

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 162  
3007511

BETWEEN            MICHAEL HARLING  
Applicant

A N D                GORDON JOHNSON LIMITED  
t/a McDONALD'S TIMARU  
Respondent

Member of Authority:     David Appleton

Representatives:         Timothy Jackson, Counsel for Applicant  
Peter Johnson, Advocate for Respondent

Investigation Meeting:    22 August 2017 at Timaru

Submissions Received:    1 and 22 September 2017 from Applicant  
10 September 2017 from Respondent

Date of Determination:    27 September 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Harling does not succeed in his personal grievance of unjustified dismissal for the reasons set out in this determination.**
- B.     Costs are reserved in accordance with paragraph 72 of this determination.**

## **Employment relationship problem**

[1] Mr Harling claims that he was unjustifiably dismissed from his employment on 10 June 2016. The respondent denies that the dismissal of Mr Harling was unjustified asserting that it occurred at the end of a number of warnings in relation to Mr Harling's conduct and performance.

### **Brief account of the events leading to the dismissal**

#### *Mr Harling's understanding of what his duties would entail*

[2] The respondent company owns and operates the franchise to run the McDonald's fast food restaurant in Timaru. Mr Harling applied on line for a position at McDonald's Timaru in early April 2016. Mr Harling's evidence is that he had suffered a head injury in the past which had caused post-traumatic stress disorder (PTSD) which he believed, in turn, had caused him to get anxious when he was under pressure<sup>1</sup>. Mr Harling's evidence was that he did not think he could cope with the pressure and customer contact of the drive thru<sup>2</sup> and the front counter areas at McDonald's and so intended to work only in the kitchen. It appears that he never stated this expressly, but said at the Authority's investigation meeting that he did indicate in his on-line application that his preference was the kitchen. It is the respondent's position that crew members have to be flexible enough to work in all three areas (kitchen, drive thru and front counter).

#### *What Mr Harling was told his duties would entail*

[3] Mr Harling was selected for an interview, which took place on 7 April 2016. The interview was conducted by the senior restaurant manager, Ms Gillian Anderson. Mr Harling's evidence is that he did not inform Ms Anderson that he would not work in any other station other than the kitchen, but that he was not told he would have to. It appears that

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<sup>1</sup> It appears that this was later determined to be a misdiagnosis but it is not in dispute that Mr Harling suffered from anxiety, including social anxiety, at the material time.

<sup>2</sup> I adopt the American spelling because this is how McDonald's spells the word.

Mr Harling's evidence is that he assumed that he could choose just to work in the kitchen area because of his having indicated his preference. I note, however, that the copy of Mr Harling's on line application which was put before the Authority (pages 1 to 3 of the Applicant's bundle) does not show that Mr Harling had expressed any preference, and there does not appear to be any question that asked him to do so.

[4] In addition, Mr Harling acknowledges that he did not tell Ms Anderson that he suffered from PTSD and/or anxiety because he did not think he needed to, given that he would be only working in the kitchen in accordance with his assumption. Ms Anderson gave evidence and states that she expressly mentioned that the work would involve working in the drive thru and the front counter, and that Mr Harling did not raise any concerns. Mr Harling disagrees that Ms Anderson mentioned these areas.

[5] The respondent uses standard McDonald's recruitment and interview materials as well as standard McDonald's terms and conditions of employment and orientation and training materials. The Authority saw a number of these materials. One such document was a completed "Hire the Smile Interview Toolkit" which had been completed by Ms Anderson. This document listed a number of interview questions designed to test candidates to check that they had the characteristics necessary to work as a crew member in McDonald's restaurant including job fit, teamwork, initiative, speed and accuracy, customer engagement and willingness to learn. Although no notes had been written against four of these categories, Ms Anderson had written against the "job fit" category the following:

Isaac had mentioned we were hiring. Similar work to what he has been doing.  
\*kitchen  
\*counter  
\*drivethru.

Work teams – crew (BK)

[6] The individual named Isaac was a friend of Mr Harling who worked at McDonalds Timaru at that time. BK refers to Burger King, where Mr Harling had been working before taking six months off work for health reasons.

[7] In another part of the “Hire the Smile Interview Toolkit”, Ms Anderson had written the following:

- \* Advised Michael looking for employees over rush/high sales.
- \* Duties to include counter/drive-thru/kitchen.
- \* Day parts required Thurs-Sun mainly.
- \* Asked if any reason/sickness or ACC/that would prevent working here.
- \* Can be stressfull [sic] environment – but fun.

[8] Mr Harling agrees that Ms Anderson had said three of the points referred to above, except he did not recall her mentioning the second and fourth points. Ms Anderson says that she always mentions these five points when she is interviewing because it was important that potential new recruits understand that the restaurant is busy, given that some were young adults, applying to work after school. She did not recall what Mr Harling had said.

[9] It is my finding that, on a balance of probabilities, Ms Anderson did mention these five points, and did make clear what the job would entail. I reach this conclusion because Ms Anderson had a better recall than Mr Harling about the interview, and because McDonald’s has streamlined and fairly rigid processes in place for most of their activities, including the conducting of interviews, with which Ms Anderson was very familiar. This conclusion should not be construed to mean that I find that Mr Harling lied when he gave his evidence to the Authority; rather, he had a vague recollection of the interview.

*Whether Mt Harling was issued with the terms and conditions of his employment*

[10] Mr Harling was offered employment by the respondent as a crew member and his first day at work was 12 April 2016 when he was taken through the “in-restaurant orientation” process. On that day, he was given an offer of employment which Mr Harling signed. This document stated that Mr Harling could choose employment on an individual employment agreement or a collective employment agreement between McDonald’s and Unite Union. The offer of employment document states that a copy of the individual employment agreement

was enclosed and that he was being employed in the position of “crew”. The section went on to state the following:

We have described the duties to you and you will be given more details during your induction on your first day of work.

[11] The Authority also saw a copy of a “restaurant orientation checklist” which Mr Harling had signed and which stated that a collective agreement had been issued.

[12] Mr Harling says that he was not given a copy of either a collective agreement or the individual employment agreement, and says that, whilst he knew that there was a booklet with terms and conditions in it, he only ever saw parts of it when he was training. Mr Peter Johnson, the director and shareholder of the respondent, and Ms Anderson both said in evidence that Mr Harling would have been issued with an individual employment agreement during orientation as that was standard practice, and the company has a number of them available for that very purpose. In addition, a virtual copy is also available online to crew members and a physical copy was present in the staffroom.

[13] On this point, I believe that it is more likely than not that Mr Harling had been issued with a copy of the individual terms and conditions in the form of a booklet, although the determination of the unjustified dismissal application does not hang on this finding.

[14] The Authority saw a copy of the McDonald’s employment agreement and terms and conditions for 2015-2017 which is in the form of a 45 page booklet. This document contained the following terms relevant to the employment relationship problem in question:

**Probationary Period**

When you start your employment it is really important that you are given feedback about your performance so that you can give your best efforts to your job. Also at the beginning of the employment relationship, both you and McDonald’s may feel uncertain about each other until a ‘track record’ has been established.

In order to ensure that expectations are clarified during the beginning of the employment relationship, and that feedback is ongoing, you will serve a

probationary period of 90 days from the commencement of your employment with McDonald's.

- During this period your performance will be monitored and reviewed by the Restaurant Manager/Franchisee in terms of the skill required of the position, performance and team compatibility. The Restaurant Manager/Franchisee shall take reasonable steps to provide any necessary assistance.
- If at any time during the probationary period, you fail to demonstrate the required skills and attributes, or if in the Restaurant Manager/Franchisee's reasonable opinion it is inevitable that you will fail to meet expectations during the probationary period, the Restaurant Manager/Franchisee may give one week's notice of termination of your employment, or payment in lieu of notice. For the avoidance of doubt the Notice Period provided in the Termination section, does not apply to termination in accordance with this clause.
- There shall be at least one review of your performance prior to termination during the probationary period. You should be given a reasonable amount of time to improve your performance.
- In the event that the Restaurant Manager/Franchisee dismisses you in accordance with this probationary period, the Restaurant Manager/Franchisee must explain to you the reasons for the dismissal.
- Nothing in this probationary period clause prevents a Restaurant Manager/Franchisee from terminating your employment without notice in accordance with the Termination clause in this Agreement.

[15] The McDonald's employment agreement booklet also contained the code of conduct for McDonald's. This described the "basic responsibilities and rules" which had to be adhered to when employed at McDonald's. The code of conduct contained a section called "work performance", which stated:

You must observe all reasonable instructions given by a manager or other person authorised to give such instructions.

You are required to follow McDonald's standard procedures in accordance with the station observation checklist. Your performance will be reviewed regularly. Failure to maintain an acceptable standard may result in termination of employment.

[16] On or around 25 April 2016 Mr Harling arrived at work and saw that he had been rostered on to work in the drive thru area. He sent a text to Ms Anderson to say that he could

not work in drive thru (and possibly on the front counter during busy periods; the Authority did not see a copy of this text).

[17] The Authority saw a copy of a note that Ms Anderson left for Mr Harling on Wednesday, 27 April 2016. This stated as follows:

Hi Michael

I'd like to talk to you about your text on Monday (re working in service/Drive thru).

1. I'm disappointed you never mentioned in interview that this would be an issue for you. You stated you had done all stations @ BK so I assumed this would not be an issue.
2. To be fulltime you need to learn all stations.
3. Training Plan is 2 wks on F/C Stations,  
2 wks on DT Stations,  
2 wks on Kitchen Stations.

You would then have a good broad basic training across the Restaurant which is necessary espec on closes.

I finish @ 4pm today so won't see you but I'd like to talk on Thursday if possible. (@ 5pm is fine or when you get here)

Gillian

[18] On the note, Ms Anderson had later written the following, reporting what he had told her:

Spoke to Michael today – 28/4/16 – he has stated he has anxiety so DT will stress him. Will train in Kitchen. Can do F/C when quieter.

[19] The respondent has detailed and fairly stringent rules in relation to the appearance of crew members. During the first part of his employment, the respondent expressed dissatisfaction in relation to two aspects of Mr Harling's appearance, which were described as him not being 'clean shaven' and not wearing the correct shoes. The shoe issue was resolved fairly early on, and there is no need to refer to it any further in this determination. The issue

of Mr Harling allegedly not appearing clean shaven arose intermittently, but I do not find that it played any part in the dismissal as it appears not to have been expressly referred to after 1 June 2016, and so it will not be referred to again.

[20] On 26 May 2016, a meeting took place between Mr Harling and Ms Anderson and the Authority saw three documents which recorded this meeting. The first, completed by Ms Anderson, was headed up “File note template – Informal Coaching”. This document, completed by Ms Anderson, recorded inter alia that Mr Harling would “not do drive thru due to anxiety/PTSD, which was not discussed at the time of hiring”.

[21] The “File note template – Informal Coaching” note also stated that Mr Harling told Ms Anderson that he had post-traumatic stress disorder which he had been dealing with for seven years and that Ms Anderson told him that he should have made McDonald’s aware of this at the time of hiring. It also states that “Michael replied that he did not realise he would have to work in service areas when he was hired”.

[22] The next document the Authority saw relating to the meeting on 26 May 2016 was headed “90 day Probationary Period/Crew Performance Review (1<sup>st</sup> meeting)”. This was also completed by Ms Anderson. In this, three categories of the eight performance criteria were noted as needing improvement. Two of these related to Mr Harling’s shoes and the third related to “following management direction and adhering to restaurant policies”, with the words “won’t do drive thru” noted. The document indicated that “improvement was required”.

[23] Under the heading “in order to help the employee to improve to ‘good’, agree together on an action plan for the performance items listed above”, Ms Anderson had referred to the shoes issue (under personal presentation and health and safety) but had also written the following:

Item 3 – must follow all Management directions whilst @ work including positioning.

[24] This document was then signed by Mr Harling and Ms Anderson. The document also states that a copy of it had to be given to the employee.

[25] The third document seen by the Authority in relation to this meeting with Ms Anderson was a letter signed by Mr Johnson. This stated the following:

Dear Michael

**RE: Invitation to Second Formal Performance Review Meeting**

Further to our discussion on 26 May 2016 regarding your unsatisfactory performance and the first review of your progress, I am writing to confirm that you are required to attend a second formal review meeting to discuss this further.

If your performance is at a satisfactory level no further action will be taken.

If however, your performance in relation to presentation, health and safety issues and following management direction has not improved you may face the prospect of your employment being terminated as you have been employed with McDonald's for less than 90 days, and are therefore within your probationary period.

During the meeting you will have the opportunity to present your viewpoint and we will agree on the next steps which may include an extension to the previously agreed performance improvement process.

You are entitled to bring a support person or representative to the meeting if you choose and we encourage you to do so. The support person or representatives role is to ensure that a fair meeting is held and that you have the opportunity to present your views.

The second formal performance review meeting will take place on Wed June 1 at 5.00pm at McDonald's Timaru. At the meeting Gillian Anderson as Senior Manager would also be present.

Please acknowledge receipt and understanding of the implications of this letter by returning one signed copy to me on 30 May 2016. If I do not hear from you before this time and date, I will assume that the meeting is confirmed.

Yours sincerely  
Peter G Johnson  
McDonald's Restaurant Timaru

[26] The letter had a tear-off part which stated “signed in acknowledgment of receipt and understanding of the implications of the contents of this letter:” with a space for Mr Harling to sign and date. However, the copy seen by the Authority had not been signed or dated by Mr Harling. He said this was because he did not have a problem with the date proposed.

[27] A second meeting with Mr Harling took place on 1 June 2016. The Authority saw a document headed “90 day probationary period – crew performance review (2<sup>nd</sup> meeting)” which had been completed and which showed that Mr Johnson and another individual called Tash Alloo, who was Mr Harling’s shift supervisor, were present. This document indicated that four items needed improvement. These were the three items that had been indicated previously, plus a fourth which was described as “follows McDonald’s procedures and quality standards in accordance with McDonald’s standards (SOCs)”.

[28] The document then contained a section which was headed up:

The following performance items have not improved to “good” since the last meeting and are critical for the employee’s role.

[29] Three items were listed under this heading as follows:

Item 1 – Experience and pace in kitchen.

Item 2 – Furthing [sic] up front work with customer interaction.

Item 3 – Some D/Thru work.

[30] Mr Johnson had also written on this document the following:

Ok in the kitchen. Don’t want D/T. Drinks and presenting only requested. Would do counter during quiet time. Tax code – sorted now. Hours are steady.

Follow up 10 June.

[31] Mr Harling had signed this document on 1 June 2016.

[32] Mr Johnson sent a letter to Mr Harling dated 6 June 2016 which was headed up “Invitation to third formal performance review meeting” and was written in similar terms to that of the letter dated 27 May 2016. This letter, however, stated that the performance issues were “productivity and pace in the kitchen, customer interaction and some Drive Thru work”. The letter stated that a third formal performance review meeting would take place on 10 July 2016.

[33] The Authority saw a note headed up “McDonald’s crew reports” in relation to Mr Harling which noted that, on 8 June 2016, the following:

Needs to work at speed. Make sure grill is pulled out every night to be cleaned behind. Would be helpful if he could do Drivethru.

[34] The Authority then saw a template document which was in identical form as the first and second crew performance review documents but which had been annotated to refer to this as the third meeting. This indicated that the same four categories of performance items as in the previous meeting still needed improvement. This time, no items had been listed as not having improved but the following notes were written on the document:

Meeting at 4pm.

1. Asked Michael if he was happy to continue with review given July on letter – he was.<sup>3</sup>
2. Asked Michael if he wanted a support person –declined.
3. I advised there had not been sufficient improvement and I had concerns for Michael, himself, working in such a quick and stressful environment when it gets busy – due to his stress disorder – which he did not previously disclosed [sic].
4. Advised I would be evoking [sic] the 90 day probationary period clause and would give a full week’s notice. Advised will be confirmed by letter.

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<sup>3</sup> The letter of 6 June had referred to the third performance review meeting taking place on 10 July, which was an error and which should have referred to 10 June.

[35] This document had not been signed by Mr Harling or Mr Johnson. Mr Johnson wrote a letter to Mr Harling dated 13 June 2016. This stated as follows:

Dear Michael

In our discussion on 10 June, 1 June and 26 May 2016 regarding the issue of the performance of your duties/your conduct/and your behaviour remaining below the standards required by the Company, you were given feedback and then a reasonable opportunity to improve. At that review meeting you were advised that if your performance did not reach an acceptable standard you faced the prospect of your employment being terminated. Regretfully you have not met the required standards and we do not consider that you are suitable for the permanent position of Crew Person.

As you have been employed with McDonalds for less than 90 days, and are therefore within your probationary period, please treat this letter as formal notice of the termination of your employment. You are required to work a notice period of one week, and your last day will be Saturday, 18 June 2016.

You must return to Gillian Anderson your full clean uniform, equipment and all records, documents, letters, books, computer disks, keys, and other materials of every description (including copies), which are within your possession or control and which belong to or came from the Company. Please also note that the Confidentiality clause in your employment agreement still applies after termination of your employment.

Your final pay will take into account any holiday pay owed to you, any holidays taken in advance and any monies owed by you to McDonald's.

We wish you all the best for the future.

Yours faithfully,  
Peter G Johnson  
Franchisee

[36] A personal grievance for alleged unjustified dismissal was raised on behalf of Mr Harling by way of a letter dated 21 June 2016 from Quentin Hix Legal. Mr Harling did not work his notice as he was too upset at being dismissed he says.

[37] In his written statement of evidence, Mr Harling states that he could understand that the respondent was annoyed because he could not work in the drive thru or front counter areas when the restaurant was busy, but that he was working "okay" in the kitchen and would have

just done that, even on less hours. He was not sure, though, whether he had expressly told the respondent that.

### **The issues**

[38] In determining whether Mr Harling was unjustifiably dismissed, it is necessary to consider both the procedure followed by the respondent and the substantive reasons for the dismissal. In considering both of these aspects, the Authority will consider the duty of good faith owed by the parties to one another as set out in s.4 of the Employment Relations Act 2000 (the Act) and the test of justification set out in s.103A of the Act.

[39] Section 4 of the Act provides as follows:

#### **4 Parties to employment relationship to deal with each other in good faith**

- (1) The parties to an employment relationship specified in subsection (2)—
  - (a) must deal with each other in good faith; and
  - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
    - (i) to mislead or deceive each other; or
    - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1) –
  - (a) is wider in scope than the implied mutual obligations of trust and confidence; and
  - (b) requires the parties to 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
  - (c) within 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.

[40] Section 103A provides as follows:

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

[41] For the avoidance of doubt, the probationary period clause in the McDonald's employment agreement is not a trial period as defined by s.67A of the Act and so it does not have the effect set out in s.67B of the Act. As s.67 of the Act makes clear, where a probation period is specified in an employment agreement, neither the fact that it is specified nor what is specified in respect of it affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period. Therefore, the law in relation to unjustified dismissal applies to Mr Harling's dismissal in full, just as if he had not been dismissed in reliance upon the probationary clause in the employment agreement.

[42] The courts have also set out the principles of fairness that are to be applied to a dismissal for poor performance. These were first expounded in *Trotter v Telecom*<sup>4</sup> and were referred to in *Yan v Commissioner of Inland Revenue*<sup>5</sup> as follows (citations omitted):

[3] It is well accepted that an employer may dismiss an employee for poor performance. Section 103A of the Employment Relations Act 2000 (the Act) provides the yardstick for assessing the justification or otherwise for the Department's actions. While Mr Scott, advocate for the plaintiff, cautioned against a formulaic tick-box approach, the factors identified in *Trotter v Telecom* (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:

- a) Did the employer in fact become dissatisfied with the employee's performance?
- b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
- c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?
- d) Was the employee given a reasonable time to attain the required standards?
- e) Following the expiry of a reasonable time:
  - i) Use of an objective assessment of measurable targets?
  - ii) Fairly putting tentative conclusions before the employee?
  - iii) Listening to the employee's explanation with an open mind?
  - iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).
  - v) Exhausting all remedial steps including training, counselling and exploring redeployment.

[4] Ms Hornsby-Geluk (counsel for the defendant) drew my attention to *Bagchi v Chief Executive of the Inland Revenue Department*. In that case the plaintiff had been dismissed after a performance improvement plan failed to produce the required results, and claimed that the employer had improperly prejudged the outcome of the process. The Chief Judge observed that:

[70] It is simply not possible for a court, perhaps years later, to determine many elements of justification for a performance dismissal as does the employer. It is, after all, the employer, that sets

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<sup>4</sup> [1993] 2 ERNZ 659

<sup>5</sup> [2015] NZEmpC 36

the expected standards and must assess those. It is also the employer that is aware of, and must deal with, the consequences of poor performance on the enterprise and other staff. All the court can do is to ensure that the decision to dismiss was taken in good faith, fairly and reasonably and otherwise is a decision that it is reasonably open to the employer to make.

[5] The employer's actions are not to be subjected to minute scrutiny in an effort to find any fault, however minor. The overarching question is whether what the employer did and how it did it was what a fair and reasonable employer could have done in all of the circumstances at the relevant time.

[43] I shall apply the test set out above in *Trotter* in analysing whether the respondent treated Mr Harling fairly in pursuing its performance review process.

*Did the respondent in fact become dissatisfied with Mr Harling's performance?*

[44] Having heard the evidence of Mr Johnson and Ms Anderson, I am satisfied that the respondent genuinely had concerns about Mr Harling's performance. Mr Johnson stated in evidence that Mr Harling was dismissed for three reasons:

- a. because of his lack of pace and productivity in the kitchen,
- b. because of concerns about his health and safety, given his PTSD; and
- c. because Mr Harling would not follow management directions.

[45] I accept that there was a genuine concern about Mr Harling's pace and productivity in the kitchen. The evidence of both Mr Johnson and Ms Anderson was that managers had fed back to them that Mr Harling was not quick enough in carrying out various tasks in the kitchen. This was confirmed by a copy of the note made by a manager on 8 June 2016 in which reference is made to the need for Mr Harling to work at speed. Mr Johnson and Ms Anderson explained that McDonald's had set times within which to carry out each of the many tasks involved in serving customers, and if one crew member was not keeping up, that placed a burden on other crew members and on management. I accept this evidence.

[46] However, I believe that Mr Johnson was not entirely correct in his evidence when he denied that Mr Harling was dismissed because he was reluctant to work on the front counter and in drive thru, and I reluctantly conclude that Mr Johnson has created alternative and additional post hoc reasons for the dismissal which he believes are more palatable to the Authority.

[47] That is to say, I do not believe that health and safety concerns featured as the principal reason in Mr Johnson's decision to dismiss, and I believe that Mr Johnson is now trying to re-characterise as general insubordination references made in notes at the time which actually referred to Mr Harling's reluctance to work in drive thru and on the front counter. I conclude this for the following reasons:

- a. no mention is made in the contemporaneous documents about health and safety concerns arising out of Mr Harling's anxiety condition, save at the actual dismissal;
- b. Mr Harling says that Mr Johnson never mentioned such general health and safety concerns to him;
- c. Mr Johnson was unable to explain specifically to my satisfaction how Mr Harling's anxiety and believed PTSD could put at risk his own health and safety and that of his co-workers. Mr Johnson's evidence in this regard came across as speculative;
- d. Mr Johnson was unable to give any specific examples of what orders Mr Harling had refused to comply with;
- e. There were no notes made by managers of Mr Harling's alleged subordination; and
- f. I do not accept that managers would not have elevated express insubordination to a disciplinary level as soon as it had occurred.

[48] In conclusion, I believe that the real reasons for Mr Harling's dismissal were that his pace and productivity in the kitchen were below an acceptable standard, and because he was reluctant to work in the drive thru and on the front counter. This was what Mr Harling said he was told at the dismissal meeting, and there are numerous mentions of him not doing so in various documents, so it was clearly an issue of key concern to the respondent. In addition, Ms Anderson said that she would not have recruited Mr Harling if he had said he could not work on drive thru and the front counter. His reluctance to work in those two areas was also a reason for dismissal I conclude.

[49] The fact that Mr Johnson sought to rely before the Authority on different reasons for justifying the dismissal does not in itself render the dismissal unjustified, as the Authority must assess the actions of the respondent at the time of the dismissal, taking into account all the circumstances that prevailed then. Its actions post-termination do not affect the reasons for the dismissal.

*Did the respondent inform Mr Harling of its dissatisfaction and require him to achieve a higher standard of performance?*

[50] On balance, I believe that Mr Harling was told that he was not working up to the required pace in the kitchen, and that he was required to improve this aspect of his performance or face dismissal. I conclude this because of the note made by Mr Johnson at the second meeting on 1 June 2016, and because of the contents of the letter to Mr Harling dated 6 June 2016. I also accept the evidence of Ms Anderson that Mr Harling would have been regularly told on the job by his supervisors of dissatisfaction about his pace, because of the system of close supervision and highly formalised processes that make up the McDonald's operational model. I am also satisfied that Mr Harling was told he was required to increase his pace by his direct supervisors.

[51] There is also evidence that Mr Harling was told that his reluctance to carry out drive thru and front counter work was causing concern to the respondent. There is reference to this in the notes made at the second review meeting. What is not clear, however, is what was said

to Mr Harling about him having to carry out these duties; that is, whether he was told he had to do so, or that he was not told to do so. Because Mr Johnson denied that Mr Harling had been dismissed for not carrying out these duties, he gave no evidence about what he told Mr Harling in this respect. I will say more about this below.

*The information given to Mr Harling*

[52] I am satisfied that the information given to Mr Harling about his pace was readily comprehensible. It is not a difficult concept to grasp that crew members need to achieve a certain pace for the service operation to run smoothly. I also accept that there was an objective critique of Mr Harling's work. The production of food in the McDonald's kitchen is so process driven that it would have been very easy to spot areas where Mr Harling's pace was too slow. For the same reason, I also accept that the supervisors gave Mr Harling an objective statement of the standards he needed to reach.

[53] Mr Jackson submits that the respondent's concerns changed during Mr Harling's employment, implying that this rendered the respondent's treatment unfair. However, in the context in which Mr Harling was working, it is not unexpected that new concerns might emerge as time passed. During the first few weeks of employment, it would not be unexpected that an employee's pace would be slower than was required, as the employee is learning and mastering the various processes. However, after a sufficient period, the respondent could reasonably expect these processes to have been learned and for the work pace to have improved. If it has not done so, it would not be unreasonable for the employer to then treat that failing as a concern to be addressed.

[54] With respect to Mr Harling not carrying out duties in drive thru and the front counter, again, I am unable to ascertain whether the information given to Mr Harling was readily comprehensible, an objective critique of his work and that he was given an objective statement of the standards to be reached because Mr Johnson denied that Mr Harling was dismissed for these reasons.

*Was Mr Harling given a reasonable time to attain the required standards?*

[55] The issue of Mr Harling's pace was first formally raised in the second review meeting on 1 June 2016. He was dismissed on 10 June. Was 10 days enough for him to improve his pace? On balance, I believe that it was, because of the highly process driven nature of the work. Provided that Mr Harling had followed the detailed instructions, he would have achieved the pace required.

[56] With respect to Mr Harling not carrying out duties in drive thru and the front counter, the problem was that Mr Harling was suffering from a psychological condition that impacted on his ability to comfortably work in those areas. It is possible that he may have been able to have 'desensitized' himself to the work, with some form of counselling for example. However, I do not believe that that was ever canvassed by the respondent, and it is not appropriate to speculate. Without that issue having been canvassed, the respondent is not in a position to assert that Mr Harling was given sufficient time to start working comfortably in drive thru and front counter. In any event, it is not clear that he was told he had to.

*After the expiry of a reasonable time*

[57] I am satisfied that the respondent did objectively assess Mr Harling's pace after the 10 day period, and did put its conclusions to him. It is not clear what Mr Harling said to the respondent about his pace at the meeting of 10 June, although Mr Harling did say in evidence that he thought his pace was acceptable.

[58] Did the respondent exhaust all remedial steps, including training, counselling and exploring redeployment with regard to Mr Harling's lack of pace? First, the documentation put before the Authority showed that detailed instructions were given to Mr Harling in respect of various aspects of the kitchen work. By way of example, there was a two page document before the Authority which set out the process involved in producing hash browns and fries. The document even included detailed instructions of how to apply salt to fries and how to

scoop them into the bags to be given to the customers. There were other documents showing detailed instructions for cooking burgers and eggs, and even how to bag pies.

[59] I do not believe that a protracted or elaborate amount of extra training was necessary to reasonably expect Mr Harling to have increased his pace to an acceptable level. He had been given the detailed instructions of each station at the start, and what remained was to practise and improve the skills. New crew members, having been shown how to carry out a given set of tasks, are expected to perfect them on the job, and are assessed by supervisors and managers. This is what happened to Mr Harling. I am satisfied that managers or supervisors told him that his pace was not acceptable. Given the impact on the entire crew and on customer service of slowness, I am also satisfied that the managers and supervisors assisted him to improve, as Ms Anderson said in her evidence.

[60] There was no evidence that redeployment was explored with Mr Harling, but even if it had been I am satisfied that no other stations could reasonably have been given to him in view of his reluctance to work in drive thru and on the front counter.

[61] With respect to the inability of Mr Harling to work in drive thru and on the front counter, I am satisfied that the respondent did not exhaust all possible reasonable remedial steps. That is, they did not consider whether adjustments could have been made to the two roles to have enabled Mr Harling to have gradually ‘desensitised’ himself to the potential stress of working in the two areas in question. It is possible that such adjustments could not have been reasonably been made, but as no attempt was made to explore them, the respondent has failed to act reasonably in regard to this issue.

### *Conclusion*

[62] I conclude that the respondent acted reasonably in treating Mr Harling’s lack of pace as a sufficient reason to dismiss Mr Harling. I am also satisfied that he was given reasonable opportunity to improve, but failed to do so. That is to say, I am satisfied that a fair and

reasonable employer could have dismissed Mr Harling for his failure to improve his pace of working in all the circumstances that prevailed at the time.

[63] However, the respondent did not act reasonably in respect of the other reason for dismissal, Mr Harling's inability to work on the front counter and in drive thru. In particular, the respondent did not attempt to explore ways of either helping Mr Harling to adjust to the roles, or to adjust its requirements. This renders that aspect of the dismissal unjustified.

*Mixed reasons for dismissal*

[64] There appears to be no higher court case law that addresses directly the situation where there are mixed (but separate) reasons for a dismissal, one of which was relied upon in a procedurally and substantially justified manner, and one of which was not. However, in the Employment Court case of *Kaipara v Carter Holt Harvey Ltd*<sup>6</sup> the Chief Judge said the following at [21]:

Compliance with fair and reasonable procedures is not, and never has been, a requirement simply for its own sake. For it to constitute a personal grievance of unjustified dismissal, it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable. Put another way, if the procedural failing nevertheless led to the same substantive outcome as would have occurred if the process had been correct, then, whilst in some cases it may amount to an unjustifiable disadvantage in employment, it should not usually cause an otherwise justified dismissal to be declared unjustified

[65] I believe that this rationale can be applied to the situation where there are two reasons for dismissal, one of which was relied upon in a procedurally and substantially justified manner, and the other of which was not. Therefore, I believe that to determine whether the overall dismissal was justified must depend on whether the 'justified reason' was sufficient

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<sup>6</sup> [\[2012\] NZEmpC 40](#)

alone to justify dismissal. In other words, the unjustified reason cannot turn the entire dismissal unjustified in spite of the separate justified reason. However, partial reliance by an employer on a reason in an unjustified manner may give rise to an unjustified disadvantage grievance in respect of that reason.

[66] Was Mr Harling's failure to improve his pace of work reasonably sufficient to justify dismissal? I have already found that it was. There was a genuine need for Mr Harling to improve his pace; he was told of the need to do so; the letter dated 1 June 2016 made clear that he could have his employment terminated if he did not do so, and he was given a reasonable opportunity to improve and, I have found, sufficient training.

[67] I must therefore find that Mr Harling's dismissal was justified.

*Unjustified disadvantage?*

[68] Does the flawed approach that the respondent took in relation to the actions taken in response to Mr Harling's inability to work in drive thru and on the front counter give rise to an unjustified disadvantage grievance? Mr Harling has not brought such a claim before the Authority and unjustified disadvantage was not referred to in the letter raising a personal grievance on behalf of Mr Harling dated 21 June 2016.

[69] Whilst s 160(3) of the Act states that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described, that does not extend to adding a new cause of action.

[70] For this reason, I am unable to find that Mr Harling was unjustifiably disadvantaged in his employment.

### **Determination**

[71] Mr Harling's dismissal was justified.

**Costs**

[72] Costs are reserved. However, Mr Harling is in receipt of legal aid. Under s 45 of the Legal Services Act 2011, no order for costs may be made against a legally aided person in a civil proceeding unless the Authority is satisfied that there are exceptional circumstances.

[73] The respondent was not represented at the investigation meeting and so may not have incurred any legal costs in defending the matter. However, if it does seek an award of costs against Mr Harling, it must make an application in writing within 14 days of the date of this determination, and must set out what contribution it seeks, the basis of that contribution, and the exceptional circumstances it relies on. Mr Harling would then have 14 days within which to reply in writing.

David Appleton  
Member of the Employment Relations Authority