comply with three out of the four procedural requirements set out in s.103A(3) of the Act;
- (e) Kleana was not justified in concluding that Mr Davis had engaged in serious misconduct;

¹¹ [1992] 3 ERNZ 483

- (f) Dismissal was not a response that was available to a fair and reasonable employer in all of the circumstances.

[110] Accordingly, I find that Kleana's dismissal of Mr Davis was substantively and procedurally unjustified.

Remedies

Lost remuneration

[111] An employee has an obligation to mitigate their loss. Mr Davis told me that he had not taken any steps to mitigate his loss because he effectively believed he was unemployable as a driver until this matter had been resolved. Notwithstanding his view about that, Mr Davis was still required to take appropriate steps to seek alternative employment and I find that he did not do so.

[112] Accordingly, I consider that only six weeks' lost remuneration can be attributed to his unjustified dismissal. I find that any lost remuneration after this period is attributed to his failure to take any steps to mitigate his loss, and not to his unjustified dismissal. His failure to mitigate therefore breaks the chain of causation and means that he is not entitled to any more than six weeks' lost remuneration pursuant to s.128(2) of the Act.

Distress compensation

[113] I accept that Mr Davis was very distressed by his unjustified dismissal. It has had a very severe financial impact on him and his wife. It also effectively isolated him because he has been unable to afford to continue with his motor racing hobby which formed most of his social interaction.

[114] Mr Davis also suffered because he had to sell his motor vehicle which was his pride and joy. It was valued at over \$35,000 but he only got \$16,500 for it because of the forced sale due to his inability to afford any repayments on it. He had to downgrade to a motor vehicle that cost \$2,000.

[115] I consider that \$6,000 compensation pursuant to s.123(1)(c)(i) of the Act is appropriate to compensate Mr Davis for the hurt, humiliation and injury to feelings his unjustified dismissal caused him.

Contribution

[116] Having determined that Mr Davis has a personal grievance, the Authority is required to consider the extent to which his actions contributed towards the situation that gave rise to the personal grievance and if so required, reduce remedies that would otherwise have been awarded accordingly.

[117] I find that Mr Davis had not engaged in any culpable behaviour which would justify a reduction in the remedies awarded. Accordingly, remedies are not to be reduced.

Costs

[118] Mr Davis represented himself in person so no issue arises as to costs. He is however entitled to be reimbursed for his \$71.56 filing fee.

Orders

[119] Kleana is ordered to pay Mr Davis:

- (a) Six weeks' lost remuneration pursuant to s.128(2) of the Act;
- (b) \$6,500 pursuant to s.123(1)(c)(i) of the Act (being \$6,000 for the unjustified dismissal plus \$500 for the unjustified disadvantage claims); and
- (c) \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority