

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 319
3074372

BETWEEN NIGEL MAURICE EDE
Applicant

AND MBSS LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Harriet Enright, counsel for the Applicant
Alastair Espie, counsel for the Respondent,

Investigation Meeting: 16 and 17 July 2020 in Queenstown

Submissions Received: 24 July 2020

Date of Determination: 18 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nigel Maurice Ede was employed by MBSS Ltd, trading as MAXRaft, as a Panel Plan Technician in Queenstown until he was summarily dismissed on 20 March 2019.

[2] Mr Ede raised a personal grievance by a lawyer's email of 26 March 2019 alleging an unjustified dismissal that said "[A] detailed letter outlining our client's personal grievance will follow in due course". A further 4 July 2019 letter set out Mr Ede's grievance in significant detail.

[3] In a statement of problem filed at the Authority on 11 September 2019, Ms Ede claimed the dismissal was unjustified on both procedural and substantive grounds and he identified a disadvantage claim pertaining to a suspension preceding his dismissal that he claimed had been implemented in a procedurally unfair manner. Further, Mr Ede asserted that MBSS had failed to provide him with a safe workplace by not sufficiently recognising that an increasing workload with attendant expectations was causing him distress and anxiety.

[4] In the alternative, Mr Ede claimed that he had been constructively dismissed due to his employer proposing to outsource his work to an external provider but counsel accepted that this claim was unsustainable due to Mr Ede having not resigned and that factors he felt led to his dismissal, could be dealt with by the Authority considering the wider circumstances of his claimed unjustified dismissal. Essentially this element of Mr Ede's claim could be categorised as his belief that he was dismissed for an 'ulterior motive'.

[5] MBSS filed a statement in reply, asserting that Mr Ede's suspension was carried out in a procedurally fair manner, that an investigation confirmed his conduct to be sufficiently serious to warrant summary dismissal, and that the dismissal was effected by a "fair and reasonable process" and was substantively justified.

[6] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[7] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

Issues

[8] The issues to be decided are:

- (a) Was Mr Ede unjustifiably dismissed and/or unjustifiably disadvantaged by the actions of MBSS suspending him then summarily dismissing him?
- (b) Did MBSS breach their contractual and statutory duty to provide Mr Ede with a safe working environment?
- (c) If MBSS's actions in suspending and then dismissing Mr Ede do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering Mr Ede's claims for:
 - i. Lost wages; and
 - ii. Compensation under s 123(1)(c)(i) of the Act.
- (d) If Mr Ede is successful in all or any elements of his personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?
- (e) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[9] MBSS trading as MAXRaft is a Queenstown based company that designs and manufactures insulated foundation slabs for the building and construction industry. It has just fewer than twenty employees.

[10] In 2016 Mr Ede commenced working for MBSS from home on a casual basis as he had developed a method of drawing up panel plans for foundation slabs using Computer Aided Design software specific to MAXRaft's business needs. By 2017 Mr Ede was working full time on a permanent basis pursuant to an individual employment agreement

signed in November 2017. This led to Mr Ede eventually working in MBSS's Queenstown office and from June 2018 his position title changed to 'Technical Advisor'.

[11] Mr Ede says he signed an updated employment agreement that he did not retain a copy of and MBSS dispute this. I do not find that it is necessary to conclude a view on this to assess Mr Ede's grievances. The parties seem to agree that the aforementioned job title change occurred at this time, coinciding with an agreement that Mr Ede train an assistant to complete panel plans (Ivy Ding) and be allocated study time to complete his engineering degree.

[12] At this time MBSS was going through a growth spurt and company witnesses acknowledged that the work flow was constant. Mr Ede described feeling "under immense pressure while I was at work" with the most prevalent factor being the time to complete panel plans. MBSS witnesses disputed the extent of Mr Ede's workload pressure believing he brought some of it upon himself as he was a perfectionist.

[13] Central to Mr Ede's growing frustration was his view that insufficient information was being provided by clients for him to complete panel plans to his satisfaction; a view MBSS was more relaxed about and tension developed over this issue. This tension initially spilled over in a 14 February negative exchange Mr Ede had with a co-worker Samantha Drummond, MBSS's Operations Co-ordinator, who was tasked with liaising directly with clients, project management, on site supervisory staff and staff.

[14] Gary Lonsdale ("Gary"), a founder of MBSS and a current company director, was present in the office to witness the exchange. Gary related that Mr Ede had initiated the exchange and had angrily raised his voice and gesticulated at Ms Drummond about a job they were involved in and he had to intervene. This led to a meeting between Gary and Mr Ede that involved counselling about the exchange and attempts to reconcile Mr Ede and Ms Drummond to improve their interactions.

[15] Gary, who impressed in giving evidence, described an easy working relationship with Mr Ede as they were also friends socially and shared some common interests. He described Mr Ede's interactions with Ms Drummond as out of character and he had not observed any negative interactions between Mr Ede and other staff.

[16] A follow up meeting occurred involving Henry Edney another director and MBSS's general manager, who Ms Ede and Ms Drummond reported to. Mr Edney is based in Christchurch and assumes responsibility for general HR issues (with support from an external HR company – MyHR) and his role was described by Gary, as strategically and operationally pivotal to the company.

[17] Whilst Ms Drummond was very shaken by the 14 February incident (confirmed by Gary), she presented as a very confident person and Gary suggested she gave 'as good as she got' in the exchange with Mr Ede.

[18] From questioning Ms Drummond and Mr Ede, I perceived that there was a genuine clash of personalities between them involving a generational divide, an inability of each to accommodate the others' needs and very different ways of working. I did perceive however, that Mr Ede had been unwittingly patronising and rude in his discourse with Ms Drummond.

[19] In his evidence Mr Edney described Mr Ede as "diligent and technical" and possessing a lot of valuable knowledge for MBSS but that:

..... he is also a perfectionist in how he goes about his work. As a result, he had a lot of difficulty accepting that he would not always have the information he necessarily wanted when preparing panel plans".

[20] From examining Mr Ede's evidence and the evidence that others gave, the above appeared to be a reasonably accurate depiction of how Mr Ede was perceived in the workplace. It was also accepted by MBSS witnesses that Mr Ede was passionate and committed about his work.

[21] The impression I gained of Ms Drummond, reinforced by Gary's evidence was that she has a forthright personality (explaining that she felt she had to be so, to survive in a male dominated industry), is highly efficient and organised (Gary described her as "process driven") but perhaps lacking in awareness of how best to 'gel' with Mr Ede's personality. Gary described them as very different personality types. Ms Drummond also conceded she had difficulty in communication with others whereas no evidence was brought forward to suggest that Mr Ede had negative relationships other than with Ms Drummond.

[22] Gary had a coffee with Mr Ede to discuss the incident with Ms Drummond and related that this "went well" and that they discussed the dynamics of Mr Ede's working relationship with Ms Drummond and how that could improve.

[23] The upshot was that Mr Ede, although the protagonist in the 14 February incident was not made subject to a disciplinary process and MBSS appear to have put it down to communication style differences that Mr Edney sensibly resolved by encouraging more regular and structured communication. Mr Edney then generally set out his expectations of a "communication process" and operating practice going forward to Mr Ede and Ms Drummond, in a 20 February email also addressed to four other employees.

[24] The only criticism I would level against Mr Edney's handling of the situation is that he entered into undisclosed phone and later text correspondence with Ms Drummond that could be viewed as partisan to her concerns and may have compromised his impartiality (given that Ms Drummond did not raise a formal complaint and he did not talk to Mr Ede's to gain his perspective of the exchange) or as Mr Ede's counsel suggested, he allowed a more negative view of Mr Ede to be created than was warranted.

[25] In responding to questioning, Mr Edney said he felt the matter was resolved from feedback he got from Gary so he did not investigate it further and that he was surprised by Mr Ede's reported conduct. He had been made aware that both parties had had a dispute but was advised that Mr Ede had been the protagonist.

[26] Mr Edney had further cause to address Mr Ede's communication issues after a complaint from a client arising out of a conversation the client had with Mr Ede on 27 February. It would appear this involved an issue of Mr Ede getting "heated" and "frustrated" at not being able to obtain sufficient details on work plans that Mr Ede considered essential, and he had inappropriately expressed his frustration to the client.

[27] A 28 February 2019 email from Mr Edney to Mr Ede, suggested that he reflect on his professionalism in communication with clients and have a coffee with Gary to discuss how "we can stop this from happening. It concerns me that so soon after our catch up last week we are in this situation". Mr Edney concluded this email:

As I've stated a lot recently this is a difficult period which I take full responsibility for and everyone is under pressure because we are at maximum capacity with ordering. However I still expect us to always remain professional whether we are dealing with each other or a customer or supplier.

[28] Neither party alluded to the follow up conversation arising from the above exchange, so I can only assume that the matter was satisfactorily resolved.

[29] From this point in time, it was evident Mr Ede became more distressed about work pressures that despite some work being taken off him and given to Ms Ding, he perceived he was being pressed to speed up his output at the expense of accuracy. One flashpoint that persisted was whether it was always necessary to obtain digital files (DWGs) from clients with accurate dimensions for completing panel plans. Mr Ede claimed Mr Edney had specified such were not needed earlier in February 2019, then in March 2019 said they may be needed on some occasions which led to uncertainty from Mr Ede's perspective and a claim that it made his task more difficult to ensure accuracy.

[30] Mr Edney acknowledged Mr Ede felt passionate about making sure he always had accurate information but Mr Edney looked at it from a 'business' perspective.

[31] Mr Ede emailed Mr Edney and other directors on 1 February 2019, claiming that missing or insufficient information was constantly compromising his ability to produce

accurate panel plans. Mr Ede claimed his concerns were not addressed and he continued to get feedback that he was not processing panel plans fast enough.

[32] Of frustration to Mr Ede was an email he focussed on from Mr Edney of 6 March 2019, that he considered a flippant response to his concerns as it had opened with “[I] want you to be less stressed about it because life is too short” and concluded:

My summary right now is that we cannot expect every piece of information to be recorded because everyone is flat out, no one role is busier than anyone else and we are working close to capacity so we need to address this and make some changes to how we operate if we want to continue growing. The focus now is on making it happen and accepting this is where we’re at.

Don’t allow this stuff to affect you because in a couple of months we will have addressed the problem and we will all think what we worried about!

[33] Then later on 3 March, Mr Edney emailed the whole team indicating that he had caught up with Mr Ede that day and said Mr Ede had agreed as a “general rule” they should “ask for the consented plan from the customers only in the first instance” and Mr Edney gave further guidance:

... we need to get information, at the same time we need to be mindful how we go about doing it as we are a bespoke product and we are continually educating the market on how the process works. It will get better, but in the meantime we do not want to put customers off by making the whole process sound “too hard” as we won’t sell any slabs and then we won’t have any business at all.

[34] Mr Edney did conclude the aforementioned email with a suggestion: “[W]hen someone is difficult to get information from don’t get stressed about it, talk to someone and we can collectively try a different approach”. Mr Ede felt this did not resolve his concerns.

[35] A further significant issue emerged of MBSS contracting out some of Mr Ede’s tasks to accommodate the rising demand for their product, a decision to not update a software licence pertaining to Mr Ede’s responsibilities and Mr Ede’s perception that Ms Ding was being lined up to undertake more of his work tasks. Mr Ede in evidence suggested:

This made me feel that they weren’t understanding what I needed to do my job efficiently as I could. All I was trying to ensure I produced accurate and clear plans

to save time and money on mistakes and wastage, which in effect saved the company money.

[36] Matters became worse on 12 March 2019 when Bruce Vallance, a Nelson based Business Development Manager for MBSS, visited Queenstown and during an evening meal he had at Mr Ede's home, conversation strayed into workplace issues. Mr Ede perceived that Mr Vallance was wrongly critical of him and Mr Ede felt that Mr Vallance was conveying a message from Mr Edney critical of his approach to his timeliness of plan preparation.

[37] Mr Vallance conceded in evidence that during the dinner, he had expressed a view that client provided information was not always accurate and that Mr Ede needed to be more relaxed about working around this 'given' state of affairs.

[38] Whilst different accounts were given about what occurred at the evening meal, it was clear Mr Ede felt strongly that Mr Vallance had spoken critically and hurtfully of his approach to his work. This set the scene for the next day.

Wednesday 13 March meeting and aftermath

[39] Mr Ede indicated in evidence that he was planning to discuss with Mr Edney, who was in the Queenstown office on 13 March, his concern about Mr Vallance's comments to him the previous evening. However, he said he did not find an opportune moment as Mr Edney was busy in various meetings during the day.

[40] Around mid-afternoon, Mr Edney convened an office meeting the format of which was to brainstorm 'ideas' – this was the first such meeting Mr Edney had initiated. All those present at the meeting gave evidence at the Authority's investigation meeting and all remain in the employ of MBSS: Henry Edney, Jeremy Lonsdale ("Jeremy"), Ivy Ding, Samantha Drummond, Bruce Vallance and Nigel Ede.

[41] The consensus of participants was that Mr Ede had indicated at the outset (around 3pm) that he would be leaving early to attend a GP appointment at 4pm and Mr Edney was relaxed about this.

[42] Topics discussed at the meeting that Mr Edney highlighted as increasing his tension, included a request that he prepare a 3D animation for the company website, the need not to order DWG files from clients, a decision not to update software he felt he needed updating and further outsourcing of panel plan work. This led to an outburst from Mr Ede and a short terse exchange with Mr Edney. In a raised voice Mr Ede indicated that he would leave the meeting before he said something he would regret.

[43] I listened to the various accounts given by the witnesses present at the meeting, who basically confirmed up to this point in the meeting that they had been very surprised by the tone of Mr Ede's outburst but all agreed that his decision to leave the meeting was sensible as he was obviously very upset.

[44] I unfortunately had no reasonably contemporaneous account of the meeting as MBSS did not document the participants' recollections as part of an investigation; so I could only consider later recollections set out in written briefs and at the investigation meeting.

[45] Up to the point Mr Ede left the meeting, the background is relatively clear – he had an angry outburst and was upset with contextual factors I have described, contributing to such.

[46] Mr Ede in his written brief, suggested that:

Mr Edney did not consider my response at all. I said "I am going to leave now so I don't say something I regret." I accept that this may have been in a frustrated tone, as I was, in fact frustrated. I do not consider I was aggressive towards any of the staff.

[47] During the investigation meeting Mr Ede recalled that the 'trigger' for his outburst had been Ms Drummond mentioning DWG files but he claimed he did not yell (as claimed by some witnesses) and felt that his indicating he would have to leave before he said something further, was the 'professional' thing to do. When pressed, Mr Ede conceded that he had been "a little bit angry at not being listened to" and that he felt there was an 'agenda' going on at the meeting against him.

[48] I reasonably surmise Mr Ede's frame of mind was not good by the time the meeting commenced on 13 March and a build-up of contextual factors had been playing on his mind.

[49] By contrast, Mr Edney recalled during the meeting that when outsourcing was being discussed Mr Ede expressed his concerns at some length and appeared to be getting frustrated so Mr Edney tried to move the conversation by switching topic, but Mr Ede started yelling at him that he was not been listened to and turned more aggressive in his tone. Mr Edney conceded that it was a good idea that Mr Ede had walked out at that point.

[50] In written evidence Mr Vallance was less detailed about what occurred and could not recall the matters being discussed but said Mr Ede suddenly became agitated and then he "erupted". When questioned, Mr Vallance recalled Mr Ede raised his voice and when asked if he was yelling said "hard to tell cannot recall".

[51] Jeremy described not particularly noticing what led up to Mr Ede getting upset but that Mr Ede used a loud voice during his outburst.

[52] Despite using the term "yelling" in her written evidence, when asked if Mr Ede was yelling Ms Drummond said that she could not recall what was being said.

[53] Ms Ding, who had described a very good relationship with Mr Ede, indicated that Mr Ede did not yell although he was louder than normal but not aggressive. She recalls there being a clear disagreement between Mr Ede and Mr Edney and when Mr Ede left he had calmed down.

[54] I conclude that Mr Ede did react angrily to innocuous discussion at the meeting that he felt frustrated about and raised his voice. I consider that Mr Ede then wisely removed himself from the meeting as he was upset. What happened next between Mr Edney and Mr Ede is less clear as their actual conversation was not witnessed.

[55] What was established is that Mr Edney immediately pursued Mr Ede down the stairs through the office and into the car park. Jeremy described Mr Edney as being agitated and

Ms Ding recalls hearing them both being angry and “some yelling”. Mr Vallance also recalled hearing a “fairly heated discussion downstairs” with raised voices.

[56] Mr Edney claims he wanted to make sure Mr Ede left safely as there were other employees working in the office he had to pass through to get out.

[57] A verbal altercation then ensued between Mr Edney and Mr Ede.

[58] Mr Ede claims Mr Edney followed him out of the meeting as he was leaving and began loudly remonstrating with him about managerial prerogative and seemed angry, repeatedly stated he was not to return to work the next day or Friday.

[59] Mr Ede then recalls the conversation spilling outside the building and he responded in an equally loud voice and whilst pointing his finger at Mr Edney said he wanted to talk to him about “fucking Bruce” (a reference to Mr Vallance and the evening meal issue). Mr Ede recalls Mr Edney being close to him and having to go past him as he walked out the office.

[60] Mr Ede’s written evidence says: “I accept I flew off the handle during the meeting and when talking to Henry afterwards. I have apologised for this”.

[61] Mr Edney, who asserted that prior to issues arising in February and March he had a good working relationship with Mr Ede, suggested his decision to pursue Mr Ede was to diffuse the situation and get Mr Ede to calm down. His written evidence appeared to minimise his own contribution by stating :

While I don’t think I shouted at Nigel I accept I was frustrated by this outburst that had come out of nowhere so it is possible I raised my voice in trying to be heard by Nigel

[62] When questioned, Mr Edney says Mr Ede was arguing with him about outsourcing and not being listened too and he (Mr Edney) may have raised his voice.

[63] I conclude that it is more likely that Mr Edney followed Mr Ede out as he (Mr Edney) was agitated and wanted to make it clear to Mr Ede that he had to stay away from

work the next few days because of his outburst at the meeting – this was a spur of the moment decision and he perhaps regrets not simply leaving Mr Ede to calm down as he evidently was in the process of doing so.

[64] I do not find Mr Edney's suggestion that he was safeguarding other employees to be a credible explanation as Mr Ede evidently posed no physical threat to others. I also find as a contextual matter that Mr Edney was likewise getting frustrated with what he viewed as Mr Ede's pedantic approach and his emails expose this.

[65] Unfortunately, this led to a negative exchange at a time when Mr Ede was upset and he reacted to being pursued out of the building and more than likely, Mr Edney remonstrated with him while he was also angry. I do not perceive that Mr Edney acted with malice but I think he acted very unwisely and should have left Mr Ede to cool down and attend his medical appointment.

The suspension

[66] In analysing what happened next I make the observation that Mr Edney concedes in hindsight, that he failed to recognise that it was manifestly inappropriate that he be so heavily involved during the next steps in the process. I accept that although Mr Edney handled all HR issues as part of his managerial portfolio and had no in-house HR support, he was out of his depth in running a suspension/disciplinary process.

[67] To his credit, Mr Edney sought immediate advice from a MyHR consultant and proceeded to be guided by them throughout the process. I find the advice at this point and subsequently was at times questionable in its quality. I hasten to add that current counsel acting for MBSS was not involved at this point and were instructed at the investigation stage.

[68] A good starting point was that the MyHR consultant advised that Mr Edney should consider suspending Mr Ede on full pay while they commenced an investigation. It was not

clear however, if MBSS referred to Mr Ede's employment agreement - it did contain a "Suspension" provision at clause [33] indicating that the employer will "discuss the proposal of suspension with the Employee and consider the Employee's views before making a decision to suspend".

[69] Mr Edney claimed he rang Mr Ede's cell-phone but was unable to connect. He left a message but then before he got a response he "sent an email to Nigel which confirmed we had decided to suspend him". Cell phone records disclosed after the meeting did not identify an outward call from Mr Edney to Mr Ede (Mr Edney claimed that he may have used a landline or another phone).

[70] Mr Edney's suspension email was sent in the early evening on 13 March. It said:

Following your behaviour today I am proposing to suspend you on full pay until the end of this working week (15.3.19). This means you will not be working Thursday or Friday this week. You have been suspended from work due to the serious nature of this incident and potential outcome.

I am emailing now to confirm to you your period of paid suspension while we conduct a preliminary investigation into your behaviour today. You will be provided with a full summary of our findings for review and you will be provided with an opportunity to respond. You are entitled to seek advice to assist with your response.

We will be confirming this information to you in writing at the end of this week. In our letter we will also indicate a proposed meeting date and time for you to present your response.

At this stage I am happy for you to continue to have access to your vehicle until an outcome is reached after our meeting next week.

[71] Mr Edney advised that his MyHR consultant drafted the above 'mixed message' email and also advised him that if Mr Ede called him, he should not engage in any discussion. Quite how Mr Ede was supposed to engage his contractual right to give feedback on the suspension 'proposal' is unclear. It was also apparent that at the time the email was drafted and sent, that Mr Edney although not using such explicit terminology, had already effectively suspended Mr Ede by telling him in the car-park exchange not to come into work for the remainder of the week.

[72] After receiving the email, Mr Ede said he immediately called Mr Edney and “tried to apologise for my behaviour in swearing and pointing my finger. I asked if I could come into the office to discuss it with Henry who said no”.

[73] Mr Edney recalls Mr Ede ringing him around 6:30 pm and having a brief discussion and that Mr Ede said “well I am sorry” after Mr Edney had made it clear the incident was serious and that he was suspended.

[74] In his written evidence Mr Edney claimed that Mr Ede had no issue with the suspension. I find that to lack credibility as it was clear that at this point in time Mr Ede only wanted to engage and resolve personal matters with Mr Edney rather than discuss the appropriateness of a suspension that he naturally, from the confusing email content and the prior discussion with Mr Edney, thought had already been imposed.

[75] On being questioned, Mr Edney conceded that he shut down this short conversation on the MyHR consultant’s advice (and that he was too busy as he had a family dinner engagement to attend to).

[76] Sharon Ede (Mr Ede’s partner), gave evidence that Mr Ede returned home upset on 13 March and advised her of his altercation with Mr Edney indicating that he needed to apologise to him; so, he called him after receiving the email. Mrs Ede said the phone was on speakerphone and “Nigel tried to apologise if what he’d said to Henry had upset him but Henry didn’t acknowledge it”. Mrs Ede said nothing was discussed about the suspension.

[77] I conclude that no discussion occurred about the suspension and Mr Ede had no input into the decision to suspend him that had been pre-determined by Mr Edney and communicated by email – a fact Mr Edney conceded during the investigation meeting.

[78] This was a breach of Mr Ede’s employment agreement and procedural fairness.

The disciplinary process

[79] What occurred next was as MBSS directors conceded, “scripted’ heavily by their MyHR Consultant and reflective of Mr Edney and others’ inexperience.

[80] The first problem was a reference to conducting a “preliminary investigation” when none took place and Mr Edney, despite being essentially the main ‘complainant’, continuing to play a leading role. Whilst Mr Edney was not the sole decision-maker it has emerged that he very much shaped the process and I find that this was unfair to Mr Ede. Judge Travis in *Walker v Boehringer (NZ Ltd)*, a case involving a manager operating as a complainant and sole-decision maker, opines that where the person the employee offended then makes a decision to dismiss it is suggestive of pre-determination and that it is procedurally an unwise employer who allows this to happen and in this case found no fairly conducted enquiry occurred.¹

[81] Mr Edney claimed “as both myself and Jeremy had been in attendance and seen what happened, we didn’t undertake further enquiries”.

[82] It emerged during the hearing that Mr Edney had also phoned Ms Drummond immediately after the 13 March meeting. Mr Edney rang her in the early evening (5:30pm) which he said was to ascertain if she was ‘ok’. Ms Drummond could not recall what was said by Mr Edney but her response was there was no problem and then Mr Edney advised her that Mr Ede was not coming in to work the next day. This call was logged at 4 minutes 51 seconds duration and Mr Edney’s phone records also show an undisclosed call to Mr Vallance at 5:29 pm lasting 31 seconds (this may have been him leaving a message).

[83] If this was some attempt at an investigation, Mr Edney did not put anything Ms Drummond said to him during the call or subsequently, to Mr Ede as an ongoing concern and Mr Edney did not document the conversations or interview Ms Ding who was also present at the 13 March meeting.

¹ *Walker v Boehringer Ingelheim (NZ) Ltd* AEC119/95.

Invite to disciplinary meeting

[84] A 15 March letter from Mr Edney to Mr Ede again drafted by the MyHR Consultant and entitled “Notification of Meeting – Potential Serious Misconduct” commenced with “[W]e would like to meet with you regarding serious concerns the company has about your conduct at work”. The “we” and who the decision maker would be was not specified.

[85] The concerns were then detailed in a mix of allegations and conclusions on how Mr Ede had conducted himself. By implication, the content could only have come from how Mr Edney related his recall of events to the MyHR Consultant (as he conceded he was the only liaison with that party). No mention is made of an ‘investigation’.

[86] The concerns in summary were that Mr Ede had during the 13 March meeting and its immediate aftermath:

- become frustrated and raised his voice;
- caused Mr Edney to end the meeting and necessitated that he follow Mr Ede downstairs to “ascertain the reason for your outburst” (a position Mr Edney did not explain as being the purpose for such during the subsequent disciplinary meeting and the Authority investigation meeting);
- responded to Mr Edney by raising his voice at him and in an “aggressive” manner, directed swear words at him and made gestures of a threatening manner (“pointing to me with your hand close to my face”);
- indicated that he “felt the need to go home” (when it was known that Mr Ede had already disclosed he was leaving to go to a GP appointment).

[87] The letter then described the suspension process or more accurately tried to reconstruct it, as being consistent with prior consultation on this decision occurring when

none had. It then outlined what can only have been Mr Edney's recollection of the exchanges by stating "we' are seeking an explanation as to:

.... why you appear to have considered it appropriate to demonstrate aggression, this tone of communication In [sic] front of other team members, and directly towards a member of senior management.

Conducting yourself in a manner that is considered to be aggressive, using swear words and making threatening gestures towards others, is inconsistent with our expectations of you as an employee. If our concerns are upheld, this may amount to serious misconduct.

[88] The letter then refers to "previous informal discussions in regard to your conduct at work" and:

Despite this communication, it appears that you may not have met the expectations of the company to a serious level. It is therefore our initial assessment that the occurrence of these issues may be matters of serious misconduct to an extent that we are considering disciplinary action up to and including **Summary Dismissal** (termination of your employment without notice).

Before we make any final decisions we are seeking a response from you in relation to these issues and the potential outcome. You are entitled to seek advice to assist with your response.

[89] The letter stated the purpose of the 19 March meeting "is for you to present your response to the issues and the potential outcome", explained that Mr Ede could bring a lawyer to the meeting and flagged summary dismissal as a potential outcome. Without further explanation on other terms of such, the letter also advised Mr Ede to return his company laptop for the duration of the suspension.

[90] The letter was evidently a 'template' as it referred to wishing to "meet with you again" when no other meeting had taken place. It concluded in its penultimate sentence with: "[A]n outcome of this process may be a decision to proceed with Summary Dismissal".

[91] Mr Ede said he did seek legal advice prior to the 19 March meeting and then decided he would attend with a friend as a support person, give an explanation to the points raised, and provide context to what had led up to his outburst. I did find it puzzling however that prior to the meeting Mr Ede chose not to request the results of the 'investigation' MBSS

had promised to carry out and provide him the results of for comment. I do acknowledge however, that 15 March 2019 fell on a Friday.

[92] Although the 15 March letter was not consistent with the approach suggested in the suspension email, I find that it did set out MBSS's concerns with a comprehensible degree of particularity and a potential outcome.

The 19 March disciplinary meeting

[93] Before embarking on an analysis of the 19 March meeting, it was clear from questioning all three directors who attended that they did not prepare a plan for the meeting on what they would ask Mr Ede as they had generally decided to follow the MyHR Consultant's guidance and a prepared script (that also in its text assumes an 'investigation' had already taken place). Mr Edney claimed that the MyHR consultant directed him to ask nothing and only listen to Mr Ede's view of the situation – a position that was inconsistent with the provided meeting script that stated in part:

.... ask any pre-arranged questions you have that may be relevant to your decision.
This can include points from the investigation or simple direct questions such as
“did you do it”?

[94] The Authority was provided with a transcript and a digital recording of the meeting that was attended by Gary Lonsdale, Jeremy Lonsdale, Henry Edney, Nigel Ede and his support person, Helen Pewhairangi. The meeting took 28 minutes (concluding at 11:34 am) and upon listening to the recording, I find that it was conducted in an amicable and calm manner by all parties.

[95] Despite Mr Ede recording the meeting by agreement, MBSS did not record it or ask that he provide them a copy of the recording and relied upon Gary's very brief notes of such that failed to record Mr Ede's apology. The brief notes, did capture some of the essence of Mr Ede's responses and the frustrations he described as contextual factors. What was clear from listening to the tape was:

- Gary, who led the meeting at the outset, claimed its purpose was to hear Mr Ede's responses to the issues set out in the 15 March letter. Mr Ede then says he is stuck for words and wants to first hear some details of the investigation he was promised but Gary responds that "as we have said it's not an investigation". Mr Ede described this as causing him some confusion.
- Mr Ede somewhat disingenuously, in my view, implied that the first issue of MBSS having recently explored issues of his inappropriate conduct with a co-worker (impliedly the Ms Drummond interchange) and a customer could not be addressed because they had not been "formally" raised with him. However, Gary did not press the point that such discussions had occurred involving him and email exchanges between Mr Edney and, Mr Ede had confirmed such and the 15 March meeting invite identified such as recent "informal discussions in regard to your conduct at work". I find Mr Ede was fully aware of the two recent incidents being brought to his attention and had an opportunity to give his perspective that he wasted.
- Mr Ede was not questioned or asked to expand upon his reasonably full contextual explanation for why he got so frustrated on 13 March. Mr Ede cited email exchanges that highlighted what he saw as unclear or changing stances on what information was required from clients and his frustration with this – this was worth exploring as the frustrations appeared genuine.
- When Mr Ede explained that it was Mr Edney who had followed him downstairs and challenged his behaviour, not affording the time to calm down and then moved on to explain he did not swear at Mr Edney – no questions were asked. Gary merely said "I suppose that addresses the area with, for the meeting anyhow" and then moved on (albeit after asking Mr Ede if he had anything to add).

- At this point in the meeting Gary sought to bring the meeting to what was objectively a surprisingly premature end with no summary of MBSS's concerns being stated to Mr Ede. Gary and Mr Edney then appear to disagree in front of Mr Ede on how much time they will spend on making a decision with Gary exploring catching up as soon as possible and Mr Edney saying "Nah, I need to talk to the guys at MyHR". However, the meeting did not end and Ms Pewhairangi proceeded to calmly suggest that Mr Ede's behaviour was explainable in the context of his distress and that his outburst was a defence mechanism as he felt somewhat besieged.
- Gary did not challenge Ms Pewhairangi's advocacy and even concurs with her suggestion that Mr Ede removing himself from the situation was a good idea. When she ends her contribution Gary asks "do you have anything" and Mr Ede proceeds to apologise by saying he deeply regretted having flown off the handle and he wished he had "done it a completely different way". Before he can expand on this, Gary cuts in and makes an unequivocally positive response "I think they are the words that we wanted to hear – and you know to be honest we haven't heard those words you just said" (I find this to be an open and unreserved acceptance of Mr Ede's apology).
- Mr Edney then proceeds to explain his and the team perspective but does not show any contrition for his following Mr Ede downstairs and remonstrating with him.
- Mr Ede then explains how alienated he is feeling in the company and that it is affecting his health.
- When Mr Ede twice referred to his stress and medical issues no questions were asked to elicit further information on what MBSS could potentially assist with

(likewise Mr Ede provided no medical evidence to support this either at the time or subsequently to the Authority).

- Mr Ede and Mr Edney then in a calm manner, discuss how they have been interacting with each other and Gary stops the conversation saying they are straying into a different area “and we just want to keep a straight focus” but then he closes down the meeting and changes tack on a response time by stating he will get back to Mr Ede in an hour or two. The meeting ended around 11:30 am. It was not made clear to Mr Ede at this point what the next step in the decision-making process would be.

Process leading up to decision to dismiss

[96] Whilst having no full notes of the meeting of 19 March, all three directors agreed that they met shortly afterwards to discuss Mr Ede’s responses. Jeremy recalled the meeting and that during it his father (Gary) expressed disappointment in Mr Ede and that they “all agreed there wasn’t really any contrition from him about what had happened”. Jeremy’s written statement related a call from his father later in the afternoon to discuss a bit more what they had heard from Mr Ede and whether it was workable to separate him from other office staff and when that was discounted he stated “[W]e therefore felt that dismissal was the way we would likely need to go”.

[97] When questioned, Jeremy could not recall the length of the 19 March deliberation meeting and he indicated that Mr Edney had typed up and circulated a summary after the meeting and that they decided to dismiss Mr Ede “later in the afternoon” of 19 March.

[98] Although not a factor detailed in the notes or put squarely to Mr Ede, Jeremy said one of the significant but not sole reasons for dismissing Mr Ede, was to protect Ms Drummond.

[99] Jeremy focused on his belief that Mr Ede could have kept his job if he had shown remorse but that his apology had to be coaxed out of him and was not genuine – he felt Mr Ede just “did not get it” and kept going over his justification for getting upset rather than taking ownership of his behaviour. He did recall that Mr Edney had discussed an earlier attempt Mr Ede had made to apologise to him on the evening of 13 March but Mr Edney had advised he felt that it was not genuine.

[100] Gary who was not present during the 13 March ‘ideas’ meeting, disclosed he first became aware of the situation on being rung by Mr Edney later on that day and “informed of the details” and he told Mr Edney to contact MyHR – he then said he was aware of the content of the email subsequently sent that suspended Mr Ede and he supported that decision. Jeremy also called him concerned about the seriousness of the incident.

[101] When asked did you then turn your mind to carrying out an investigation and whether Mr Edney was actually the complainant, Gary said “no, I left that to MyHR to guide Mr Edney”. Likewise Gary indicated that he allowed Mr Edney to put together the 15 March invite letter with MyHR input and that he considered the 19 March meeting was a “chance to gather information” and allow Mr Ede to put his side of what had occurred.

[102] When asked if Mr Edney had disclosed that Mr Ede rang him to attempt an apology on the evening of 13 March, Gary said not that he could recall – he did not know that.

[103] Turning to the 19 March meeting, Gary indicated that he allowed Mr Edney to attend because he handled HR matters and because of his position in the company. When asked what preparation they carried out beforehand and why no questions were devised for the meeting - Gary indicated that they prepared no questions and simply followed the MyHR prepared script.

[104] After the meeting Gary indicated that he, Jeremy and Mr Edney had lunch off - site to discuss what took place and that they resolved that Mr Ede had not made a sufficient

attempt at a genuine apology or shown any real remorse and that “Jeremy and Henry agreed that we needed to propose dismissal”.

[105] In being questioned on how he perceived Mr Ede’s behaviour at the 13 March incident, Mr Edney conceded that he had never experienced such a reaction from Mr Ede previously and that Mr Ede had not been aggressive towards him in the past but he believed that the conduct was similar to the incident with Ms Drummond.

[106] Mr Edney described that in the days following the incident on 13 March and before meeting Mr Ede, he had discussed with Gary and Jeremy how they would address the issue they all agreed “that having reflected on the incident, this was a serious issue and that we were going to need to consider dismissal as a possible outcome” and, that whilst he normally dealt with HR issues, Gary and Jeremy would be involved with all decision making but he “would continue to lead communications as I typically would within the business”.

[107] Mr Edney accepted that the transcript prepared by Mr Ede was an accurate record of what was said at the meeting apart from some mistakes in attributing who said what (mainly that Gary and not Jeremy led the meeting).

[108] Mr Edney noted that Mr Ede had conceded his inappropriate behaviour at the 13 March meeting and only contested Mr Edney’s stance that he had been sworn at during the meeting aftermath. There was no evidence given that Gary and Jeremy did consider the distinction made by Mr Ede on whether he swore at Ms Edney or as he contended, swore abstractly in reference to his frustration about Mr Vallance’s conduct at his home on 12 March.

The disciplinary meeting aftermath

[109] Outlining what occurred after the 19 March meeting, Mr Edney said he met immediately afterwards with Gary and Jeremy and that after a long discussion:

We all considered that Nigel’s explanations for the outburst did not excuse his behaviour and that he did not seem to appreciate why his behaviour was

inappropriate and: As a result we were concerned that there was a high likelihood that this type of behaviour could happen again and that dismissal was the appropriate outcome.

[110] It would appear that the notes Mr Edney made were first created shortly before the 19 March meeting commenced then modified after the meeting at 12:07 pm and then forwarded to MyHR as an email attachment at 12:13 pm. This email indicated:

The attached has been added to the platform. We feel that he talked about why this happened but did not accept that his actions were unacceptable and have no confidence that this will not happen in future.

We also do not accept that we are the cause of his frustration and it does not excuse this type of behaviour.

[111] Given that the meeting on 19 March with Mr Ede ended at 11:28 am and the three directors met off-site, which would have involved travel time; it is apparent that the meeting deciding Mr Ede's fate took at the most around 20 - 25 minutes.

[112] Mr Edney's notes as emailed to Jeremy and Gary, suggest that counterbalancing contextual factors were traversed but that the basic step of first discussing whether the conduct in question could amount to serious misconduct was not undertaken – this appears to have been a 'given' and no alternative such as a final warning, were contemplated.

[113] If the notes are accurate about what was discussed a particular item of concern was in response to Mr Ede indicating that the job was causing him stress and affecting his health they concluded that they were a supportive company but "this has not been brought to our attention and does not excuse the behaviour". Evidence provided suggested otherwise, ranging from Gary being aware of Mr Ede's domestic issues and that he had high blood pressure and observations by all of Mr Ede acting out of character. Mr Vallance also gave evidence that after the dinner exchange he formed the opinion that Mr Ede was stressed and says he discussed this with Mr Edney on the morning of 13 March and that he was generally concerned for Mr Ede's well-being.

[114] MBSS had no employee assistance provider at the time. Mr Edney acknowledged that they have one now but during the events leading up to Mr Ede's dismissal no such counselling support was considered.

[115] It was also apparent from the notes that no discussion took place around the issue of what happened between Mr Edney and Mr Ede in the immediate aftermath of the 13 March meeting and any assessment of how aggressive Mr Ede had actually been was not undertaken. I find it is more likely that Mr Edney's version of events was accepted unquestioned. From Mr Edney's perspective, Mr Ede had no 'insight' into his behaviour and its impact on others.

The next step

Having made a collective decision to dismiss Mr Ede, Mr Edney then contacted MyHR to get assistance with preparing the next communication and emailed this to Mr Ede at 4:20pm on 19 March thanking him for attending the meeting that day and inviting him to a 9 am meeting with Gary the next day. No purpose for meeting was outlined and no indication was given that Mr Ede should be represented – Mr Ede was asked to confirm the meeting time with Gary as "I will be away".

[116] The summary notes Mr Edney had prepared were not disclosed to Mr Ede. This is not surprising as they seemed to be only for the purpose of reaching a preliminary decision, but to ensure fairness I find, Mr Edney should have expressed their specific concerns about Mr Ede's responses and their belief that Mr Ede had not convinced them that he would not repeat his behaviour in future – this was the predominant reason for the dismissal decision that had evidently already been made on 19 March.

[117] Oral evidence also suggested that the directors took into account a suggestion from Ms Drummond that she may resign if Mr Ede continued in employment but this was not specifically put to Mr Ede or included in Mr Edney's notes.

The dismissal meeting

[118] On 20 March at 9am, Gary met with Mr Ede alone. A MyHR consultant provided Gary with a script for the meeting, who by this point had Mr Edney's notes and the email of 19 March indicating the direction MBSS wished to follow. From this information MyHR prepared the script for the 20 March meeting describing the meeting as an "OUTCOME MEETING" and a directive to communicate that the employer had fairly considered Mr Ede's responses and factored them into their decision-making but that MBSS had found:

Your explanation for the incident was that you were frustrated with changes occurring within the business and that you were fed up with being blamed for what he was doing. We do not consider this to be a satisfactory explanation.

Conducting yourself at work in a manner that is considered aggressive by using swear words and threatening gestures is a serious breach of our trust and confidence in you as an employee.

As a result of these findings, we consider that the allegations of serious misconduct against you have been upheld in relation to the incident that occurred on Wednesday 13 March.

We are therefore proposing to terminate your employment by way of a summary dismissal (effective immediately).

Before we finalise this decision, you are entitled to consider whether or not you think this proposed outcome is fair and provide us with a response. We will consider your views then confirm the outcome to you.

[119] The notes contained in the MyHR script suggested an adjournment occur of 10-15 minutes and after listening to Mr Ede's response "make a final decision". Given the instructions received and notes scripted this was clearly inducing MBSS into an artifice of pretending to fairly consider Mr Ede's further mitigating issues.

[120] Mr Ede's recollection of the 20 March meeting was that Gary first asked where his support person was and Mr Ede explained that he had not been informed he was allowed one and, then Gary stated "off the record" that he could resign if he wanted too and potentially be engaged as a contractor. Mr Ede said his response to this was negative as he felt Mr Edney would not allocate him any work.

[121] Mr Ede then indicated Gary “read a script and asked for my response” and that he (Mr Ede) expressed his concern that the proposed dismissal was “unfair and unjust”. Gary’s hand written notes say Mr Ede said “feel hard done by and victimised. I did phone Henry and apologised on the night it happened”.

[122] Mr Ede then said that Gary, after hearing his brief response, went back to reading the script explaining that his employment was now terminated and the reasons why. Mr Ede was adamant that no break occurred in the meeting.

[123] Mr Ede says Gary then assisted him with collecting his belongings and drove him home. The meeting concluded at 9:15 am (as confirmed by Gary’s notes) and Mr Ede recalls leaving the office at 9:45 am and arriving home around 10:15 am.

[124] During the drive Mr Ede claimed Gary said he thought he should not be dismissed but Mr Edney had insisted on that option. At the investigation meeting Mr Ede recalled Gary had said he did not want to do it and had tried to talk Henry out of it.

[125] Gary’s written evidence explained that he felt very uncomfortable convening the 20 March meeting due to his friendship with Mr Ede – he confirmed Jeremy and Mr Edney were in Wellington on the day. He recalled “[I] relied on a script from MyHR to explain the views we had come to, and to invite Nigel to provide any further responses”. Gary recalled that Mr Ede was reluctant to say much, he referred to an earlier apology but:

.... he still didn’t seem sorry or volunteer any apology to me. Nothing he said indicated to me that this sort of thing wouldn’t happen again in the future.

[126] Gary conceded that he explored Mr Ede resigning at the commencement of the meeting. Whilst I would not go as far as to find this was a deliberate attempt to constructively dismiss Mr Ede as could reasonably be found in some circumstances – I have to consider that Mr Ede was not represented and Gary did not give him more time to consider the ‘offer’. It was technically a cloaked message of ‘resign or be dismissed’. I do conclude that this could well have had a chilling impact on Mr Ede’s subsequent response

outlining mitigating factors as it could have reinforced the futility of him trying to persuade Gary away from a dismissal decision. The latter premise could reasonably be reinforced by Gary reading from the script and detailing why he intended to dismiss him rather than giving Mr Ede more space to discuss what he could do to resolve matters or put to him his (Gary's) view of the situation for further comment.

[127] In finding that it was not a deliberate strategy, I prefer a view that Gary went 'off script' proposing a resignation at the outset of the meeting - genuinely believing it was a way of preserving a friend's dignity, albeit not in accord with accepted legal tenets of procedural fairness.

[128] Gary claimed in written evidence that he took a break to call Jeremy and Mr Edney but when questioned, conceded that was not so or that he could not recall the conversation and, that the meeting was a bit of a blur and he did not take full notes.

[129] Gary then conceded that he may have dismissed Mr Ede during the 20 March meeting. I suspect that due to lapse of time the inconsistency of his evidence could be explained by him likely discussing with the other two directors what had occurred later in the day.

[130] I make the observation that Gary appeared wholly reliant on the MyHR script that he had not been involved in preparing and that this was a less than an ideal situation.

[131] In his written evidence, Mr Edney claimed there was a break in the 20 March meeting and that Gary called him to go through Mr Ede's response but he provided no evidence of the call and I find it more likely than not given Gary's oral evidence and his notes not indicating a break, that this call did not occur or was made after the meeting.

[132] Subsequent to the investigation meeting, Mr Edney disclosed that he had emailed MyHR at 11:01 am on 20 March indicating:

We went ahead with Nigel's termination of employment today and met with him this morning. Please can we have the letter that confirms everything? I am in Wellington so this was handled by another Director of the company.

[133] Whilst needing guidance it was clear MBSS directors did not get advice on how to assess the threshold question of what could constitute 'serious misconduct' or how to carefully assess mitigating circumstances – I find that this was a dismissal enacted in a “painting by numbers” manner.

[134] Gary confirmed that no option apart from dismissal was discussed at this point in the process.

Mr Ede's reaction

[135] Mr Ede appeared, with some justification, to take a fatalistic approach to the final meeting believing a decision had already been made. I find it would have been more fair and reasonable had MBSS set out their initial reasoning beforehand, and then allowed Mr Ede more time to absorb the finding that he had been considered to have committed an act of serious misconduct and had from their perspective failed to show contrition. This would have properly allowed Mr Ede time to get some professional advice on constructing an approach to setting out mitigating factors.

[136] Whilst I found Mr Ede to be articulate in giving evidence, he genuinely struggled to comprehend why he had been dismissed and he did not express his emotions very clearly. I did not consider this and other inconsistencies of recall and sequencing of events that Mr Ede displayed formed enough evidence to question his credibility. Rather, Mr Ede displayed distress when giving evidence and significant time has elapsed since the events in question.

[137] Gary conceded when questioned that he should have inquired further into Mr Ede's workplace stressors, that he had 'pigeon holed' him as being a perfectionist, and that he had not considered all contextual factors as to what led to the outburst on 13 March. However, he denied the exchange in the car after the dismissal and indicated all three directors had

affirmed the dismissal decision. Gary expressed genuine distress at having to dismiss Mr Ede as they had previously enjoyed a good personal relationship.

The dismissal letter

[138] Mr Ede says the 20 March dismissal letter was received by him at 11:31 am that day and was signed by Henry Edney. The timing suggests that it was either drafted in haste or prepared before the final meeting. I do not need to make a decisive finding on this as it is clear from evidence that the decision to dismiss was pretty firm prior to the 20 March meeting and that the factors that led to it have to be examined in terms of a statutory test.

[139] Given Mr Edney was in Wellington this was perhaps a letter that little time was spent on and MyHR did most of the drafting. It is formatted in what looks like a template. The dismissal effective that day and reason for such is expressed briefly as:

We confirmed with you that the allegations of serious misconduct against you were upheld in relation to conducting yourself at work in a manner that is considered aggressive by using swear words and threatening gestures at work on Wednesday 13 March.

[140] In submissions MBSS's counsel suggested Mr Ede's credibility in giving evidence was at issue due to him still not being able to describe why he had been dismissed. I find that this was not unusual in the confused circumstances of the process and that the dismissal letter of 20 March and response to Mr Ede's personal grievance did not describe MBSS directors' belief that he had failed to convince them of his contriteness, and had not provided sufficient assurances on how he intended to modify his behaviour going forward.

Post dismissal issue

[141] I also heard evidence from Paula Hugens, a director of a local structural engineering company, who subsequently employed Mr Ede in September 2019 without any concerns. Ms Hugens described an unsolicited phone call she received from Mr Edney shortly after Mr Ede left MBSS that indicated that his dismissal was due to involvement in an incident that "raised issues of the safety for his other staff".

[142] Whilst initially Mr Edney could not recall the telephone conversation and claimed he would not have disclosed “any specific information to Paula around why Nigel was not working with us”, on being questioned on such and after Ms Hugens’ oral evidence was put to him, he conceded that he knew Ms Hugens was connected with Mr Ede (as she was with MBSS having undertaken consultancy work for them) and that he may have discussed that there had been an ‘incident’, as she was pushing to inquire why Mr Ede had left MBSS, but he denied giving further details.

[143] It has been held that it is possible to award compensation for unreasonable conduct an employer engages in post-dismissal if it aggravates the distress caused by an unjustified dismissal². This would require some evidence of significant detriment or loss to Mr Ede and none was provided beyond a suggestion that he did not approach Ms Hugens initially seeking employment due to Mr Edney’s negative comments.

[144] Given the positive relationship Mr Ede had with Ms Hugens and her evidence not establishing that she thought less of Mr Ede’s reputation, I find no detriment occurred beyond Mr Ede understandably feeling his privacy had been breached, and trepidation that Mr Edney could disclose such information to other prospective employers. Therefore I am not required to make a finding on what exactly was said from hearing the conflicting accounts of the conversation but I do not condone Mr Edney providing unsolicited information in these circumstances. Mr Ede may well have an ongoing action for breach of privacy in another jurisdiction.

Was the dismissal justified?

[145] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in

² See *Sisson T/A Edgeware Law v Lewis* [2004] 1ERNZ at [75]. See also a contra analysis in *Richora v Group Ltd v Cheng* [2018] NZEmpC113 where CJ Inglis describes at [48]-[50] that subsequent employer conduct may not fall within a s123 Employment Relations Act 2000 remedy as not being connected to the grievance.

all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applied as set out in s 4 of the Act.

[146] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

[147] My initial finding is that MBSS had no problem with resources and access to advice but they did not conduct an unbiased investigation into what had occurred in the aftermath of the 13 March meeting and should have done so.

[148] Allowing Mr Edney's continued involvement in the disciplinary process and decision to dismiss was not the action of a fair and reasonable employer. Mr Edney was a participant in the events that led to the dismissal, the only contact with MBSS's HR advisor, and he took part in the decision to dismiss. Mr Edney essentially judged Mr Ede, without having sufficient regard to his own contribution to the situation.

[149] I find MBSS did not initially properly identify concerns and distinguish them from Mr Edney's own perspective when putting them to Mr Ede for consideration before the disciplinary meeting; although I accept that Mr Ede would have been fully aware of the general nature of the concerns as after the meeting on 13 March he felt the need to apologise to Mr Edney. I do acknowledge though, as MBSS's counsel has asserted that Mr Ede had time to reflect upon his approach to the 13 March meeting and initially time to get legal advice.

[150] I find that Mr Ede at the 19 March meeting had a "reasonable opportunity"³ to respond to MBSS's concerns and was politely listened to but I find that the lack of exploration by MBSS of some of the responses provided did display that all three directors were not approaching the matter with an 'open' mind.

[151] Whether MBSS genuinely considered Mr Ede's responses is I find in doubt, and the manner by which they approached the final meeting I find lacked objectivity - this may have been because of Mr Edney's continued involvement in the deliberations.

[152] Mr Ede was then not afforded sufficient warning of MBSS's proposal to dismiss and time to get advice to assist him with presenting what were credible mitigating factors. There was no reason for the haste other than MBSS 'going through the motions' of a process that I find was flawed and deficient in procedural fairness.

[153] MBSS failed to treat all involved in the 13 March meeting aftermath in the same manner - Mr Edney was not the subject of an investigation or even scrutiny about his contribution to the matter escalating. I am also not wholly convinced that these factors support a premise that the directors approached the decision to dismiss without the influence of a degree of bias due to the involvement of Mr Edney.

[154] Although not a mitigating factor for the employer, I make an observation that MBSS was poorly served by their HR advisor. The advisor would have been aware that Mr Edney

³ Section 103A (3)(c).

was inexperienced and should have taken much more care in assisting him beyond remotely drafting correspondence and suggesting a ‘scripted’ approach to the two meetings.

[155] Whilst no investigation took place, I do not find that Mr Edney consciously decided to omit this step (as suggested by Mr Ede’s counsel) – I think it is more likely that Mr Edney, due to sheer inexperience, did not turn his mind to the necessity to carry out an investigation and whether he was best placed to do it - an oversight exacerbated by him not stepping aside from the process. I reject the suggestion by MBSS counsel that there were no conflicting factual issues absolving MBSS from the need to carry out a ‘stand-alone’ investigation.

Procedural defects

[156] It is apparent from the correspondence that the suspension process was inconsistent with Mr Ede’s employment agreement. No one ‘stood back’ and thought about whether the conduct in question met the threshold of serious misconduct and may have been amenable to other solutions such as a combination of a written warning and EAP counselling support, and Mr Edney’s continued involvement was easily avoidable.

[157] It was not absolutely clear to Mr Ede `at times, what the main reason for the proposed dismissal was: whether it was how Mr Ede reacted in the aftermath of the 13 March meeting or the ongoing threat to the safety of other employees related to his conduct during the meeting (that was objectively overstated) or that he had failed to display contrition in a timely enough or genuine manner.

[158] I find that Mr Ede’s second apology was not fairly considered in context and his first one not communicated to the other two decision-makers. Insufficient notes were taken at the 19 March meeting and the decision to move to dismissal was made in haste without due consideration of alternatives.

[159] Further, the moving to communicate a summary dismissal decision without a break in the final 20 March meeting leads to a reasonable implication that the matter had already been pre-determined. It also breached MBSS's obligation under s 103A of the Act to consider other contextual matters such as Mr Ede's health situation, observable out of character behaviour that was objectively easily linked to work place stress, other potentially mitigating factors such as Mr Ede's prior commitment and contribution to MBSS, and an otherwise unblemished disciplinary record.

[160] I find that summary dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I do find that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors before making the dismissal decision. The assumption that the serious misconduct threshold had been met is at issue. I find it had not been met in all of the circumstances (discussed below).

[161] I find that the defects in process were not minor as envisaged in s 103A(5) of the Act and they did result in Mr Ede being treated unfairly. Although MBSS is a small enterprise they did have access to an HR resource and were heavily reliant upon such but I cannot absolve MBSS from a poorly conducted process.

[162] I would encourage MBSS to discuss with their HR advisor, the shortcomings and potential omissions in their advice that I have identified as they may have contributed to this matter proceeding to litigation and my finding that the dismissal was procedurally deficient to the extent that I find this was an unjustified dismissal. I stress however, that the latter premise is speculative as I did not hear any evidence from MyHR during the investigation meeting.

The summary and substantive nature of the dismissal

[163] This was a summary or 'instant' dismissal that required first that MBSS consider that Mr Ede had initially engaged in serious misconduct. Guidance on how "[B]ehaviour that deeply impairs or is destructive of confidence and trust" is to be assessed was summarised

recently by Judge Holden in the Employment Court decision *Emmanuel v Waikato District Health Board*⁴.

- [58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.
- [59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.
- [60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.
- [61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and

⁴ *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[164] Essentially the above guidance on approaching a summary dismissal involves applying the same justification test in s103A of the Act but the seriousness of the conduct has to be first considered so destructive of the employers trust in the employee, or substantial in its level of seriousness, that no notice is warranted before dismissing – thus the sanction of summary dismissal is reserved for the most serious cases of misconduct.

[165] I have made comment on the fact that MBSS directors could not demonstrate to the Authority that they had turned their mind to the threshold issue of whether Mr Ede had engaged in serious misconduct during the 13 March meeting or its immediate aftermath. What appears to have predominantly driven the decision to dismiss was a perception that Mr Ede was not contrite enough and their speculation that he may repeat his behaviour to the detriment of the safety of others.

Assessment

[166] Whilst I cannot re-run or “stand in the shoes” of the employer conducting a disciplinary inquiry, I can assess whether the decision to categorise the conduct as sufficient to warrant summary dismissal was objectively a course open to a fair and reasonable employer at the outset. In this regard, I consider this could not be the case as during the fateful 13 March meeting Mr Ede, whilst expressing frustration, quickly assessed his heightened emotional state and sensibly sought to remove himself from the meeting. No witness provided compelling evidence of being particularly traumatised by Mr Ede’s outburst that was by all accounts brief in its occurrence and evidence suggested that the use of strong language expressed forcefully was not uncommon in the context of the workplace

and construction industry and the concept of ‘professional’ language was a highly aspirational but otherwise worthy concept.

[167] On the aftermath of the meeting, that I have found above was not sufficiently investigated to come to any conclusive finding that Mr Ede had been aggressive, I have commented that it was unwise of Mr Edney to pursue Mr Ede whilst he was leaving the building. I find that their subsequent interchange was unfortunate and avoidable but again it fell short of being capable of being deemed to be ‘serious’ misconduct.

[168] Mr Ede was contextually upset and genuinely overwrought and whilst his outburst and reaction later to Mr Edney was not ideal, it could only be fairly deemed to be at best misconduct warranting perhaps a written warning with some attached conditions that he take steps to deal with his recent pattern of reactive behaviour. An offer of counselling would also have been appropriate.

[169] Mr Edney described being “shaken” by Mr Ede’s behaviour in his written brief suggesting “Nigel appeared to have become unnecessarily aggressive out of nowhere” – I find that Mr Edney should have more carefully analysed his contribution to the later confrontation as it was objectively easy to recognise Mr Ede was upset and frustrated for genuine reasons given his known ‘modus-operandi’ and passion for the work he undertook.

[170] I have been guided by the candid and helpful evidence of MBSS directors and cases alluded to in both parties’ legal submissions and found them useful but in the final analysis this was a straightforward factual inquiry involving a particular context. Mr Ede also impressed as a witness despite some difficulties in recalling events. He showed no signs of a belligerent personality but he did display an attention to detail and a reasonable belief that based on his skill set and qualifications his approach to his work quality was in his employer’s best interests.

[171] I was drawn by counsel for MBSS to claimed parallels in Judge Travis' decision of *Dodd v DE and LM Spence t/a a Pak'N'Save*⁵ that found Ms Dodd's conduct to be sufficiently blameworthy to deprive her of a remedy even though she had been found to be unjustifiably dismissed on procedural grounds. Whilst counsel advanced this cited case in the context of arguing contribution, it is also illustrative of a notional threshold required to determine serious misconduct where foul language is at issue. Here Judge Travis concluded that the Authority was wrong to substantively conclude that Ms Dodd had not engaged in serious misconduct. As an analogy on the facts I would distinguish the cases: Ms Dodd was found to have engaged in insulting, provocative and insubordinate conduct including use of foul language directed toward a manager in front of co-workers sufficient to establish repudiatory conduct and not merely offensive language as used between staff on an equal footing.⁶

[172] By contrast, it was not fairly established that Mr Ede had engaged in deliberately aggressive conduct in the meeting aftermath or that his use of swearing was directed at Mr Edney in a confrontational manner and 'insubordination' was not traversed as a reason for Mr Ede's dismissal.

[173] I determine that Mr Ede's reactive behaviour at the time was driven by stress and his reasonable perception however misconstrued, that his employer was seeking to marginalise him in the workplace and not take full account of his expertise.

[174] I find in the overall circumstances, that the summary dismissal of Mr Ede was not substantively justified on the grounds that MBSS did not first conduct a full and fair investigation to determine whether the conduct in question was capable of being regarded as serious misconduct and Mr Ede's conduct did not objectively reach the threshold of being considered serious misconduct. Significant procedural deficiencies I have identified also render the dismissal to be unjustified.

⁵ *Dodd v D E and L M Spence t/a a Pak 'N' Save* [2002] 2 ERNZ 572, 574

⁶ At [22].

[175] However I do not find that MBSS has breached its obligation to provide a safe workplace, dismissed Mr Ede for an ulterior motive or treated him with disparity as no compelling evidence established such, other than Mr Ede speculating after the event that his employer's reasonable actions in running their business were deliberately engaged in to his detriment.

The disadvantage claim and breach of good faith

[176] I find that the procedural deficiencies in the suspension process disadvantaged Mr Ede in the sense that he was denied a full opportunity to comment on a proposal to suspend and on a wider front, participate in the somewhat abrupt disciplinary process that could have included him having a fairer opportunity to seek representation and better advance mitigating factors.

[177] However, the suspension was brief and on pay and it was highly likely that Mr Ede was going to spend some time off work for reasons of stress after the 13 March meeting as he clearly was in a high state of agitation. It is therefore difficult to establish what detriment was caused during the suspension period.

[178] I have also found that the disciplinary process breached good faith requirements pursuant to s 4(1A)(c) of the Act in that MBSS did not provide sufficient relevant information prior to the final disciplinary meeting or a fair opportunity for that information to be appraised and commented upon during that meeting – it was rushed.

[179] I also find that MBSS misled Mr Ede into believing that they were going to carry out a preliminary investigation of the 13 March events and then allow him to comment on the finding of such. This breached good faith obligations. I however put this breach down to sheer inexperience and poor HR guidance – I accept that there was no intent by MBSS to mislead Mr Ede.

[180] Mr Ede's counsel identified good faith breaches but did not seek a penalty for such, so none is appropriate.

Conclusion

[181] Having made a finding of unjustified dismissal on procedural and substantive grounds and breaches of good faith but rejected the disadvantage grievance and breach of a duty to provide a safe work environment, Mr Ede has been largely successful in his personal grievance and is entitled to remedies.

Remedies

Lost wages

[182] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Ede should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[183] Here I find Mr Ede's lost remuneration was attributed to the personal grievance. Mr Ede gave evidence that he did not secure alternative employment until 9 September 2019 and evidence of his prior attempts to mitigate his loss. In exercising an equity and good conscience jurisdictional approach,⁷ I find that Mr Ede provided sufficient evidence to justify that he took active steps despite the impact of the dismissal on him to mitigate his loss in both his specialist field and wider settings and that he did not, as claimed by counsel for MBSS, take himself out of consideration for alternative employment for study purposes or turn down offers of employment.

[184] Mr Ede asserted he was under financial stress and all the jobs he sought involved full-time employment and that ongoing study was not an impediment as he was well used to

⁷ See *Rush Security Services Ltd v Samoa* [2011] NZEmpC 76 where a paucity of evidence about attempts to mitigate loss did not lead to a reduction in remedies awarded by the Authority.

undertaking it in his spare time to complete three remaining papers toward an engineering degree.

[185] I also make the passing observation that completing a qualification in itself, is evidence of someone committed to mitigating the impact of the loss of employment and here unlike an Authority case cited by MBSS's counsel, ⁸ Mr Ede did not pursue study that prevented him from pursuing gainful employment.

[186] I also reject the speculative suggestion that had the employment continued and Mr Ede been placed on notice to address his reactive behaviour that his further employment would have been of a shorter duration due to his belligerence over work process issues. This is because evidence by MBSS directors acknowledged that Mr Ede had been acting out of character and was otherwise a valued employee and friend to at least one director. Mr Ede's negative interchange with Ms Drummond was of a 'one off' nature and he had made rebuffed efforts to improve this relationship. A supportive approach to encouraging Mr Ede to get EAP counselling may well have better equipped him to deal with the stressors he was suffering and some reconciliation with Mr Edney could have resolved the 'outburst' issue. Mr Edney also compellingly asserted that prior to the events leading to the dismissal he had a good working and personal relationship with Mr Ede and his evidence displayed no enmity toward Mr Ede. In these circumstances, I make the observation that had Mr Ede sought reinstatement it would have been considered favourably.

Finding

[187] Given the above and reflecting on the unfortunate circumstances of the unjustified summary dismissal, I consider that overall justice is served by awarding Mr Ede lost wages for the whole period 20 March 2019 to September 2019 when he then secured alternative employment. This amounts to a sum of \$32,307.

Compensation for hurt and Humiliation

⁸ *Cummings v Absolute Insurance Limited* [2012] NZERA Christchurch 220.

[188] Mr Ede gave evidence of the significant impact of the summary dismissal, the uncertainty it created at a difficult time to find immediate alternative employment, and losing the confidence to apply for jobs in the range of his qualifications based on his general state of mind and the belief that Mr Edney may seek to disparage him further. He described the upset it caused him given his attachment to MBSS and the product he had developed to aid panel plan preparation, the evident pride and passion he had in his work and progress to completing his engineering degree and the former good relationships he had with co-workers inside and outside the workplace.

[189] Sharron Ede described the negative impact upon her husband's self-confidence and general mental well-being including that he would be reduced to tears at times, had difficulty sleeping and had to seek assistance with his general mental health. Mr Ede provided limited medical evidence in the form of a medical certificate covering the immediate post dismissal period that confirmed the distress caused by the dismissal and recommended medication to reduce his anxiety. Nevertheless, I am convinced that at the time, Mr Ede suffered significant hurt, ongoing humiliation, loss of dignity and injury to feelings and found it very hard to link the extent of his conduct to being dismissed given his otherwise committed contribution to his former employer.

[190] Mr Ede's counsel sought \$40,000 compensation and set out a comparison of recent legal authorities she considered supported this level of compensation.

Finding

Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider Mr Ede's evidence warrants moderate compensation of \$25,000 under s 123(1)(c)(i) of the Act⁹. I do not find the aggravating factors identified by counsel sufficient to increase Mr Ede's compensation including MBSS's failure to provide personal information in a timely fashion

⁹ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

as these claims should have been pursued under the heading of breach of good faith and no penalties for such were sought.

Contribution

[191] Section 124 of the Act states that I must consider the extent, if any, that Mr Ede's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹⁰.

[192] I find that Mr Ede whilst stressed, still engaged in a degree of reactive blameworthy behaviour at both the 13 March meeting and its aftermath (although I have genuinely conflicting accounts on how much Mr Edney contributed to the aftermath interchange) but when confronted with such by a suspension notice, he did show some contrition and attempted to apologise to Mr Edney in a timely manner.

[193] I have to balance this consideration up with my finding that MBSS's approach was procedurally deficient and I have found that MBSS directors did not approach the dismissal with an open mind. Mr Ede cannot be blamed for these deficiencies that robbed him of the time for more reflection and seeking of professional advice which may have led to him adopting a different approach to the final disciplinary meeting and allowed him to better explain his mitigating circumstances and articulate better his second apology and how he intended to address his contribution to the situation.

[194] I have also discussed above, how I see no parallels in terms of the level of seriousness cited in the *Dodd* case sufficient to deem such to be egregious conduct warranting no remedy and I am guided by the review of authorities in *Maddigan*¹¹ as to the range and level of blameworthy contributory conduct that I find to be at lower range of

¹⁰ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

¹¹ At [75]-[76].

contribution. Evidence from MBSS witnesses confirmed that Mr Ede had, up until a relatively short period prior to his dismissal, not shown any tendency to behave in a reactive manner and he was well regarded for his technical contribution to MBSS's growing business success.

Finding

[195] On balance, given Mr Ede's contribution in the events that led up to his dismissal I find this warrants a 10% reduction in all of Mr Ede's remedies.

Summary

[196] **I have found that:**

- (a) Mr Ede was unjustifiably dismissed and disadvantaged by the manner in which his employment with MBSS Limited was terminated.**
- (b) MBSS failed to adhere to good faith obligations in effecting the dismissal.**
- (c) In the circumstances MBSS Limited must pay Ms Ede the sums below:**
 - (i) \$29,077.00 gross lost wages pursuant to s 123(1)(b) of the Act; and**
 - (ii) \$22,500 compensation pursuant to s 123(1)(c)(i) of the Act.**

Costs

Costs are at the discretion of the Authority and here Mr Ede was successful in his predominant claim of unjustified dismissal and has obtained significant compensatory remedies in an investigation meeting that took two days and timetabled legal submissions thereafter. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs. If no agreement is

achieved, Mr Ede has fourteen days following the date of this determination to make a written submission on costs and MBSS Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority