

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 180
3003511

BETWEEN BRODIE HALLIDAY
Applicant

AND LANE GROUP LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Ben Nevell, Counsel for Applicant
Don Rhodes, Advocate for Respondent

Investigation Meeting: 13 July 2017 in Dunedin
26 July 2017 by telephone

Submissions received: 26 July and 2 August 2017 from Applicant
27 July 2017 from Respondent

Determination: 26 October 2017

DETERMINATION OF THE AUTHORITY

- A Lane Group Limited did not breach its health and safety obligations to Brodie Halliday when he worked in the food room. No penalty is awarded and no disadvantage grievance made out about that matter.**
- B Brodie Halliday was unjustifiably dismissed from Lane Group Limited.**

- C Lane Group Limited is ordered to pay to Brodie Halliday:**
- (a) Reimbursement of lost wages for a period of eight weeks less notice paid and contribution. Leave is reserved for Mr Nevell and Mr Rhodes to return to the Authority if calculation proves difficult.**
 - (b) Compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000 taking contribution into account in the sum of \$6000 without deduction.**
- D There is no separate award of remedies for a grievance of unjustified action causing disadvantage about the performance/misconduct concerns. Process issues are absorbed in the dismissal grievance.**
- E There is no award of a penalty for a breach of good faith.**
- F Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Brodie Halliday was employed by Lane Group Limited trading as Regent Night'n Day Foodstores Limited in Dunedin from 3 November 2015 as a team member. He was dismissed with notice on 5 September 2016.

[2] Mr Halliday says that he was disadvantaged in his employment because he continued to be rostered on to make sandwiches after an incident when he was verbally abused. He says that this was a breach of the duty of good faith and a breach of the employer's obligations under the Health and Safety in Employment Act 1992.¹ He submits that the breaches resulted in stress and two periods of sick leave. Further that there was disadvantage when Lane Group

¹ Health and Safety at Work Act 2015 aside from subpart 4 of part 5 did not come into force until 4 April 2016 although there could be some overlap.

commenced a course of action that he says was designed to cause him to resign. Finally Mr Halliday says that his dismissal was unjustified.

[3] Mr Halliday seeks reimbursement of lost wages, payment of compensation together with a penalty for breaches of good faith and breaches of the employment agreement.

[4] Lane Group Limited is a duly incorporated company which owns and operates the food store Regent Night'n Day. One of its directors is Denise Lane who is also a director of Night'n Day Foodstores Limited.

[5] Lane Group say that Mr Halliday over a period of more than three months was found to have breached a number of rules, process and performance work requirements. It held meetings with him at which he was accompanied by his parents, and for the final meeting also his lawyer but he failed to bring about the required improvement to its satisfaction. Lane Group says Mr Halliday continued to breach rules even after the final disciplinary meeting and before it had made its decision as to outcome.

[6] It does not accept that its actions during his employment were unjustified or that they disadvantaged Mr Halliday. It says that it was unaware that working in the food room was causing Mr Halliday distress until in or about June 2016 by which stage he had ceased working in the sandwich room. Until then it says that it took reasonable steps in all the circumstances.

[7] It does not accept that it breached any duty of good faith or that its actions breached health and safety requirements. It says that it had genuine performance concerns that it brought to Mr Halliday's attention and ultimately his dismissal was justified and there should be no award of remedies.

The issues

- What did the employment agreement provide for the health and safety and management of performance?

- Did Lane Group breach contractual or statutory duties it owed to Mr Halliday for his health and safety?
- How were performance concerns raised with Mr Halliday?
- Was the procedure when considered with the reasons for dismissal fair and in accordance with the employment agreement including:
 - Were the specific reasons for performance dissatisfaction and any allegations of breach of rules disclosed,
 - Was there an opportunity for an explanation and advice why the explanation was unsatisfactory,
 - Was a specific and measurable improvement identified with a timetable to achieve corrective action and demonstrate the improvement,
 - Was there assistance provided if required and was it made clear to Mr Halliday that failure to improve could result in dismissal,
 - Was there objective assessment whether measurable targets were met,
 - Was Mr Halliday offered an opportunity to be heard on the preliminary conclusion before a decision was reached to dismiss,
 - Was his response taken into account before deciding to dismiss,
 - Were alternatives considered?
- Was dismissal an action a fair and reasonable employer could have taken in all the circumstances at the time?

- If dismissal was not justified or if there were actions that disadvantaged Mr Halliday then what remedies is he entitled to and are there issues of mitigation and contribution?

The Employment Agreement

[8] Mr Halliday was party to an individual employment agreement with Lane Group. He received an employment agreement on 28 October 2015 and it was signed on 3 November 2015 when employment commenced.

[9] The work to be performed by the team member was set out in the employment agreement was potentially quite far reaching. It covered tasks from general cleaning, customer service, food manufacturing, cooking, baking, office and book work, handling stock, staffing requirements and any other particular aspects of the business through to management as instructed.

[10] Clause 1.2 of the employment agreement provided that Mr Halliday agreed to be bound by the team member handbook and he was also provided with a copy of the clauses in the handbook and the interpretation intended for each clause to be read with the 2015 handbook.

[11] The team handbook contains a number of rules and regulations that applied to team members.

Health and safety

[12] The handbook provides rules around health and safety. A clause about individual team member safety requires a team member to advise their manager if there are circumstances they feel might prevent them performing their work satisfactorily.

Code of conduct

[13] The team member's handbook 2015 contained a code of conduct which sets out matters that may constitute serious and less serious misconduct. Under warnings it provides that these will be for issues where work performance is below the standard set and/or where company procedures and rules are breached and there is no satisfactory explanation.

[14] Depending on the circumstances the handbook provides that the warnings can be issued in one of the following forms. There can be a verbal warning, a written warning or a final written warning. It provides that when issuing any warning there are points that must be covered and written warnings will always incorporate previous incidents where relevant so as to create a complete picture of the team member's performance and will not just refer to the issue at hand. The giving of a warning is not limited to repetition of the same offence but may be applied to separate offences.

Did Lane Group breach contractual or statutory duties it owed to Mr Halliday for his health and safety?

The food room

[15] Mr Halliday initially undertook counter work at Regent Night'n Day but then expressed an interest in learning all aspects of the job and was trained in sandwich making from in or about December 2015. The sandwich hand and trainer is an employee who I shall call G. Mr Halliday said that after he started in the food room it became evident that whilst he was good at customer service he was not so good at food preparation. Primarily Mr Halliday said that he was too slow because he was a perfectionist.

The incident with G

[16] The Authority heard G's affirmed evidence by telephone. G said that she was training Mr Halliday and he would not take instruction and would not make the sandwiches the way she asked him to. G said that when told to follow instructions Mr Halliday would sulk.

Sometime she said he would sit on the floor which she found quite unusual and sometimes he would cry. Mr Halliday did not disagree that there were occasions he sat on the floor.

[17] One day G said working with Mr Halliday got too much for her and she said “Fuck this I’m going home.” She did not accept that she said additionally as Mr Halliday said in his evidence “I’m sick of training useless assholes who don’t know what they’re doing.” She categorically denied swearing at Mr Halliday. G left the room and spoke to her supervisor when she walked out. She then went back inside to retrieve her handbag. She said that at that time Mr Halliday was laughing which indicated to her he thought the whole thing was funny. Mr Halliday said that the laughter was of a nervous type and not because he found the situation humorous.

[18] Mr Halliday complained about the way he had been spoken to by G to the manager of the Regent Night’n Day David Hellyer. Mr Hellyer also gave affirmed evidence by telephone. Mr Halliday when asked did not want to make a formal complaint. Mr Hellyer undertook an investigation of an informal nature. He said that he thought both G and Mr Halliday were in the wrong because of G’s outburst and because he recalled Mr Halliday saying that he may have provoked the outburst. He recalled Mr Halliday saying to him that he made a couple of creative sandwiches which annoyed G. G said that she was concerned for Mr Halliday and talked to him about some out of work matters that she thought may be relevant to his behaviour. I do not find Mr Hellyer or G had knowledge that Mr Halliday’s behaviour was because he worked in the sandwich room.

Steps taken after the informal complaint

[19] G and Mr Halliday only worked one or two days after the incident together because G went on a period of annual leave for about two weeks. When G returned from leave Mr Halliday went from working Monday to Friday in the food room to working by himself on the weekend and he returned to working three evening shifts at the counter during the week. The two shifts worked in the food room were from 6am to 2.30 pm. Mr Halliday said that because he was slow he would work to 4 or 5 pm to get the work done but he did not record

on his time sheet he was taking that period of time to complete the role. I am not satisfied that there was knowledge that this is what he did until in or about June 2016. Ms Lane said that had she known she would have instructed him to complete his time sheets correctly.

[20] Mr Halliday said he wanted to be taken out of the food room altogether but was told by Mr Hellyer that he was the only person trained in the role so had to keep working there.

[21] In January/February 2016 Mr Hellyer transitioned out of the manager role and Jade McPherson took on the role as manager of the Regent Night'n Day Store. Mr Halliday said that he asked Ms McPherson, possibly only once or twice, if he could be removed from the food room but she said that there was no-one else trained. Mr Halliday said that Ms McPherson must have been aware of his distress at being in the sandwich room because he said words along the line of "I am not coping and the place is destroying me". Ms McPherson said that it was not until 10 June 2016; after Mr Halliday had been rostered off the food room that she said she was aware that he was saying working in the food room had caused him to become unwell. Whilst I accept that Ms McPherson knew Mr Halliday wanted to stop working in the food room I am not satisfied that she was aware of the distress that he described in his evidence.

[22] Ms McPherson said that she had made efforts to replace Mr Halliday but could not do that immediately. She reduced his weekend shifts from two weekend days to one day because he could not complete his shift adequately.

When was Mr Halliday no longer rostered to work in the food room

[23] Mr Halliday said that sick leave for two periods of 14 days from 13 April 2016 and from 19 May was as a result of the stress in working in the food room. His evidence was that when he returned from the second period of sick leave he was no longer rostered in the food room.

[24] Ms Lane in her evidence said that she did not think that Mr Halliday worked in the food room in April 2016.

[25] There was no documentary evidence to support when the rostering in the food room stopped. I accept Mr Halliday's evidence that he was not rostered in the food room after 19 May 2016.

Meeting 7 March 2016

[26] On 7 March 2016 a meeting took place between Ms Lane, her daughter Katrina Hellyer, Mr Halliday and Mr Halliday's parents Bruce and Debra Halliday.

[27] Ms Lane provided a handwritten note she took at the 7 March 2016 meeting. Mr Halliday could recall discussion about some of the matters on the note and in particular his productivity and focus. At that time Mr Halliday was working three shifts a week on the counter and when I read the notes the concerns appear more focussed on that aspect of his role. I am not satisfied that the first meeting referred to in the notes typed by Bruce Halliday was the meeting on 7 March. I conclude it is in all likelihood the next meeting on 10 June 2016. I find that Ms Lane's notes are the best record of what was discussed at that earlier meeting.

[28] Ms Lane's notes do not support there was any discussion about how Mr Halliday felt working in the food room. The purpose of the meeting, as set out in the notes, was to discuss not signing job lists, not completing jobs, lack of productivity and not maintaining food levels and quality. Time was spent discussing how to fix the issues and there is a plan of action set out in the notes.

Conclusion about whether there was a breach of health and safety obligations

[29] There is a duty to maintain a safe workplace in the Health and Safety in Employment Act 1992. An employer should take all practicable steps to do so in respect of circumstances known about or which ought reasonably to have been known about. An employer does not

guarantee to cocoon employees from stress and upset nor is the employer the guarantor of the safety and health of the employee – Court of Appeal in *Attorney-General v Gilbert*.²

[30] The two medical certificates that Mr Halliday says were for periods of sickness due to the stress of working in the food room simply state he was certified unfit to resume work for 14 days. I am not satisfied that Mr Halliday clearly advised Ms McPherson that working in the food room was the cause of his stress and absence from work.

[31] There was awareness that Mr Halliday did not like working in the food room. Of its own that is not enough to constitute a breach. Many employees do not like aspects of their jobs but that does not form the basis for a claim against the employer. I am not satisfied that Ms Lane and Ms McPherson were aware of the extent of Mr Halliday's distress before the meeting on 10 June 2016. That meeting was primarily to discuss the amount of sick leave Mr Halliday had taken from the week ending 17 April 2016 to 10 June 2016 which was 23 days. This was after he had stopped being rostered on in the food room.

[32] There was no evidence to support that the system of work in the food room was unsafe or that the nature, volume and circumstances of the work was such to conclude Lane Group did not take all reasonable care. I find that Lane Group took reasonable and fair steps proportionate to the knowledge they had. Mr Halliday worked different shifts to G after the interaction. Lane Group attempted to find a replacement for him and then reduced Mr Halliday's shifts to two a week and then one.

[33] I do not find that there was a breach of the obligations to provide a safe work place.

Disciplinary and performance issues being raised

[34] Mr Halliday says he was disadvantaged in his workplace when numerous disciplinary and performance issues were raised with him in a way he says was unjustified. Mr Halliday says that the issues were presented as serious misconduct when it was clear they were

² *Attorney-General v Gilbert* [2002] 1 ERNZ 31 at [83]

performance issues. He says that the issues raised were oppressive because of the number of allegations put and the process was not in accordance with the employment agreement but designed to force him to resign rather than to assist to bring him up to standard.

[35] The factual background to this issue overlaps that of the unjustified dismissal claim and I will turn to that and the test of justification in s 103A of the Employment Relations Act 2000 (the Act) now.

The test of justification

[36] The Authority is asked to consider whether Mr Halliday was unjustifiably disadvantaged and unjustifiably dismissed. The Authority is required in those circumstances to apply the justification test which is set out in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Lane Group and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[37] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether the allegations against Mr Halliday were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them, and whether such explanations were considered genuinely by Lane Group before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[38] Lane Group as a fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

How were performance concerns raised with Mr Halliday?

[39] The evidence from Mr Halliday and his parents was to the effect that Ms Lane was targeting Mr Halliday and looking for matters to “get rid of him” and that Ms Lane was on a “witch hunt.” I will consider the raising of concerns as set out below.

7 March 2016

[40] I have referred to this meeting and the participants earlier when considering the issue of working in the food room. The evidence supported that serving customers was an important aspect of Mr Halliday’s counter role but there were also other jobs that he was required to attend to during a shift when he was not serving customers. These were on a list and Ms Lane explained there were duties such as maintaining the counter and cleaning it, stocking and maintaining a list of cigarettes, doing dishes and keeping fried food up to date and maintained for customers. Each job would be signed off on a shift. Ms Lane said that Mr Halliday would sign off on one or two jobs whereas other staff would sign off all the jobs on a shift. She was also concerned that the food level was low on a shift and the food presented was not fit to be sold. I find that Mr Halliday accepted at this meeting that he lost focus and then forgot after serving customers what job he had been working on previously.

[41] It was agreed at the meeting that Mr Halliday would put a mark in the nature of a star on the job sheet so he would remember what he had been working on and would complete it and sign it off before moving to the next job. The notes reflect that Mr Halliday accepted that the rule is that if food is not fit to eat then it is to be thrown out and that everyone left that meeting happy. I am not satisfied that what was raised at that meeting were other than genuine concerns Lane Group had. The outcome was agreed. Mr Halliday accepts in his written evidence that Ms Lane was at that stage still trying to work with him to improve his performance.

10 June 2016

[42] The second meeting was held on 10 June 2016. It was attended by Ms Lane, Mr Halliday and his mother Debra Halliday. There was a dispute that I do not find I am required to resolve about whether Ms Lane attended that meeting with her daughter Karina or Ms McPherson. Ms Lane did not take notes but there are some notes provided by the Hallidays. Primarily I accept the meeting was called to discuss concerns about the number of days Mr Halliday had been absent. Mr Halliday and his mother were concerned about what Ms Lane said about sick leave to the extent that it suggested it was not genuine. Ms Lane said that she never said that but her focus was on Mr Halliday's reliability because he had taken 23 days off between mid- April and 10 June 2016. She felt that there was an issue developing about frustration of the employment agreement. Mention was made at that stage, I find, clearly for the first time that some of the leave was necessary because of the stress caused by the work in the food room.

[43] Issues of productivity and not completing the job book may have been raised again. Mr Halliday accepted in his evidence that he had not continued with the proposal to put a mark beside an uncompleted job when he served customers but said that he made sure someone signed the job off.

21 June 2016

[44] The third meeting was on 21 June 2016. Ms Lane wanted to meet with Mr Halliday but she was overseas when the meeting took place so her daughter Karina Hellyer ran the meeting and she was accompanied by Savi Arora from Head Office. Mr Halliday attended with his father Bruce Halliday. The concerns discussed were about not following instructions to work with the food door open, issues about productivity and failing to follow instructions to clean the confectionary counter and putting cigarettes away. There was a concern that Mr Halliday was late twice without explanation and that he had left a threatening message on a pottle and was wasting work resources with tape.

[45] Mr Halliday answered the allegations. He said that he had cleaned the confectionary counter and after the meeting called Ms Hellyer to advise that he was not working the shift when the cigarettes had not been put away and that had been unfairly attributed to him. Mr Halliday said that he was only late for a few minutes when he could not find his belt and when he called his father about the disciplinary meeting. He did not accept that he was asked for an explanation. He said that his productivity had increased but he was not writing in the book but it was recorded by other staff. Bruce Halliday raised a concern at the meeting whether Ms McPherson was directed to target his son.

[46] I heard evidence from Ms McPherson. She said that there were continuing issues with Mr Halliday's productivity that she experienced as store manager. Ms McPherson said that she brought up with Ms Lane that Mr Halliday had been late for two shifts and when she asked him why he was late he did not answer her. She said that she found a note Mr Halliday had left on a banoffi pie saying "I swear to God that if you throw this out I will open my jaw and swallow you like a snake" threatening and raised the matter with Ms Lane. She said that she did not recall Mr Halliday cleaning the confectionary counter properly and said she had to ask many times and she said that it was Mr Halliday who did not put the cigarettes away.

[47] The evidence satisfied me that Ms McPherson found Mr Halliday difficult to manage. This included a concern that even after meeting with Ms Lane and Karina he took an unusual length of time to complete tasks compared to other staff and that he would only do tasks he liked until instructed to complete other tasks. Further that he did not start jobs or if he started jobs he did not complete them. Ms McPherson said that he chatted too much to customers and staff. I also heard evidence from another employee Tamsin Savage who began as assistant manager at Regent Night'n Day in June 2016. Ms Savage said that Mr Halliday's strength was in dealing with customers when he was a real asset to the team. He was fast and always friendly to customers. Ms Savage however also found him difficult to manage as she had to remind him to do things and regularly check his work. She said in her oral evidence that when customers left Mr Halliday lost focus and would stare into space.

[48] There was no formal outcome to that meeting.

4 August 2016

[49] By letter dated 1 August Mr Halliday was invited to a disciplinary meeting on 4 August 2016. Some of the concerns in the letter were captured on CCTV cameras. Mr Halliday was advised that whilst access to the CCTV footage was not to be provided prior to the meeting he would be able to view it at the meeting with his support person. There was advice that the items collectively were viewed as very serious and that there could be disciplinary action including dismissal.

[50] The items to be discussed were attached to the letter as set out:

Sitting on a stool during work time behind the counter at the POS (point of sale).

Continued lack of productivity.

Absences from work - 28 days since 17/4/2016.

Substantial changes of appearance since interview.

Failing to follow instruction of covering hair with the use of a hat by lifting the hat a number of times to display hair.

Message left on banoffi pie.

Serving yourself a portion of hotdog combo and sauce.

Ringing the sale for yourself on at the POS, putting the transaction on sale 2, and not ensuring it was charged to your account.

Failing to allow on the transaction for the additional condiment.

Consumption of products in the retail area in front of customers.

Customer complaint on 14/7/2016 for lack of service.

Loitering on premise after the end of your shift.

Unprofessional behaviour of till slips being used as a scarf and hat during your shift

[51] Mr Halliday attended the disciplinary meeting with his mother and solicitor, at that time Ms Lucia Vincent. Ms Lane attended with Mr Rhodes.

[52] There were notes taken during the meeting by Ms Vincent which have been provided as part of the investigation process. There was an offer for Mr Halliday and Ms Vincent to view the CCTV footage but a concern from Ms Vincent about the length of time required to do so. Some still photos were provided by Ms Lane in respect of the specific allegations.

Explanations given to the allegations from the meeting notes and Ms Vincent's letter of 12 August 2016 to Ms Lane sent during the process and after the meeting of 4 August 2016

[53] Some of the allegations relate to the same incident and have been grouped together accordingly. The explanations given can be summarised as follows.

- (i) *Allegation of sitting on a stool behind the counter.* A photograph of the footage was provided. Mr Halliday said that he had already finished his shift and was not at work and the allegation was therefore not proven.
- (ii) *Continued lack of productivity.* Mr Halliday said that he did his best to complete the listed jobs but as he is the primary counter person he has less opportunity than other staff. He thought he had improved. Ms Vincent maintained that this was a performance issue and there needed to be specific concerns put and an opportunity to improve before disciplinary action.
- (iii) *Absences from work.* It was stated that these were genuine, caused largely by work related factors and not appropriate to raise in a disciplinary process.
- (iv) *Substantial change of appearance since interview and failure to follow instruction to cover hair with hat by lifting it to display the hair to customer.* Mr Halliday's hair colour changed from purple hair at his interview to pink, white and blue. Reference was made to the student population that were served at the Regent store. An issue was raised about whether there was

actually a breach of the requirements of the handbook supplement or handbook. It was not accepted that Mr Halliday had failed to follow an instruction to wear a hat during his shift. He says that customers asked him to show them his hair and he lifted his cap accordingly feeling compelled to do so. He took steps subsequently to wash the colour out with the result that his hair was only white and in her letter of 12 August 2016 Ms Vincent said any hair colour changes would be checked in future to avoid conflict.

- (v) *Message left on banoffi pie.* Mr Halliday said that those who work with him know about his weird sense of humour and no-one would take him seriously. Ms Vincent said that even if it could be categorised as misconduct it was not serious misconduct.
- (vi) *Mr Halliday serving himself a hotdog combo and sauce, ringing the sale for himself at POS, putting the transaction of the sale through, and not ensuring it was charged to his account and failing to allow for the transaction for the additional condiment.* Mr Halliday was provided with a photograph of CCTV footage showing a transaction whereby he had served his own hotdog combo, rung it up onto the POS, put the transaction on sale two to avoid clogging it up for other customers and then ask another staff member to charge the purchase to his account. He thought nothing more about it until it was brought to his attention and he then arranged payment. He said that it was common for staff to serve themselves and ringing the sale on in the same way he did. During the process Ms Lane said that the two employees did not recall Mr Halliday requesting they charge it to his account. Ms Vincent wrote in her letter that now Mr Halliday was aware what he was doing was not in accordance with the rules he would not do it again. Further it was explained that he did not know he ought to charge for an extra condiment but would do so in the future.

- (vii) *Consumption of products in the retail area in front of customers* – Mr Halliday was shown a photograph from CCTV footage showing him with a drink in his hand behind the counter from 14 June 2016 at 1.33am. Mr Halliday said that he had finished work at 1am and was not therefore at work. The photo showed Mr Halliday had the money bag over his shoulder and he explained he was on his way to deliver this and would have signed off. Mr Halliday was aware that it was unacceptable to consume product in the retail area during work.
- (viii) *Customer complaint* – Mr Halliday’s explanation about this matter was accepted.
- (viiii) *Loitering on premise after end of shift* – Ms Lane said that she advised staff at earlier meetings that they should not remain at the store after the shift had finished. Notes were provided about a staff meeting on 12 February 2016 where this was raised as unacceptable. Mr Halliday accepted that he had on occasion stayed at work after shift finish as he socialises with other staff after work, waits for their breaks and buys food. Ms Vincent set out that since that had personally been brought to his attention and he understood the depth of her concern he had made effort to ensure he does not do this. Ms Lane sent an email dated 10 August to Ms Vincent following the disciplinary meeting showing Mr Halliday some 23 minutes after his shift ended on 8/9 August 2016 with his bicycle in the shop reading magazines. There was also reference to his lack of productivity on a shift which Ms Lane said was available for viewing. Ms Vincent said that Mr Halliday was waiting for a hotdog which took longer than usual because staff had run out.

[54] In her letter Ms Vincent proposed that a performance management plan should be put in place.

Ms Lane's response by letter dated 23 August 2016

[55] Ms Lane responded to Ms Vincent in a letter dated 23 August 2016. Ms Lane clarified that all of the concerns related to underperformance. Ms Lane did not accept that a training plan be put in place and said that it was sufficient to bring matters to Mr Halliday's attention. She wrote that having done so there was still continued underperformance.

[56] In her letter Ms Lane went through each of the explanations and where appropriate advised why the explanation was not accepted. Ms Lane did not accept that Mr Halliday was targeted and said that everyone is expected to perform to standards. The sitting on the stool behind the counter explanation was not accepted because staff are expected at the end of their shift to move out from behind the counter. The lifting of the hat was regarded as an act of bravado against his supervisor as well as pushing boundaries. There was reference to Mr Halliday's actions being different and senior staff finding him hard to control. The banoffi pie was put into the same category as well as the till incident as examples of Mr Halliday pushing boundaries and being unable to concentrate on doing his job properly.

[57] The explanation to serving himself and ringing the sale on was noted. It was not accepted that because others do it the breach was acceptable. Ms Lane indicated that she would follow up Mr Halliday's explanation with others.

[58] There are two responses to the explanations that I want to set out in more detail. The first is about the lack of productivity. Ms Lane accepted that Mr Halliday is most often assigned to primary counterwork but the concern is that he does not move to continue working through a list of tasks after a customer has left which is not acceptable. Ms Lane wrote that he "loiters" for want of a better term. She said that CCTV footage showed that Mr Halliday was not achieving expectations.

[59] The second response is about the hanging around after shift finish. Ms Lane set out that the explanation given was unacceptable because Mr Halliday had ample opportunity to be served but continued to talk to staff. Two further instances of hanging around after shift

finish were referred to that had occurred after the disciplinary meeting on 4 August in addition to the new instance referred to by Ms Lane on the shift of 8/9 August. Ms Lane referred to footage of Wednesday morning on 10 August 2016 showing Mr Halliday hanging around after his shift finished until 12.13am and then going to the smoko room to get his bike, returning to the shop, buying a chicken slice and drink then staying at the counter with his bike until 12.33am. She also refers to footage of the following week on 16 August showing that Mr Halliday collects his bike after finishing work and goes to the front counter at 1.07pm and collects something from the staff member which is concluded at 1.09pm but he hangs around until 1.18pm.

[60] The letter concluded with an intention to dismiss Mr Halliday for continual and collective breaches of rules and processes. Ms Lane wrote that she would delay the timing of the action to give Mr Halliday one last opportunity to make further comment if he wished by no later than 26 August 2016.

Reply from Ms Vincent dated 26 August 2016

[61] Ms Vincent responded to Ms Lane by letter dated 26 August 2016. In her letter she did not accept that Mr Halliday could be fairly and reasonably dismissed. She noted that underperformance under the policy attracts a warning (at best) and that there should be a performance management plan with warnings. Ms Vincent referred to a new matter in Ms Lane's letter of 23 August 2016 letter that Mr Halliday was late.

Two medical certificates

[62] Two medical certificates were provided to Lane Group for Mr Halliday. The first was that he was unfit to resume work on 22 August and 25 August 2016 due to illness. The second was that he was unfit to resume work for a period of 30 days from 29 August 2016.

Letter of dismissal from Ms Lane and reasons for dismissal

[63] By letter dated 31 August 2016 Ms Lane advised that a decision had been made to dismiss Mr Halliday on notice effective 5 September 2016 and pay him the notice period contained in his employment agreement. The reason for this the letter stated was to give Mr Halliday, because of his age and personal situation, some income over the time to look for another role.

Was dismissal an action a fair and reasonable employer could have taken in all the circumstances at the time?

Procedural fairness

[64] It was unclear what exactly was relied on for dismissal notwithstanding reasons set out in the letter of dismissal. Ms Lane was not certain, when I asked her if the instance referred to Mr Halliday telephoning in sick but after being contacted being able to come into work, and continuing to be absent without any medical certification were taken into account in making the decision to dismiss. These occurred after the 4 August 2016 disciplinary meeting. If they were taken into account, and they are set out in the dismissal letter as part of the reason for the decision to dismiss, then Mr Halliday did not before his dismissal have those matters put to him for his explanation. That was unfair.

[65] Continuing loitering after shifts was a reason for dismissal. Ms Lane's evidence was that a warning could possibly have been an outcome but for the later discovered instances of loitering after shift end to which there was no explanation. It appeared from the dismissal letter that there was a view such behaviour could have an element of deliberateness. Mr Halliday did not get an opportunity to answer that element as it only appeared in the dismissal letter.

[66] Two further instances of remaining after shift end were put to Mr Halliday in the 23 August 2016 letter and no explanation was provided. Mr Halliday said he thought that

would be fruitless as Ms Lane had proposed dismissal in her letter of 23 August 2016. When the letter is read as a whole it is not so obvious that those new matters whilst concerning are considered in isolation to be so serious that alternatives to dismissal are no longer seen as viable unless they are satisfactorily explained. There is reference at the conclusion of the letter to all the matters set out resulting in a belief that Mr Halliday was well aware of shortcomings in the areas listed and had been given opportunities to perform his duties as expected. Whilst there was an opportunity to “make further comment” that followed a statement of an intention to dismiss Mr Halliday for continual and collective breaches of the rules and processes.

[67] A fair and reasonable employer could have been expected to have more formally advised of the two new allegations in the letter and that they were serious and could result in disciplinary action up to dismissal. There should have been mention that the CCTV footage was available for viewing or photo stills could have been attached. Mr Halliday should have been specifically asked for an explanation in the letter about these two new allegations. A fair and reasonable employer could have been expected to have wanted an explanation about these matters.

[68] Productivity between serving customers I find was also a reason for dismissal. I accept it had remained a concern. A new matter was relied on regarding the concern about productivity which was one handed sweeping whilst sitting down. That was not been put to Mr Halliday for comment but was relied on in making the decision to dismiss. That was unfair.

[69] The final specific matter referred to in the letter of dismissal is that Mr Halliday served himself [the hotdog] and that because others do it that does not excuse his action which was referred to as serious. Whilst objectively assessed a fair and reasonable employer could find the fact others were breaching the rule did not make the breach acceptable it needed to be weighed whether Mr Halliday had simply done what others had done or deliberately breached

a rule. The letter of 23 August from Ms Lane said that the incident was being followed up with others but no outcome to that follow up was provided.

[70] In conclusion I accept Lane Group became dissatisfied with Mr Halliday's performance and attitude. It drew to his attention a number of rules and processes it considered he had breached. Some of these were minor but I accept they were important for Lane Group and its desire for a professional customer image and/or they were rules designed to protect its business. The matters for concern were viewed by Lane Group as underperformance but objectively assessed some could be seen as either performance or misconduct.

[71] There was a policy in the handbook for performance concerns and rule breaches. I do not find in terms of the performance concerns, such as productivity, there was a timetable to achieve the corrective action as required in the policy. Mr Halliday on one hand said that he felt he had improved but that was not the view of Lane Group. There needed to be some objective measurement. In accordance with the policy in the handbook about work performance and rule breaking a fair and reasonable employer could have been expected to have considered a written warning which incorporated all the previous incidents where an explanation was not found to be acceptable. The warning could have specifically included a clear statement about the failure to complete the corrective action and/or the consequence of continuing to breach rules. There should have been a timeframe against which continued performance and adherence to rules could have continued to be measured.

[72] In terms of procedural fairness I find that reasons for dismissal included new allegations of continued breaches of rules and issues about performance. Some were not put to Mr Halliday for explanation. Some were not adequately put. Lane Group policy supported that a warning should have preceded dismissal for minor rule breaches and performance concerns and that policy was not followed.

Substantive fairness

[73] Substantive fairness overlaps in this matter with the procedural unfairness to an extent it is difficult to separate the elements. At the Authority investigation meeting the focus for the dismissal from Lane Group was on occasions after the disciplinary meeting Mr Halliday remained in the store after shift end. I could not be satisfied that the reasons for dismissal were only for that matter. It is unclear exactly what the reasons were.

[74] I do find a fair and reasonable employer could conclude that Mr Halliday continued after his shift to remain in the store notwithstanding as his lawyer wrote he understood the depth of Ms Lane's concerns about doing so. A fair and reasonable employer could conclude this supported a continued inability to follow instructions about that matter impacting on the trust and confidence in the relationship that Lane Group needed to have in Mr Halliday.

Targeting

[75] Mr Halliday and his parents say that he was being targeted. I am not satisfied objectively assessed that Mr Halliday was targeted by Ms Lane but rather his performance and behaviour was such that his supervisors frequently escalated matters to Ms Lane as they found him difficult to manage. Mr Halliday would not for example accept Ms McPherson's advice about the hair colour change and therefore Ms Lane had to attend the store and talk to him and the matter was in that way escalated. Ultimately escalation did lead to him being scrutinised more carefully by Ms Lane using CCTV footage.

[76] I am reinforced in my view that Mr Halliday was not targeted by the evidence of Ms Savage the assistant manager who started in June 2016. She said that Mr Halliday frequently told her he felt that Ms Lane "had it in for him" but Ms Savage said that she did not see it. Her evidence was that Ms Lane asked her to retrain Mr Halliday and help him and she said that if Ms Lane had targeted Mr Halliday she would not have asked her to do that. Ms Savage said that the issues about signing jobs on the list off continued for Mr Halliday until he left and she did not stop having to remind Mr Halliday to do that. I also note that

other employees were also spoken to by Ms Lane about issues and concerns. It was not just Mr Halliday.

[77] In conclusion there was procedural and substantive unfairness as set out above.

Decision to dismiss

[78] I find that the policy in the handbook was not followed where there were concerns of performance and/or misconduct. Some of the reasons for dismissal had not been put to Mr Halliday or put inadequately. There was no indication in respect of one reason whether it was a common practice or not which would have impacted on a finding as to seriousness. A decision to dismiss as a result was not one accordingly that a fair and reasonable employer could have reached in all the circumstances.

[79] Mr Halliday has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies. There was also a grievance for unjustified disadvantage. I have not found that Mr Halliday was targeted or that the process was designed to encourage him to resign. I find that there was some basis for the issues raised. I accept that there was some confusion about categorisation of the concerns but ultimately it seemed to be accepted by Lane Group they were concerns of underperformance. Process concerns are absorbed in the grievance of dismissal and there is no separate assessment of remedies.

Remedies

Lost Wages

[80] Mr Halliday seeks reimbursement of six months lost wages. He said that he was not in a position to look for a role for an even greater period than six months and could not face going through a job interview and facing rejection. In assessing lost wages the Authority needs to consider whether the employment relationship was likely to last for that period. I am simply not satisfied that it would have. There was after the disciplinary meeting continued examples of Mr Halliday staying after his shift despite his promise to do his best to ensure

that would not happen. He did not seem able to follow that instruction. It is inevitable that he would have been required to be more productive and I accept that had been an ongoing concern since March 2016. I cannot be satisfied with a fair process the relationship would have lasted from the date of dismissal on 5 September 2016 beyond a further eight weeks.

[81] No information was provided about the quantum of lost wages. My understanding is that Mr Halliday was paid in lieu of notice from 5 September 2016 in accordance with his employment agreement notwithstanding that he was too unwell to work for 30 days from 29 August 2016. Subject to contribution Mr Halliday is entitled to be reimbursed for eight weeks lost wages less what he received for his notice period from 5 September 2016.

Compensation

[82] Mr Halliday gave evidence that leading up to and subsequent to his dismissal he was depressed, anxious and low in confidence. His parents suggested that he move to the Caitlins and stay with his grandmother for a time after dismissal which he did. He said whilst there he was depressed, withdrawn and low in confidence. His mother was concerned about his mental state and had him assessed by Emergency Psychiatric Services but they did not diagnose immediate concern with depression, suicide and anxiety. Mr Halliday said that he had become angry and aggressive and he eventually returned to an organisation called Tree House, which had helped him with the job with Lane Group, to help him prepare to look for another role.

[83] I accept that there was a reasonably significant impact for Mr Halliday as the result of his dismissal and the procedure that lead to his dismissal. This was his first job of a permanent nature. I have balanced with that the view Mr Halliday had that Ms Lane was out to target him. That contributed I find to his distress but I have not found that in fact he was targeted. Those who worked with Mr Halliday as his supervisors knew he had significant strengths in dealing with customers but some of his other behaviours were difficult to manage. Good faith requires parties to an employment relationship to be responsive and communicative and that includes raising concerns when they arise.

[84] Subject to contribution I find a suitable award of compensation is \$9000.

Contribution

[85] The Authority is required to, when it has found a personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If the actions so require then the remedies should be reduced.

[86] Mr Halliday contributed to the situation that gave rise to the grievance primarily when he continued to stay after his shift when Ms Lane's concerns about that were made very clear to him. There was also, I find, an element of boundary pushing. I find blameworthy conduct that contributed towards the situation that gave rise to the personal grievance. I find that the remedies awarded should be reduced by a third or 33%.

Orders

[87] Taking contribution into account any amount of lost wages is to be reduced by 33%. I reserve leave for Mr Nevell or Mr Rhodes to return to the Authority if there are difficulties in reaching agreement about the amount for reimbursement of lost wages.

[88] I order Lane Group Limited to pay to Brodie Halliday taking contribution into account compensation under s 123 (1)(c) (i) of the Act in the sum of \$6000 without deduction.

Penalty for breach of good faith

[89] I have not found a breach arises in terms of health and safety so no issue of penalty arises. A penalty is also claimed for a breach of good faith because of the alleged intentional action of Ms Lane to undermine the employment relationship. I have not been satisfied of that. The process was unfair but that matter was considered as part of the grievance of unjustified dismissal and I make no award additionally for a penalty.

Costs

[90] I reserve the issue of costs. It may be that agreement can be reached. Failing which Mr Nevell has until 9 November 2017 to lodge and serve submissions as to costs and Mr Rhodes has until 23 November 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority