

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 186
5395119

BETWEEN DEAN HOWARD
 Applicant

A N D CARTER HOLT HARVEY
 PACKAGING LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for Applicant
 David France, Counsel for Respondent

Investigation meeting: 5 June 2013 at Christchurch

Submissions Received: 13 June 2013 from Applicant
 19 June 2013 from Respondent

Date of Determination: 5 September 2013

DETERMINATION OF THE AUTHORITY

A Mr Howard was justifiably dismissed.

B I have reserved the issue of costs and timetabled for submissions to be lodged and served.

Employment relationship problem

[1] Dean Howard was employed for 25 years by Carter Holt Harvey Packaging Limited (Carter Holt) as a speciality gluer assistant at its packaging factory in Hornby, Christchurch. His employment was covered at the material time by a collective employment agreement between the New Zealand Amalgamating Printing & Manufacturing Union (EPMU), the National Distribution Union and Carter Holt Harvey Packaging Limited 2011-2013. Mr Howard was a member of the EPMU.

[2] Mr Howard was summarily dismissed on 16 August 2012 and the dismissal was confirmed in a letter dated 20 August 2012 for hitting a temporary member of staff. Mr Howard says that his dismissal was unjustified.

[3] Carter Holt says that its decision to dismiss Mr Howard was a decision a fair and reasonable employer could have made in all the circumstances at the time of the dismissal. Carter Holt opposes the remedies sought by Mr Howard.

[4] By way of remedies, Mr Howard seeks:

- (a) Reinstatement;
- (b) Compensation in the sum of \$10,000;
- (c) Reimbursement of lost earnings; and
- (d) Costs.

Issues

[5] The issues for the Authority to determine are as follows:

- (a) Was Mr Howard unjustifiably dismissed;
- (b) If the Authority does determine that Mr Howard was unjustifiably dismissed, then what remedies is he entitled to, is reinstatement practicable and reasonable, and is there an issue of contribution and mitigation?

Test of justification

[6] The test of justification to be applied is in s.103A of the Employment Relations Act 2000 (the Act) which came into effect on 1 April 2011. The Authority is required by the test to make a determination on an objective basis about whether the dismissal was justifiable. It needs to determine whether Carter Holt's decision to dismiss Mr Howard, and the process used to reach the conclusion to dismiss taking into account the requirements set out in s.103A (3)-(5) of the Act was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Was Mr Howard unjustifiably dismissed?

Background against which the issue are to be assessed

[7] On 26 July 2012, one of the permanent staff members at Carter Holt advised the converting manager, Shane McCarthy, she had been told Mr Howard punched a temporary employee in the face after a rubber band had hit Mr Howard in the eye on 17 July 2012.

[8] Mr McCarthy discussed this with his manager, production manager Graeme Burgess, and they talked to the human resource manager, who advised that a formal investigation process needed to be commenced.

[9] Mr McCarthy and Mr Burgess met with Mr Howard and Union delegate Mike Dale, during the afternoon of 26 July 2012. Mr Howard was advised that Mr McCarthy and Mr Burgess were investigating the allegation that he had punched the employee in the face and needed to commence an investigation. Mr Dale cautioned Mr Howard against making any comment and he did not.

Initial Interviews

[10] Mr McCarthy commenced interviews with potential witnesses after meeting with Mr Howard and Mr Dale. Mr Burgess was present primarily as an observer throughout the interviews.

[11] Avinesh Lal took part in an interview with Mr McCarthy observed by Mr Burgess on 27 July 2012 and he signed typed meeting minutes as a true and accurate record of the meeting on 30 July 2012. The typed meeting minutes record amongst other matters:

... was pre-stretching rubber bands for the end pieces when one flicked off and hit Dean in the eye. Dean then came around the side of the machine and hit Avinesh in the head, Dean didn't give any warning. Avinesh had a sore jaw and had some blood in his mouth from the punch. Avinesh went home at the end of his shift and put an ice pack on his face and was sore for 2 days but was okay now.

[12] Glen who worked alongside Mr Lal on the day in question took part in an interview with Mr McCarthy observed by Mr Burgess on 26 July 2012. He signed typed meeting minutes as a true and accurate record on 27 July 2012. It is recorded in the meeting minutes amongst other matters:

... saw a rubber band fly past him (he and Avinesh were putting bands on bundles of end pieces). Glen saw Dean go around the take off mumbling something and then struck Avinesh with a fist to the face then Dean walked off. Glen said he saw blood coming from the inside of Avinesh's mouth.

[13] Don Walker took part in a meeting with Mr McCarthy observed by Mr Burgess. Mr Walker was supported by Mr Dale, the Union representative. He did not sign the meeting minute notes that are dated 27 July 2012. Mr Walker is recorded in those meeting minutes as saying:

Don didn't see anything but went away from the feed unit after Dean was seen walking away holding his eye. Don asked Avinesh what happened and he said a rubber band had hit Dean from his pre-stretching band.

[14] Willie was interviewed on 26 July 2012 by Mr McCarthy observed by Mr Burgess. He did not attend the interview with a support person. Willie signed the meeting minutes as a true and accurate record on 27 July 2012. Willie said:

Saw Dean holding his eye and then saw Dean walk around the take off and punch Avinesh in the face with his fist. Dean then walked off.

Suspension

[15] On 27 July 2012, Mr Burgess and Mr McCarthy met with Mr Howard and Mr Dale in order to hear Mr Howard's view on whether or not he should be suspended. Mr Howard declined to comment on suspension and a conclusion was reached that he would be suspended. The suspension was confirmed in a letter dated 27 July 2012 to Mr Howard from Mr Burgess. The letter provided that the suspension was to be for the period whilst the investigation took place and that the reason for removal from the workplace was that physical harm to others in the workplace was considered extremely serious (serious misconduct). The suspension was on full pay.

[16] By letter dated 31 July 2012, Mr Burgess invited Mr Howard to attend a disciplinary meeting at 11.30 am on 1 August 2012. The purpose of the meeting was described in the letter as being to discuss and, further investigate as required, serious concerns in relation to the allegation that he physically hit a member of staff on 17 July 2012. It was recorded that Mr Burgess and Michael Guy would be attending for Carter Holt. Mr Guy is the general manager of Carter Holt's Paper Bag division. Part of his responsibilities is also to act as general manager of human resources for

Carter Holt Packaging. Mr Howard was advised in the letter that the company considered the matter to be a serious one which could result in disciplinary action up to and including termination. He was invited to bring a representative with him.

Meeting 1 August 2012

[17] Mr Howard attended the meeting on 1 August 2012 with EPMU official, Jo McLean. Mr Burgess attended the meeting with Mr Guy. Mr Guy took notes and these were subsequently typed up. There is an issue raised with the accuracy of part of the notes, particularly whether they fully and/or correctly recorded Mr Howard's explanation. I shall explore that in more detail shortly.

[18] There was no issue taken, though, with what is recorded in the notes about the commencement of the meeting. Mr Guy outlined the allegation and reinforced the seriousness of it. He referred to the Carter Holt managing performance tool kit that fighting or physically assaulting another person on company premises is defined as serious misconduct and can result in summary dismissal. Copies of the statements from Mr Lal and the other witnesses were provided to Mr McLean. An adjournment was requested by Ms McLean. After about 25 minutes, the meeting recommenced and the notes record consistently with the evidence of Mr Burgess and Mr Guy that Mr Howard provided his explanation of the incident.

[19] The notes record Mr Howard advanced the following by way of explanation:

- He was working on bundling the kiwifruit end pieces with rubber bands;
- It was common for the bands to break during the collation process;
- On the day of the incident, he had been hit several times in the chest;
- He believed the victim was trying to wind him up;
- A band struck him in the eye;
- He believed it was a deliberate action from the victim;
- He moved towards the victim and punched him with a closed fist in the side of his face;
- He then went to get first aid applied to his sore eye;

- Mr McCarthy administered first aid;
- He returned to the machine and continued working.

[20] Mr Howard set out in his written statement of evidence further detail about earlier interactions with Mr Lal which Mr Burgess and Mr Guy say he never mentioned at the meeting on 1 August 2012 and/ or at the next meeting on 16 August 2012 at the end of which Mr Howard was dismissed.

[21] Mr Howard also took issue with the part of the notes that stated the following:

Dean was asked whether the bands were being flicked deliberately. He replied that they weren't being flicked with fingers but he did believe that it was deliberate.

[22] In his evidence at the Authority meeting, Mr Howard said that his explanation was *bands were being flicked with fingers*. The typed notes of the 1 August 2012 meeting were provided to Mr Beck before the 16 August 2012 meeting. I am satisfied that no issue was taken with the notes accuracy and/or level of detail before or at the 16 August meeting and I find it more likely in those circumstances as submitted by Mr France that Mr Howard did not give the more detailed explanation he did in his brief of evidence about the earlier interactions with Mr Lal. Mr Howard always maintained that he believed that Mr Lal deliberately flicked the band and that was understood by Mr Guy and Mr Burgess as his explanation. I find it more likely that he did not at the earlier meeting say that Mr Lal was flicking the bands with his fingers. Had he done so then I would have expected that would have been something Mr Howard would have noticed on receipt of the notes from the 1 August meeting and would have brought this to Mr Beck's attention.

[23] During the 1 August meeting an adjournment was taken for Mr Guy to discuss some of the points raised by Mr Howard with Mr Burgess and to interview Mr McCarthy. The notes record that Mr Guy asked Mr McCarthy to describe Mr Lal so he could understand the likelihood of deliberate provocation. The notes record that Mr McCarthy believed this to be totally out of character and that he had not witnessed any foolery in the plant. He described Mr Lal as a *quiet guy* who got on with the job. Mr Guy asked Mr McCarthy whether it was possible for the bands to be *accurately fired* towards another employee in the process [pre-stretching for the end pieces]. I note that there was no question asked about deliberately flicking with fingers which would I find have been likely if such an explanation had been given by Mr Howard.

Mr McCarthy responded about the process that that was highly unlikely. Mr McCarthy was asked why Mr Lal had not raised a formal complaint and the notes record that he replied that it was likely he felt vulnerable due to the temporary nature of his employment. I note somewhat surprisingly Mr Lal was not himself asked that question. I don't find anything materially turns on that matter though. Mr McCarthy described that he had administered first aid to Mr Howard through the provision of eye drops and confirmed that Mr Howard did not mention the punching incident at the time. Mr Beck in submissions questioned the appropriateness of Mr McCarthy both interviewing witnesses initially in the process and then being interviewed himself. I am not satisfied objectively assessed that there was unfairness as a result.

[24] The notes then reflect that the interview with Mr McCarthy was interrupted when Ms McLean entered the room and asked whether Mr Howard should consider resigning. Ms McLean asked whether Mr Howard was going to be dismissed and the notes record that Mr Guy replied that he was still conducting the investigation and was not in a position to make a decision. Ms McLean inquired into whether the company would be withholding the super contribution and the notes record that Mr Guy replied he had never used that clause and he was not about to consider it for this investigation. The notes record a degree of frustration on Ms McLean's part. The notes record Ms McLean then returned with a resignation letter to be effective immediately.

[25] In his evidence, Mr Guy said that he accepted the resignation but he did not accept Mr Howard's statement that he had initially dismissed him. I am not satisfied about that from the evidence. The nature of the meeting with its adjournment and subsequent discussion with Mr McCarthy supports that until the resignation was provided the investigation was intended to be an on-going.

Post resignation

[26] By email dated 6 August 2012, Mr Beck advised Carter Holt that he represented Mr Howard and wished to pursue a claim that Mr Howard was constructively dismissed during a rushed disciplinary process on 1 August 2012. Mr Beck advised that he would seeking his client's reinstatement and asked for minutes of the disciplinary meeting and any written material pertaining to the disciplinary investigation including handwritten notes of witness interviews and a

copy of Mr Lal's statement of complaint. Mr Beck also asked for a copy of Mr Howard's personnel file.

[27] Mr Guy responded by email dated 6 August 2012 and explained that he did not agree that Mr Howard was unfairly dismissed but rather that the disciplinary process was interrupted by Ms McLean presenting a resignation letter on Mr Howard's behalf. Mr Guy said in his email to Mr Beck that at no time had there been an indication that Carter Holt was in a position to make a decision on the outcome of the investigation. Mr Guy suggested there be contact with Ms McLean.

[28] Mr Beck responded by email dated 7 August 2012 and advised that there was a problem as Mr Howard was advised by Ms McLean that Mr Guy had decided upon dismissal. Mr Beck said that Mr Howard therefore clearly resigned under a mistaken impression although he noted that was apparently not of Carter Holt's making. Mr Beck advised that Mr Howard was retracting his resignation and wished to recommence the disciplinary process.

[29] This was agreed to by Mr Guy and a meeting date suggested of 15 August 2012. The requested information was received, although the meeting notes were in typed form as were the interview minute records. The proposed 15 August 2012 date had to be postponed and a date of 16 August 2012 was confirmed as a suitable date to recommence the disciplinary process. For completeness Mr Howard considered the disciplinary process was starting afresh but I do not find that the evidence supports that view and rather I find that the disciplinary process simply continued.

[30] On 14 August, Mr Beck provided a sworn affidavit from Mr Walker to Mr Guy. Mr Walker deposed in his sworn affidavit that the typed notes from his interview with Mr McCarthy about the incident on 17 July 2012 (which he did not sign) did not record all he said. He deposed in his affidavit materially that after assisting Mr Howard with his eye and the necessary first aid, he went to talk to Mr Lal. Mr Howard said that Mr Lal was laughing at the situation and said that he had *hit Dean with a rubber band and it was a good shot I got him right in the eye*. Mr Walker deposed to jokingly saying that if Mr Lal had done that to him he would have knocked him off his chair and that Mr Lal said he was hit but seemed unconcerned about it. Mr Walker deposed he saw no blood on Mr Lal's face or other sign he was hurt. Mr Walker also provided a written statement of evidence for the Authority investigation which provided that Mr Lal intentionally fired the rubber band. I agree with Mr

France's submission that Mr Walker confirmed in his evidence to the Authority that he believed the only way Mr Howard could have been hit was if Mr Lal did it deliberately. He described such an incident with the rubber band as *unusual*. I did not conclude from Mr Walker's evidence that it went as far as that Mr Lal actually told him he flicked the rubber band deliberately.

[31] At that time, Mr Lal was no longer working for Carter Holt as his temporary employment had ended. He agreed to come into the workplace to be interviewed again about Mr Walker's affidavit on 14 August 2012. Mr Guy is not based in Christchurch so he conducted the interview by telephone and Mr Lal sat with Mr Burgess and Mr McCarthy in the office of the Christchurch plant. Notes from the interview were subsequently typed up. Mr Lal was asked to describe the events leading up to and the incident as he recalled it. It is recorded in the written notes that he said he was stretching a rubber band and it left his hand and struck Dean in the eye. It is recorded that *the bands regularly ping off during the shift about 10 per shift*. It is recorded that Mr Howard then approached him without warning and punched him in the side of the face near his temple and blood came out of his mouth. It is recorded that Mr Lal said that he was working with Glen, Peter and William and William asked him if he was OK but he did not answer as he was in shock. He denied that Mr Walker had spoken to him on the day of the incident and said that he spoke to Mr Walker the next day about the incident and Mr Walker suggested that he wear protective goggles. Mr Lal said that at no time did he state to Mr Walker that it was *intentional* or that he said he had *got him in the eye*. Mr Lal's view was that he had a good relationship with Mr Howard.

[32] There was further interviewing of five employees from Mr Howard's team by Carter Holt. This was undertaken by Human Resource Manager Julia Bockett by telephone with Mr McCarthy and Mr Burgess present with each employee as the interviews were carried out. Questions were asked of each employee about the relationship between Mr Lal and Mr Howard, whether employees were aware of any issues and their view on Mr Howard's relationship with the team and the general feeling in the team. Specific questions were asked of Glen and William whether they had observed any conversation between Mr Lal and Mr Walker on the day the incident occurred. Glen said that he *did not think so* and William said *nothing on that day*. I do not find that it was the intention of the interviews to elicit information or responses that went further than the disciplinary issue of the punch and explanation of

provocation. However the questioning of some in the team, particular the Process Manager, Kelvin Forbes did elicit comments that were wider than the immediate events. From the interviews there were some comments made about Mr Howard that were favourable and some that were not. I have reflected about the fairness of these interviews. Looking at the process overall I am not satisfied that the interviews were relied on for anything other than an understanding of the dynamics between the team and particularly Mr Lal and Mr Howard and the explanation of provocation. Fairness required however that comments made were recorded (relevant or not) so that they could be provided to Mr Howard so he could respond if he wished. I do not find unfairness in that regard.

Disciplinary meeting 16 August 2012

[33] Mr Howard attended at this meeting with Mr Beck and Mr Burgess attended with Mr Guy. Mr Beck and Mr Howard recorded the meeting. That recording was subsequently made available for the first time at the commencement of the investigation meeting when it was listened to. The Authority has subsequently listened again carefully to the entire recording before determining the matter.

[34] Mr Guy also took notes and a typed up version of the notes was provided. I have considered the notes against the recording and, whilst they are not a verbatim record, there was no significant, in the sense of material difference, between the notes and the recording.

[35] Mr Guy commenced the meeting and reiterated the serious nature of the allegation referring again to the managing performance tool kit that defines fighting or physically assaulting another person on company premises as severe misconduct. Mr Guy also summarised the position from the previous meeting on 1 August 2012.

[36] Mr Beck was provided with copies of further statements including a record of Mr Lal's statement made in response to Mr Walker's affidavit and the witness statements taken about the relationship as seen by others in the team between Mr Howard and Mr Lal and generally. Mr Beck asked for an adjournment. On return Mr Beck challenged whether a thorough investigation had taken place and he queried why Mr Walker and Mr Dale had been excluded from the process.

[37] Mr Guy advised that he considered Mr Walker's affidavit, to be sufficient and said that Mr Dale had refused initially to be interviewed. It was agreed that Mr Dale

should be interviewed at that point by Mr Guy and Mr Beck but not with Mr Howard present. That was not I find unfair. Mr Dale advised that he did not see the incident. He said that no fighting or pranks had occurred but just a little verbal joking. He described Mr Howard and Mr Lal's relationship as *not good mates*. He said he did not notice any tension leading up to the incident and that Mr Howard was not a violent person and he was surprised over his actions.

[38] An adjournment was then taken and when the meeting recommenced, Mr Beck summarised the position on behalf of Mr Howard. Mr Beck said that it was a mixed situation where some of the evidence was inconsistent. He said it was clear that Mr Howard had acted in the heat of the moment and that he believed the rubber band was deliberately flicked. Mr Beck said that Mr Howard regretted his actions and that although he accepted it could be seen as serious misconduct, dismissal was not the appropriate action. Mr Beck referred to a recent Employment Court judgment, *Kees de Bruin v Canterbury District Health Board* [2102] NZEmpC 110 as relevant and to Mr Howard's long service with the company. He said that Mr Howard was not a violent person but a quiet private person and that Mr Lal had been *riding Dean for a while and joked about his sexual exploits*. Mr Beck asked Carter Holt to consider the likelihood of it happening again, noting that Mr Lal had left, that Mr Howard had a clean work record and he had some difficulties in his home with family relationships and one family member had alcohol problems. He often had to care for his brother's children and recently had a pet put down and his property had been damaged in the earthquake.

[39] Mr Beck referred to some difficulties at the first disciplinary meeting and that it was felt that there was not enough time to discuss issues. It is clear from the recording that Mr Guy then advised that *now is the time to discuss any issues*. Mr Beck referred to the fact that there seemed to be some issues with procedural fairness initially although he described it as *getting there now*. He said he was annoyed that Mr Walker was not interviewed and Mr Dale had not been interviewed. I understand for Mr Dale he was referring to before the actual interview took place. Mr Beck stated that he considered sufficient other circumstances existed so the outcome should not be dismissal.

[40] Mr Guy requested that he ask Mr Howard some questions. He asked Mr Howard why he had not reported the punching incident to Mr McCarthy when Mr

McCarthy had administered the first aid. Mr Howard responded in reasonable length to that but the essence was that he did not want to get Mr Lal in trouble and his eye was not that bad. He felt that saying that the injury was caused deliberately would blow things out of proportion.

[41] In answer to a further question, Mr Howard said that he did not understand the significance of punching an employee in the workplace. Mr Guy presented a document signed by Mr Howard in 2011 confirming that he was re-inducted into the Christchurch induction manual which refers to fighting or physically assaulting a person on company premises as serious misconduct and not acceptable. There was some discussion by Mr Howard as to whether a punch to the head was a fight and whether that would have been covered by the provision.

[42] One of the matters in dispute is whether or not a question was fairly put to Mr Howard about any remorsefulness and any conclusions from the answer to that question fairly reached. I listened particularly carefully to the recording of the disciplinary meeting focusing on questions surrounding that. Mr Guy was persistent in his questioning about why Mr Howard had not apologised and whether Mr Howard had any remorse. The responses were reasonably consistent. Mr Howard confirmed that he had not apologised to Mr Lal over the incident and said *I gave him a tap in the head for deliberately flicking the band*. Mr Howard explained that it was a *spur of the moment thing* and *he'd snapped*. Mr Guy asked if Mr Howard thought it was okay to punch someone in the head and Mr Howard responded *it depends if someone's coming at you and you're taking blows to the body then it's okay*. Mr Guy asked if Mr Howard felt bad and had any remorse. Mr Howard said *I do* but then went on to say he could have lost an eye.

[43] A defence of provocation to an assault does not sit particularly easily with an apology or remorse that the assault took place. I find that it was open to a fair and reasonable employer to conclude that there was no remorse expressed and/or to the limited extent that it was it was qualified. It was open to a fair and reasonable employer to conclude from the responses that Mr Howard did not consider he should have to apologise to Mr Lal and although Mr Howard returned to work after first aid was administered on the day of the incident he did not talk further to Mr Lal at that point or apologise.

[44] Mr Guy then requested an adjournment to consider matters. After about 25 minutes, the meeting reconvened and on his return Mr Guy summarised his thoughts behind his decision as follows. He concluded that the alleged incident occurred and there was no dispute about that. He concluded that Mr Howard understood the significance of his actions because he had been re-inducted in 2011 although he did note that Mr Howard did doubt whether one punch was a fight. Mr Guy said that he considered whether there had been sufficient provocation so that it would amount to a significant mitigating circumstance. He acknowledged there was a conflict in the information collected but he said there was not enough in front of him to say that there was an extreme case of provocation. He went on to set out that he considered personal issues, the length of employment and Mr Howard's previous good record and then said it was particularly important if he was not going to dismiss that he needed to be satisfied the workplace was safe and he considered whether there was any remorsefulness or apology made. He concluded that Mr Howard was not remorseful and in short that remorsefulness was not about retaliation.

[45] Mr Guy then dismissed Mr Howard from his employment effective immediately.

Substantive justification

[46] There was no dispute that the conduct alleged occurred. Mr Howard had been re-inducted about Carter Holt's policies in its Case Christchurch Induction Manual on 7 February 2011 when he signed that he had read and understood them. Policy number 3 in the manual provides a summary of behaviours deemed to be serious misconduct. These behaviours include fighting or physically assaulting another person on company premises or during working hours or when attending Company approved events/Functions. I find a fair and reasonable employer could conclude knowledge on Mr Howard's part that a physical assault was not acceptable conduct in the workplace and that a punch to the head of an employee could constitute serious misconduct.

Sufficient investigation of all circumstances leading to the incident including into provocation and seriousness of the assault

[47] Mr Beck submits that Carter Holt was muddled about the extent of the seriousness of the assault that Mr Howard was alleged to have committed and there

was no evidence of the extent of Mr Lal's injuries. Further he submits that Mr Howard was seriously provoked by Mr Lal and effectively snapped and that this was ignored and there was no fair and unbiased regard of the surrounding circumstances.

[48] I find Mr Guy considered provocation but he did not find it to be a significant mitigating factor. I do not find that it was simply ignored. Mr Guy did not accept that there was evidence supporting that the rubber band was deliberately flicked but rather was as stated by Mr Lal in his two interviews that the band simply *flicked/pinged off* as part of the process as they do from time to time. I have considered whether that was a conclusion a fair and reasonable employer could have reached.

[49] Mr Guy had asked further investigation to be undertaken to understand the nature of the relationship between Mr Howard and Mr Lal. Those statements objectively assessed did not support there were any significant difficulties or a pattern of behaviour on the part of Mr Lal that he would in all likelihood have acted in this way on the day in question. There was no suggestion from those present on the day of the incident who were interviewed that preceding the punch there had been a deliberate flicking of a rubber band. Glen who was closest at the time to Mr Lal did not say that he saw Mr Lal flick the band deliberately. Mr Walker had however said that on the day of the incident he went and spoke to Mr Lal who he deposed stated amongst other matters *it was a good shot, I got him right in the eye*. Mr Walker deposed in his affidavit that was available to Mr Guy at the time the decision to dismiss to the effect the action with the rubber band was intentional.

[50] Mr Lal on the two occasions he was interviewed in response to an open question about the event did not emphasise the rubber band action not being deliberate. He simply explaining that he was pre-stretching a rubber band for the end when one flicked/pinged off and hit Mr Howard in the eye. He denied that he spoke to Mr Walker on the day of the incident and denied saying to Mr Walker that it *was intentional* or that *he had got him in the eye*. Glen and William who were both present on the day of the incident at the bench did not recall seeing Mr Walker talk to Mr Lal on the day of the incident. Mr Howard on the day of the incident when his eye was being treated did not tell Mr McCarthy that his eye had been hit by a rubber band deliberately aimed by Mr Lal and/or that he had punched Mr Lal because of that deliberate act. I have found that some of the additional matters raised in Mr Howard's statement of evidence provided as part of the Authority investigation to support

provocation on the part of Mr Lal leading to the incident were not in front of Mr Guy and Mr Burgess at the time the decision to dismiss was made. I find that it was open in all the circumstances for a fair and reasonable employer to conclude that the information gathered from the investigation considered as a whole did not establish the rubber band was deliberately flicked. Mr Guy said in his evidence before the Authority that even if Mr Lal had deliberately flicked the rubber band it would not have been an excuse for what Mr Howard did.

[51] After Mr Howard was hit in the eye with the rubber band he took three steps towards Mr Lal before punching him. It is a natural human reaction to be angry if a person has been hurt by what they believe is a deliberate action however Mr Howard did not attempt to clarify or raise the deliberateness of the rubber band action with Mr Lal before punching him. He also did not say anything after punching Mr Lal to explain why he had taken such an action but walked away immediately to get first aid for his eye. Mr Howard did have the option of removing himself immediately from the area after he was hit in the eye and reporting the incident to a manager rather than taking matters into his own hands. I accept Mr France's submission that Mr Howard was not in very close physical proximity to Mr Lal before the punch took place. There was no suggestion that he acted in self-defence.

[52] I find that this matter is distinguishable from that in *Kees de Bruin* because a fair and reasonable employer could conclude the punch was deliberate not reflexive given the three steps taken by Mr Howard to deliver the punch. A reflex action is one that is performed without conscious thought. I accept Mr France's submission that Mr Howard when asked by the Authority about what made him react said *after the touching incident nothing was getting through. So I thought I would see what happened if I hit him in the face.*

[53] I do not find where there was a short distance travelled to deliver the punch that further investigation by Carter Holt was required about deliberateness. Mr Beck submitted that further investigation was also required about the seriousness of the assault and extent of Mr Lal's injury. There was in this case an admitted punch with a closed fist. Mr Lal said that there was blood coming from his mouth following the punch which was also observed by Glen. I was not satisfied after hearing from Mr Howard that there was any good reason why a fair and reasonable employer could not have relied on Glen's statement about that. I do not find further investigation was

required about the seriousness of the assault. A punch with a closed fist is not an assault of a technical nature.

[54] Mr Beck criticised the investigation as being initially too narrow in focus although accepted that Mr Howard on advice had not explained the situation when first advised of the allegation. He had not for example said anything about being deliberately hit by a rubber band. I find that the initial interviews were to ascertain whether Mr Howard had hit Mr Lal. After Mr Howard attended the first disciplinary meeting there was a wider and more general investigation into the relationship between Mr Lal and Mr Howard. On provision of Mr Walker's affidavit Mr Lal was interviewed again about the events of the day with appropriate open questioning. Mr Dale was also interviewed at the request of Mr Beck.

[55] I am satisfied that there was sufficient investigation of the allegation that Mr Howard hit Mr Lal including the issue of provocation. Mr Howard was represented at both meetings and understood the nature of the allegation he was facing. I was not satisfied that there was evidence of predetermination. I am further satisfied that Carter Holt raised the concerns and that Mr Howard had a reasonable opportunity to respond to the concerns.

Genuine consideration of Mr Howard's explanation

[56] Mr Beck submitted that there was no genuine consideration or assessment of Mr Howard's belief that he had been deliberately hit and little regard was given to his character, work record, personal circumstances and that there was very little likelihood of re-offending. I find that there was genuine consideration of Mr Howard's explanation that he believed he had been deliberately hit by a rubber band and had effectively *seen red* as well as the other matters raised by Mr Beck during the disciplinary meeting on 16 December 2013.

[57] I am satisfied that a fair and reasonable employer could conclude that Mr Howard's action in punching Mr Lal constituted serious misconduct and objectively, but not pedantically assessed, the process used to reach that conclusion was fair and reasonable and met the requirements of s 103A (3) to (5) of the Employment Relations Act 2000.

Could a fair and reasonable employer have made a decision to dismiss Mr Howard in all the circumstances at the time the dismissal occurred?

[58] I turn now to whether, notwithstanding the conclusion, open to Carter Holt to reach of serious misconduct, dismissal was not the action a fair and reasonable employer could take.

[59] Mr Beck submitted that the assault was at the lower end of the scale because it was done in the heat of the moment, provoked by a series of actions, the applicant was injured and therefore saw red, the injury to Mr Lal was not properly verified and it was completely out of character. There were mitigating factors. It was an out of character display by Mr Howard. He did believe that he had been deliberately hit by a rubber band in the eye by Mr Lal in circumstances where he did not consider there had been a good relationship between him and Mr Lal. Mr Howard had been affected by the earthquake and had family issues. He had a good work record and had been an employee for 25 years at Carter Holt. Mr Beck submits that a more appropriate outcome would have been one short of dismissal.

[60] Mr Guy said in his evidence that he took all matters put forward into account. I accept that is more likely than not because as well as Mr Beck making quite extensive submissions about mitigation of the conduct and disciplinary outcome Mr Guy asked a series of questions of Mr Howard the answers to which were clearly designed to inform his decision making. An adjournment was taken to reflect on matters before a decision to dismiss was made. In assessing the risk of any repeat of the conduct Mr Guy placed emphasis on the absence of remorse. I have found that he was entitled to reach that conclusion about remorse. In terms of the seriousness of the assault itself I have found that a conclusion could have been reached by a fair and reasonable employer on the information available that the band was not flicked deliberately. A conclusion was available that Mr Lal was punched without warning or explanation for a matter not of his making. A fair and reasonable employer could conclude that the assault on Mr Lal in those circumstances is a very serious matter. Mr Guy said the decision reached to dismiss was based on the conduct and its seriousness and the lack of remorse which meant he concluded that he could not have confidence a similar action would not occur in the future.

[61] In the judgment of the Full Court of the Employment Court in *Angus and McKean v Ports of Auckland* [2011] NZEmpC 160 stated at [23]...

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied

by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified....

[62] I find in all the circumstances of this case that the decision to dismiss was what a fair and reasonable employer could do.

Determination

[63] I find that Mr Howard's dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The dismissal is justified.

Costs

[64] I reserve the issue of costs. Mr France has until 27 September 2013 to lodge and serve submissions as to costs and Mr Beck has until 18 October to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority