

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 258
5364924**

BETWEEN LEO GALLAGHER
 Applicant

AND AUCKLAND PACKAGING
 COMPANY LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Richard Upton, Counsel for Respondent

Investigation Meeting: 26 June 2012 at Auckland

Submissions received: 3 July 2012 from Applicant and from Respondent

Determination: 27 July 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Leo Gallagher, claims that he was unjustifiably dismissed by the Respondent, Auckland Packaging Company Limited (APC), on 4 October 2011.

[2] Specifically Mr Gallagher claims that his dismissal for leaving work without authorisation on 28 September 2011 was substantially and procedurally unjustifiable.

[3] Mr Gallagher further claims that the decision to suspend him on 29 September 2011 unjustifiably disadvantaged him in his employment.

Issues

[4] The issues for determination are whether:

- Mr Gallagher was unjustifiably dismissed by APC.

- Mr Gallagher was unjustifiably disadvantaged in his employment with APC by reason of his suspension.

Background Facts

[5] APC produces point of purchase displays, promotional materials, consumer and industrial packaging. Mr Gallagher was employed by APC as a Machine Operator and worked as part of the converting team.

[6] Mr Gallagher who had been employed by APC for approximately 12 years had been provided with an individual employment agreement (the Employment Agreement). In the First Schedule to the Employment Agreement Mr Gallagher's hours were specified as being from 7.30 a.m. until 4.00 p.m. Monday to Friday.

[7] Mr Gallagher explained that he had two options for getting to and from his place of employment and his home. These were either by bus, the timings of which were not convenient for him, or by obtaining a lift from a fellow employee, Mr Ian Gibson.

[8] Mr Gallagher said that he was allowed to vary his contractual hours in order to obtain a lift with Mr Gibson with the agreement of Mr Luther Ng Chok, the Converting Supervisor. Mr Ng Chok said that he would agree to the variation if the work scheduling permitted this, but sometimes a variation was not possible due to work commitments.

27 September 2011

[9] Mr Ng Chok said that on 27 September 2011 Mr Gallagher had asked him if he could start work at 9.00 a.m. the next day. Mr Ng Chok said he had agreed to this and had arranged for other staff members to cover Mr Gallagher's absence the following morning.

[10] Mr Ng Chok explained that because there were some large orders to be despatched on 28 September 2011, he had arranged for some employees, both permanent and casual, to start work at 2 a.m. that morning, this included Mr Gibson.

[11] Mr Ng Chok said that as Mr Gallagher had requested a 9.00 a.m. start the following day, he had concluded that he had organised alternative transport rather than obtaining a lift with Mr Gibson, who would otherwise have been commencing work at 7.30 a.m. on 28 September 2011.

[12] Mr Gallagher said that after work on 27 September 2011, Mr Gibson had informed him that he would be working from 2.00 a.m. until 2.00 p.m. on the following two days. Mr Gallagher said that he had not been able to speak to Mr Ng Chok about his own finishing time the following day as Mr Ng Chok had left for the evening.

[13] Mr Ng Chok said although he had left for the evening, Mr Gallagher could have called or texted him on his mobile telephone as he had done on previous occasions; or Mr Gallagher could have spoken to Ms Sharon Ashdown, Floor Supervisor, or to Mr Shane Dalbeth, Operations Manager.

28 September 2011

[14] Mr Gallagher said on 28 September 2011 he had started work one hour earlier than had been previously agreed with Mr Ng Chok.

[15] Before commencing employment Mr Gallagher said he had spoken to Mr Ng Chok and informed him that he wanted to finish that day when Mr Gibson finished at 2 p.m., and that he would start employment when Mr Gibson started at 2 a.m. the following day. Mr Gallagher said Mr Ng Chok had commented "*We'll see about that.*"

[16] Mr Ng Chok said he had been surprised to see Mr Gallagher earlier than expected on the morning of 28 September 2011, and that he had not agreed to Mr Gallagher's request to vary his start and finish times.

[17] Mr Ng Chok explained that there had been an urgent order which needed to be dispatched that afternoon or APC would be liable to the customer for additional costs, and that all the employees, including Mr Gallagher, were aware of this.

[18] Mr Gallagher said he did not recall being informed that the order needed to be despatched by 4 p.m., and his view was that it could be finished when he arrived at 2.00 a.m. the next day. Mr Gallagher explained that he had made a commitment to his girlfriend to be home earlier than his contractual finish time of 4.00 p.m. and the attendant travel by bus allowed.

[19] Mr Gallagher was assigned to work with Ms Helen Wilson, Team Leader, and her team of five other employees on 28 September 2011. Ms Wilson said she was expecting Mr Gallagher to work until 4 p.m. as that was his contractual finish time; however at 1.30 p.m. he had spoke to her and told her that he would be finishing at 2 p.m.. Ms Wilson said she had responded that she would first need to speak to her supervisor Ms Ashdown.

[20] Ms Ashdown said she had informed Ms Wilson that she would need to confirm with Mr Ng Chok whether or not Mr Gallagher could finish at 2 p.m. Ms Ashdown said that she needed to clear the matter with Mr Ng Chok, especially as there was the urgent order to despatch that afternoon.

[21] Ms Ashdown said Mr Ng Chok had informed her that Mr Gallagher had to stay until his contractual finish time of 4 p.m. because if he did not do so, APC would be short staffed, and this would create difficulties in completing the urgent order for despatch.

[22] Ms Ashdown said both she and Ms Wilson had told Mr Gallagher that he was to stay until 4.00 p.m., however he had informed them that he 'did not care', and that he intended to leave at 2.00 p.m. Ms Wilson said this exchange took place within the hearing of the other employees in the immediate vicinity.

[23] Ms Ashdown said she had thought it best that she inform Mr Ng Chok of Mr Gallagher's response, and as a result Mr Ng Chok had gone to speak to Mr Gallagher himself with Ms Wilson and Ms Ashdown present.

[24] Mr Ng Chok said he had been in the middle of calmly explaining to Mr Gallagher why he required him to stay until 4.00 p.m. when Mr Gallagher had interrupted and said that he did not care what happened, or if he got a warning.

[25] Mr Gallagher said it was Mr Ng Chok who had informed him that if he left at 2 p.m. he might get a warning, to which he had replied: "*I don't care if I get a warning, I'm going home at 2*".

[26] Ms Wilson said she had been agitated following this conversation and had kept glancing at the clock, although as she was busy she had not been aware that at 2.00 p.m. Mr Gallagher had walked out until informed of this by another employee

[27] Ms Wilson said the other employees in her team were annoyed at having to cover Mr Gallagher's work and they were all concerned that the urgent job would not be completed in time, so she had gone to speak to Ms Ashdown. As a result some employees had been taken off other jobs to assist with the urgent job.

[28] Ms Wilson and Ms Ashdown both said that they had felt let down by Mr Gallagher letting the team down, and they also considered that their authority had been undermined in

front of the other team members who had all been aware of the exchanges between them and Mr Gallagher.

[29] When he became aware that Mr Gallagher had left at 2.00 p.m. Mr Ng Chok said he reported this to the Chief Executive because his immediate manager, Mr Dalbeth, had been not on site that day. Mr Ng Chok said the Chief Executive had told him to discuss the incident with Mr Dalbeth the following day, and to write a report on what had occurred.

29 September 2012

[30] The following day Mr Gallagher said he had arrived at work with Mr Gibson at 2.00 a.m. Mr Ng Chok said that he had not been aware that Mr Gallagher was at work until he found him sleeping in the sick bay room.

[31] Mr Gallagher said Mr Ng Chok had told him he had no work available for him at that time, and that he was to start at his contractual time of 7.30 a.m. Mr Gallagher said he had asked at 5.30 a.m. if he could start work then; however Mr Ng Chok had reiterated that he was to start at 7.30 a.m.

[32] Mr Dalbeth said when he had arrived at work on 29 September 2011 he had read an email from Ng Chok about the incident the previous day involving Mr Gallagher leaving work without authorisation, and he had had a discussion with Mr Ng Chok to ascertain the details of what had occurred.

[33] Mr Dalbeth said at that stage he had not been sure how serious the incident was, so he asked Mr Ng Chok to call Mr Gallagher to a meeting to discuss it. Mr Dalbeth said he had instructed Mr Ng Chok to inform Mr Gallagher that it would be a disciplinary meeting about leaving work at 2.00 a.m. the previous day, and that he was entitled to have a support person present.

[34] Mr Gallagher said he had started work at 7.30 a.m. and at approximately 9.00 a.m. Mr Ng Chok had informed him that he was to have a meeting with Mr Dalbeth after the meal break. Mr Gallagher confirmed that Mr Ng Chok had said it was to be a disciplinary meeting, and agreed that Mr Ng Chok may have said he could have representation at the meeting, although he did not recall that fully.

[35] Mr Dalbeth said that as the meeting was to be of a disciplinary nature, prior to meeting with Mr Gallagher he had looked through Mr Gallagher's Employment Agreement to remind himself of the company disciplinary rules. Mr Dalbeth said that he had looked at the

clauses which discussed serious misconduct and which identified that leaving the workplace without approval represented potentially serious misconduct.

[36] In clause 25.1.2 the Employment Agreement stated:

In the event of serious misconduct, gross negligence or non-performance by you, termination without notice will occur. We may suspend you on pay pending an investigation into any suspected misconduct or gross negligence involving you.

[37] The Third Schedule of the Employment Agreement set out that the following were considered to be serious misconduct offences:

- *Failure to carry out normal safety procedures and all other duties and instructions including failure to wear appropriate/supplied safety equipment/clothing.*
- *Leaving the premises without authority (where applicable).*

[38] Mr Gallagher did not have representation at the meeting which took place at approximately 10.30 a.m. because he said he considered it would be an informal meeting and he did not realise that the matter was serious.

[39] Mr Ng Chok said Mr Dalbeth had started the meeting by asking Mr Gallagher if he would like to have a representative with him, however Mr Gallagher had declined.

[40] Mr Dalbeth said he had asked Mr Ng Chok for his version of events, following which he had asked Mr Ng Chok to leave the meeting so he could listen to Mr Gallagher's version of events in private.

[41] Mr Dalbeth said Mr Gallagher had told him that he knew he had been required to stay at work until 4.00 p.m. on 28 September 2011, but despite this he had left at 2.00 p.m.. Mr Dalbeth said Mr Gallagher had explained why he had made the decision to disobey instructions and workplace rules, and agreed that it set a bad example to others, however he had insisted that his transport arrangements were of a higher priority to him.

[42] Following this, Mr Dalbeth said he had asked Mr Ng Chok to rejoin the meeting and then he had read to Mr Gallagher the relevant parts of the Employment Agreement. In particular Mr Dalbeth said he had explained the clause which referred to serious misconduct.

Mr Dalbeth said that Mr Gallagher had remarked that had he realised that dismissal might have been an outcome; he might not have acted as he had done.

[43] Mr Dalbeth said he had decided that Mr Gallagher's actions required further investigation and he had informed Mr Gallagher that he was suspended on full pay until the next meeting. Mr Dalbeth said that Mr Gallagher had made no comment on the fact of his suspension.

[44] Mr Dalbeth said he had informed Mr Gallagher that he could bring a support person or representative to the next meeting, which would be a formal disciplinary meeting. Mr Dalbeth explained he had not decided what the likely outcome of that meeting would be, however based on his understanding that it was a serious misconduct offence, he had informed Mr Gallagher that the outcome might be either a final written warning or immediate dismissal. Mr Dalbeth said he had asked Mr Gallagher to confirm the date of the next meeting

[45] Following the meeting on 29 September 2011, Mr Dalbeth said he had spoken to various witnesses, in particular to Ms Wilson and Ms Ashdown, about what had occurred on 28 September 2011. Mr Dalbeth said he had ascertained that Mr Gallagher had been quite vocal and open about refusing to obey the instruction to stay at work until 4.00 p.m. on that day and that other employees in the area had been aware of this.

[46] Mr Gallagher explained that in the intervening period between the meeting on 29 September 2011 and the second meeting on 4 October 2011, he had looked at the Employment Agreement and started to realise how serious the matter might be; however having given the matter further consideration, his opinion was that the incident was not too serious.

4 October 2011 Meeting

[47] Mr Dalbeth said that the date of the second meeting, which took place on 4 October 2011, had been proposed and agreed by Mr Gallagher. Mr Dalbeth said that because Mr Gallagher had attended the meeting without a support person, he had advised him that as it was a serious matter, he should have a support person present, and had offered to reschedule the meeting to allow Mr Gallagher to obtain representation.

[48] Mr Gallagher agreed that he had been advised to have representation; however he had made the decision not to have representation when he had arranged the date for the meeting.

[49] Mr Dalbeth said there had been a discussion about the incident, but Mr Gallagher had not apologised or shown any remorse over his action in leaving work at 2.00 p.m. when instructed to stay until 4.00 p.m. on 28 September 2011.

[50] Mr Dalbeth said he had considered that this indicated to him that Mr Gallagher had little awareness of how serious his actions had been, and that he had little regard for workplace rules and requirements.

[51] Mr Gallagher said he had become angry during the meeting and felt that the position had been reached where neither party could 'back down'. Mr Gallagher said that the fact that he had attended the meetings should have indicated that he cared about his job.

[52] Mr Dalbeth said following the meeting he had given consideration to the appropriate outcome. Mr Dalbeth said he had decided dismissal to be the appropriate outcome taking account of the following factors:

- Issuing a warning in circumstances in which Mr Gallagher had shown no remorse and had not apologised would effectively condone what Mr Gallagher had done and send a message to the other employees that it was acceptable to disobey a reasonable instruction.
- APC had allowed Mr Gallagher to vary his contractual start and finish times whenever this was possible; however Mr Gallagher had not accommodated APC's requirements on this occasion.
- Mr Gallagher had not set a good example to the other employees, particularly to those casual workers who had been working alongside him.
- Mr Gallagher had let the team, Ms Wilson, Ms Ashdown and Mr Ng Chok down by not staying to assist with the urgent job;

[53] Mr Dalbeth said that he had given consideration to Mr Gallagher's length of service, however his conclusion that dismissal was the appropriate outcome had been reached on the basis that taking all the factors into account, he had no trust and confidence in Mr Gallagher to follow instructions in future or to show respect to management.

[54] Mr Dalbeth said he had informed Mr Gallagher of his decision and Mr Gallagher had collected his personal belongings and left the premises.

Determination

Was Mr Gallagher unjustifiably dismissed by APC?

The Law

[55] The decision to dismiss Mr Gallagher on the basis of serious misconduct must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 (“the Act”) which states:

S103A Test of Justification

(a.) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(b.) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[56] Mr Gallagher had entered into an Employment Agreement with APC which on the First Schedule detailed his contractual hours as being 7.30 a.m. to 4.00 p.m. Monday to Friday, and which on the Third Schedule detailed a non-inclusive list of incidences of serious misconduct. Mr Gallagher had initialled these pages, and had signed the Employment Agreement on 21 April 2005.

[57] On various occasions Mr Gallagher had requested permission to vary his contractual start and finish times and APC had granted Mr Gallagher’s requests provided that the work schedule allowed for this.

[58] On 28 September 2011 Mr Gallagher had left APC premises without the requisite permission having been obtained, and further in circumstances in which he had been made fully aware that his request to leave work before his contractual finish time had been specifically denied by his supervisor.

[59] The instruction by the supervisor that Mr Gallagher remain at work until his contractual finish time I find to have been both lawful and reasonable. It was in accordance with the terms of the Employment Agreement, and it was reasonable given the urgent nature of an order which had to be despatched and the requirements of the workplace.

[60] I observe that APC had been reasonable in accommodating to Mr Gallagher's requests to vary his contractual start and finish times on previous occasions, but that he had not reciprocated this reasonableness on an occasion when the reason for APC not being prepared to grant his request had been made clear to him. I consider that this falls short of the good faith requirement in s 4(1) of the Act which requires the parties in an employment relationship to deal with each other in good faith and, pursuant to s4(1A) (b), to be: "*be active and constructive in establishing and maintaining a productive employment relationship*".

[61] The Third Schedule of the Employment Agreement included '*Leaving the premises without authority*' as a serious misconduct matter. Mr Gallagher had been instructed to remain at his workplace until his contractual finish time. In the Third Schedule '*Failure to carry out Instructions*' was listed as a serious misconduct matter. Clause 26.2 of the Employment Agreement stated:

Summary/Instant Dismissal

Some behaviour is considered to be of a very serious nature, which we term "Serious Misconduct". If you perform acts of Serious Misconduct in your work place or while on company business you will be liable to dismissal without notice.

[62] Apart from the specific detailing in the Employment Agreement, the requirement for employees to carry out reasonable and lawful work instructions which are within the scope of their employment agreement is an implied duty in accordance with the common law.

[63] The case law is also clear that a failure to carry out a reasonable and lawful instruction can constitute serious misconduct. In *NZ Printing and Related Trades IUW v Clark and Matheson Ltd*¹ Judge Castle held that: "*[o]pen and deliberate defiance to obey a lawful and reasonable instruction given by a person in authority clearly amounts to misconduct of a degree which may ... justify instant dismissal*".

[64] In the Court of Appeal case *Sky Network Television v Duncan*² Blanchard J stated:³

Disobedience of an order which an employer has the lawful authority to give to an employee is a form of misconduct but it does not necessarily follow, at common law, that such an act of disobedience justifies dismissal. The disobedience must be wilful, a word which in

¹ [1984] ACJ 283

² Court of Appeal, CA284/97, 1 December 1998

³ *Sky Network v Duncan* at 7

this context 'connote[s] some deliberate design or purpose to derogate from duty' (Adam v Maison de Luxe Ltd (1924) 35 CLR 143 at 152 per Isaacs ACJ). It has an overtone of the knowingly improper. There has to be something which amounts to a deliberate flouting of the terms of employment contract [sic] (Laws v London Chronicle (Indicator Newspaper) Ltd [1959] 1 WLR 698)

[65] Similarly in *NZ (with exceptions) Food Processing etc IUW v Unilever New Zealand Ltd*⁴ the then Chief Judge Goddard held that:⁵

" What is meant by a wilful disobedience is an intentional or deliberate act of disobedience". It is to be contrasted with casual, accidental and unintentional acts and also with acts which are the result of the exercise of reason as opposed to mere whim. It therefore connotes the absence of any bona fide belief in a right to reject the commands or directions as unreasonable or unlawful or otherwise not binding on the worker ... The approach in deciding whether disobedience was wilful is the same as the approach in determining any other state of mind. It can be determined only from conduct and words and surrounding circumstances."

[66] Mr Gallagher had requested that he be allowed to leave work early on 28 September 2011 and had been clearly instructed by Mr Ng Chok on 28 September 2011, initially through the agency of Ms Ashdown, and subsequently directly Mr Ng Chok in person, that he was required to remain at work until 4.00 p.m., his contractual finish time.

[67] I accept the evidence of Ms Wilson, Ms Ashdown and Mr Ng Chok that Mr Gallagher would have been aware of the urgent despatch requirements of the order as this was common knowledge within APC. Even had Mr Gallagher not been aware of this fact prior to starting work on 28 September 2011, I accept that he had been made aware of the urgent need to despatch the order by Mr Ng Chok who had explained why he required Mr Gallagher to stay until his contractual finish time on that occasion.

[68] Despite this explanation, Mr Gallagher had been clear in expressing his intention to refuse to stay as instructed, commenting that 'he did not care' and intended to leave at 2.00 p.m. to Ms Wilson and Ms Ashdown and subsequently to Mr Ng Chok.

[69] I find that there is no indication that Mr Gallagher misunderstood the nature of the instruction he was being given. On the contrary Mr Gallagher's evidence at the Investigation Meeting confirmed that he knew his contractual finish time was 4.00 p.m. but for personal reasons involving the commitment he had made to his girlfriend and his transport

⁴ [1990] 1 NZILR 35

⁵ *Unilever* at 592

arrangements, he had disregarded the instruction to stay at work and had deliberately left the workplace at 2.00 p.m. “*flouting the terms of the employment contract*”.⁶

[70] Whilst there is some disagreement over whether it was Mr Ng Chok who informed Mr Gallagher that he would get a warning if he persisted in disregarding the instruction to stay until 4.00 p.m., or whether it was Mr Gallagher himself who said he did not care if he got a warning, I find that Mr Gallagher left the workplace knowing that the consequence might be a disciplinary action, specifically a warning.

[71] Mr Dalbeth concluded that dismissal was the appropriate outcome of Mr Gallagher’s actions. Having found that there had been wilful disobedience to obey a lawful and reasonable instruction on the part of Mr Gallagher it is necessary for me to consider whether Mr Gallagher’s conduct justified dismissal.⁷

[72] When he left the workplace on 28 September 2011 Mr Gallagher had been aware that disciplinary action might be a consequence of his actions. At the meeting on 29 September 2011 Mr Dalbeth had read the relevant parts of Mr Gallagher’s Employment Agreement to him, specifically referring to the clause concerning serious misconduct.

[73] Following this meeting on 29 September 2011 Mr Gallagher had confirmed that he had read the relevant sections of the Employment Agreement himself, however he said he had not considered what he had done to be so serious that dismissal might be the outcome.

[74] I consider that Mr Gallagher would have been aware that the matter was serious, he had been made aware of the relevant sections of the Employment Agreement, he had read them over himself, and his comments to Mr Dalbeth during the first disciplinary meeting indicated that he had been made aware that the matter was serious and dismissal might be an outcome of his actions. In his evidence Mr Gallagher had stated: “*Shane advised me that he would investigate the incident and that I may be dismissed*”.

[75] However despite this, Mr Gallagher did not apologise or show remorse for his actions at either the first meeting with Mr Dalbeth or indeed at the second meeting on 4 October 2011.

⁶ *Sky Network v Duncan*

⁷ Cf *Richardson v The Board of Governors of Wesleyan College* Employment Court, Auckland AC25A/99, 24 September 1999, Judge Travis

[76] Mr Dalbeth said that he had not made any decision to dismiss Mr Gallagher prior to the second meeting on 4 October 2011, however following this meeting he had reached the conclusion that dismissal was the appropriate outcome based on various factors, including the fact that during the meetings Mr Gallagher had behaved in such a way as to indicate that he had little awareness of the seriousness of his actions, regard for workplace rules, or respect for management.

[77] Mr Dalbeth said that before making his decision he had taken Mr Gallagher's long service into consideration but had felt that this was out-weighted by Mr Gallagher's attitude, such that he could not trust him to obey workplace rules in the future.

[78] I find that this was reasonable conclusion for Mr Dalbeth to have reached and note that this same lack of awareness of the serious nature of his actions on 28 September 2011 on the part of Mr Gallagher was apparent during the Investigation Meeting.

[79] Mr Dalbeth had also taken into consideration in reaching the decision to dismiss Mr Gallagher the impact on other APC employees and Mr Gallagher's attitude to the immediate members of his management team, namely Ms Wilson, Ms Ashdown and Mr Ng Chok. In *NZ (with exceptions) Food Processing etc IUW v Unilever New Zealand Ltd*⁸ Goddard CJ stated:

In the jurisdiction with which we are concerned, the question rather is one whether the employer could reasonably be expected to continue to put up with the conduct complained of. In arriving at a decision on this question, an employer is entitled to take into account various considerations, among them the effect on other members of its staff of the offending worker's actions and the effect on discipline if the employer does nothing because the employer will be expected to act consistently in relation to all workers committing similar offences. The gravity of the disobedience depends, in part, on the effect on the employer's work of the refusal to obey in the particular instance and generally.

[80] Mr Gallagher had carried out his act of wilful disobedience in the presence of other employees, he had disregarded the authority of his immediate managers, and he had refused to acknowledge that such an act was not acceptable.

[81] I find reasonable Mr Dalbeth's conclusion that in all the circumstances, issuing Mr Gallagher with a warning would send out a message to other employees that it was acceptable

⁸ [1990] 1 NZILR 35 at 593

to disregard their contractual start and finish times, and would set a precedent as to the consequences which would ensue in such an event.

[82] I find that not only was the instruction given by APC lawful in terms of the Employment Agreement, it was also reasonable given the urgent despatch requirements of the order. The consequence of Mr Gallagher disobeying the instruction was that other employees had to be taken from the tasks to which they had been allocated and assigned to cover the work Mr Gallagher was contractually required to do. Mr Dalbeth considered that Mr Gallagher had 'let down the team'. I consider that this was a reasonable conclusion for Mr Dalbeth to have reached in the circumstances.

[83] I find substantive justification for the decision by APC to dismiss Mr Gallagher.

[84] The decision to dismiss must be procedurally justifiable. Section 103A of the Act states:

3 In applying the test in subsection (2), the Authority or the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[85] I find Mr Dalbeth had:

- carried out an investigation into what had occurred on 28 September 2011 by interviewing Mr Ng Chok and Mr Gallagher, Ms Wilson, Ms Ashdown and some other employees;
- raised his concerns with Mr Gallagher, referring him to the Employment Agreement and outlining the possible consequences of his actions;

- provided Mr Gallagher with an opportunity to provide an explanation at the meetings on 29 September and 4 October 2011,
- given full consideration to what had been presented to him during the investigation interviews and the meetings with Mr Gallagher prior to making the decision to dismiss him.

[86] Moreover Mr Gallagher had been advised prior to the commencement of the two meetings, and at the conclusion of the first meeting, of his right to have representation, and although it had been Mr Gallagher who had set the date for the meeting on 4 October 2011, Mr Dalbeth had offered to reschedule the meeting in order that Mr Gallagher could obtain representation if he wished to do so.

[87] I find that APC followed a fair procedure.

[88] I determine that APC acted as a fair and reasonable employer could have done in all the circumstances and find that Mr Gallaher was justifiably dismissed.

Was Mr Gallagher unjustifiably disadvantaged in his employment with APC by reason of his suspension?.

[89] The Employment Agreement, which Mr Gallagher had accepted and signed, made provision for suspension in cases of serious misconduct stating at clause 25.1.2:

In the event of serious misconduct, gross negligence or non-performance by you, termination without notice will occur. We may suspend you on pay pending an investigation into any suspected serious misconduct or gross negligence involving you.

[90] There are several leading judgments which establish the law on justification for suspension. The Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that even where there is a contractual entitlement to suspend, there is nonetheless a requirement to apply the rules of natural justice to a decision involving suspension⁹.

[91] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

⁹ [1993] 2 ERNZ 546

S4(1A)The duty of good faith in subsection (1)-

(a.) requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(b.)without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

(i.)access to information, relevant to the continuation of the employees' employment; about the decision; and

(ii.)an opportunity to comment on the information to their employer before the decision is made.

[92] Mr Gallagher was suspended pending an investigation into potentially serious misconduct that might, and in fact did, have an adverse effect on his continuation of employment. The law is clear that Mr Gallagher should have been provided with access to pertinent information about the decision to suspend him, and the opportunity to comment on this information prior to the decision to suspend him being made by APC.

[93] When Mr Gallagher had been called to the meeting on 29 September 2011 he had been made aware that his actions in leaving his workplace at 2.00 p.m. the day before without authorisation might result in disciplinary action.

[94] At the meeting he was made aware of the terms of the Employment Agreement which were pertinent to what had occurred and had been provided with an opportunity to present an explanation.

[95] Mr Dalbeth had considered Mr Gallagher's explanation and concluded that Mr Gallagher's actions were potentially serious misconduct prior to making the decision to suspend him.

[96] I find that in these circumstances Mr Dalbeth was contractually entitled to suspend Mr Gallagher, and that he adhered to the tenets of natural justice and good faith dealing in so doing.

[97] I determine that Mr Gallagher has not been unjustifiably disadvantaged in his employment by the actions of APC in suspending him.

[98] I am unable to assist Mr Gallagher further.

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority