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A34/97
A66/97

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

A34/97:

IN THE MATTER of an appeal against a decision of the Employment Tribunal

BETWEEN Robert Cecil King

Appellant

AND Taupo Electricity Limited

Respondent

A66/97:

IN THE MATTER of an appeal against a costs decision of the Employment Tribunal

BETWEEN Robert Cecil King

Appellant

AND Taupo Electricity Limited

Respondent

Court: Travis J

Hearing: Auckland
13 February 1998

Appearances: Mr Jamie A Shorter, Counsel for Appellant
Chris Eggleston, Counsel for Respondent

Judgment: 27 February 1998

JUDGMENT OF TRAVIS J

The appellant has appealed against two decisions of the Employment Tribunal: The first, given on 25 February 1997, dismissed two personal grievance claims: an unjustified disadvantage relating to a final written warning given on 14 February 1995; and an unjustified dismissal claim arising out of the termination of his employment on 25 May 1995. The second, given on 6 May 1997, awarded costs against the appellant in the sum of $6,500. The following is a summary of the Tribunal's findings, some of which were challenged on appeal, together with additional material taken from the evidence to more fully describe the relevant events in light of the submissions made on the appeal.

The respondent was an electricity supplier for whom the appellant worked for 15 months between 12 January 1994 and the date of his dismissal. He was employed as a systems analyst and the most significant part of his duties involved the use of a proprietary spreadsheet and a specialised software package (BCG) which analysed customers electricity usage. The appellant reported to the electricity trading manager, Mr Ahern. Mr Wilkinson had the overall responsibility for the respondent's computer systems, including the testing of the BCG programme. The Tribunal records the appellant's view that he could do a better job than Mr Wilkinson testing BCG, but that he refused to take the role unless he was paid more for it.

The Tribunal found that the whole case resulted from the decline in the relationship between the appellant and Mr Wilkinson. Mr Wilkinson complained that the appellant was abusive towards him in face to face situations, which the appellant denied. From about mid 1994 onwards the communications between the appellant and Mr Wilkinson were conducted only on computer by way of electronic mail (E-mail). When Mr Ahern became involved to try to resolve the conflict, the appellant displayed an increasing inability to accept Mr Ahern's authority. The initial problems arose over the performance of the BCG software. The Tribunal found that there were software faults which were annoying and frustrating for the appellant for whom BCG was one of the main tools of trade. The Tribunal also found that the appellant was entitled to express his view that Mr Wilkinson was not pressing the suppliers of the software hard enough for a solution. This he did on 5 September 1994 in a memorandum to Mr Ahern. The Tribunal found there was nothing in that memorandum by way of language or tone to give offence although it was critical of

Mr Wilkinson's performance. The Tribunal found that had the correspondence and communication been conducted on that level there would have been no difficulties. In the ensuing months the Tribunal found the appellant:

> *... bombarded Mr Ahern with memoranda whose tones ranged from belligerent to offensive. The tone of his communications overshadowed whatever merit or force Mr King's complaints might have had. (Decision, p4.)*

The Tribunal found, apparently accepting the respondent's evidence, that there were some 50 communications of a confrontational manner from the appellant involving Mr Ahern, Mr Wilkinson, the personnel manager, Ms Mounsey, and the general manager, Mr Kadziolka (described by the Tribunal as the *"chief executive")*. The Tribunal's decision sets out some examples. One related to the use of an external consultant to carry out a job evaluation of the appellant's position. The Tribunal found that it had been explained to the appellant by Mr Kadziolka how the job evaluation was to be carried out but the appellant had rejected the explanation and that:

> *A pattern which recurred in Mr King's memoranda and in his evidence was that, if he disagreed with an explanation which someone had given him, he was inclined to claim that he had not had (sic) received any explanation at all. (Decision, p7.)*

The following example was the appellant's response to a polite handwritten request from Mr Ahern to make himself available in the boardroom on 24 January 1995, for a meeting between Messrs Kadziolka and Ahern:

> *NO, I will not make myself available for a meeting with yourself and Richard this afternoon at 2p.m.*
>
> *I have made it perfectly clear to you on previous occasions that it is UNACCEPTABLE to have more than one manager present when speaking to an employee on their own about any issue.*
>
> *I am prepared to meet one-on-one with you if you like though.*
>
> *If you insist on a meeting with the two of you then I have the right to have a legal representative present. I will obviously require time to organise one.*
>
> *Before I come to any meeting I need from you an agenda in writing of the items you wish to discuss and to have it presented to me at an appropriate time so I may prepare for the meeting.*
>
> *I should stress that I have not done anything amiss which warrants a meeting. I have merely run out of patience with the dithering in this organisation and have decided to set the pace myself. I have the right to do this.*

The Tribunal found that the meeting was not one intended to have been of a disciplinary nature and that if the appellant had such concerns it would have simple and sensible for him to have asked the purpose of the meeting, which was to discuss the appellant's job evaluation. Mr Ahern tried to arrange another meeting with the appellant and Mr Wilkinson to discuss some of the BCG problems. The Tribunal found that the tone of Mr Ahern's communications to the appellant were *"generally constructive and restrained, but firm"*. Mr Ahern's memorandum requested the appellant attend a meeting with Messrs Wilkinson and Ahern at 4.30 that afternoon and expressed Mr Ahern's disappointment with the appellant's *"negative tone"*. As the Tribunal records the memorandum was typed late and Mr Ahern was not able to deliver it to the appellant until the time the meeting was due to begin. The appellant refused to attend because he did not have sufficient time to prepare and his behaviour was described by Mr Ahern as *"rude and aggressive"*. In response Mr Ahern issued, what he described as *"a verbal warning"*, to the appellant for not obeying a direct request by Mr Ahern to attend the meeting. The appellant responded with a memorandum repeating his reasons for his refusal, not mentioning the verbal warning and concluded:

> *In future I require sufficient notice and agendas of proposed meetings and the right to consult with professional advisors beforehand.*

Mr Ahern wrote again that day expressing his disappointment at what he described as the appellant's *"continuing negative approach to the development of this software package"* which he said was hindering progress. He expressed surprise at the appellant's *"absolute refusal to attend the suggested meeting this afternoon"*. He said he could see no practical reason for the appellant not attending the meeting and that this was a serious matter and gave the appellant overnight to consider and to prepare for the meeting which was rescheduled for 9.30 the following morning. The memorandum concluded:

> *If you choose not to attend this meeting with a constructive approach as originally requesting then I will have no alternative but to treat this as a matter of serious misconduct as outlined in the company's House Rules.*

The appellant declined to attend this meeting and in an E-mail gave the following reasons for refusing:

1. I need to seek professional advice about the legitimacy of your behaviour towards me the previous afternoon between 16:33 and 16:40.

2. I will not attend a meeting on my own with more than one other person present when the meeting addresses a controversial issue where participants have taken fixed positions and/or the issue affects my personal circumstances in the company. These issues require INDIVIDUAL consultation.

3. I am entitled to representation at such a meeting and informing me at 08:15 about a meeting of this type at 09:30 does not give me sufficient time to organise an advocate.

I repeat my offer of a one-on-one meeting with you at any time regarding the BCG software.

Mr Ahern responded by rescheduling the meeting to 11am and recorded the appellant's refusal to attend a business meeting involving his area of expertise. Mr Ahern asserted that he had the absolute discretion as to who would attend the meeting which was not for disciplinary purposes. Mr Ahern advised the appellant that if he chose to disregard the directive to come to the rescheduled meeting the matter would be treated as serious misconduct and would then become a disciplinary issue.

The appellant duly attended the meeting on 25 January with Messrs Wilkinson and Ahern. After the meeting he was spoken to by Mr Ahern who warned him about the tone of his communications. The Tribunal accepted Mr Ahern's evidence that the appellant agreed that there was room for improvement in his written communications but that he had claimed his memoranda had been *"critical with tones of sarcasm"*. The meeting ended on a positive and conciliatory note and Mr Ahern came away encouraged as he understood he had the appellant's agreement to work with him and not against him. The appellant's evidence-in-chief records that he considered that matters were repaired after that meeting although he intended to follow up the question of whether there was a verbal warning and whether it had been put on his file. Mr Ahern went away on holiday the next day and the appellant approached Ms Mounsey to find out what the procedure was with respect to verbal warnings. He found out he had the right to put his version of what had happened on the file, if the verbal warning had been placed there. The appellant sent Ms Mounsey the following E-mail memorandum on 26 January, which is set out in the Tribunal's decision:

This is a formal request to refrain from making any entry whatsoever in my personnel file relating to the verbal warning given to me at approximately 16:40 on January 24, 1995 by Rodney Ahern. On the contrary, I am actively pursuing a course of action to have the warning withdrawn and replaced with an apology.

There was no reasonable grounds for the warning to be issued nor are there any reasonable grounds for an entry to be made in my file.

I was asked at 16:33 to attend a meeting which was supposed to begin at 16:30. When I expressed the fact that I was being given hopelessly insufficient time to prepare for the meeting he issued the warning.

The following day he issued me with a memo acknowledging his mistake.

I should not have an entry made in my file because of the ridiculous, knee-jerk reaction of someone who is under pressure because of his own poor planning.

For the sake of your own reputation I want to make it perfectly clear that no entry about this matter is to be made in my personnel file even though I am aware I have the right to place my side of the story there as well.

Ms Mounsey responded by saying that they were awaiting Mr Ahern's return from leave and that in the meantime no warning had been placed on his personnel file. The Tribunal records that when Mr Ahern returned from his leave he found that the day after his conciliatory meeting with the appellant, the appellant had sent the 26 January memorandum and the Tribunal commented *"Mr Ahern's confidence [in an improved relationship] was short lived"*.

Mr Ahern decided that the matter needed to be confronted. He sent a lengthy memorandum to the appellant dated 31 January advising of his intention to hold a disciplinary meeting on 2 February to hear the appellant's submissions as to why the respondent should not issue him with a final written warning. The appellant was reminded of the provisions of the house rules which gave him the right to be represented at the meeting. The memorandum set out in some detail the background facts *"which give rise to our intention to issue a warning"*. The memorandum referred to the appellant's *"hostile attitude to your manager and rejection of his authority and unnecessarily insulting (and sarcastic) communication with other senior company employees that provide the grounds and severity of the proposed warning"*. It referred in detail to a number of *"insulting"* memoranda issued by the appellant, his refusal to attend the various meetings, the conciliatory meeting of 25 January and Mr Ahern's reaction to the appellant's memorandum of 26 January which in his view showed that the appellant had taken *"absolutely no notice of what we discussed ..."*. He isolated the words ridiculous, knee-jerk etc and stated *"This*

hostility towards management, and particularly myself, has reached the point where it is frustrating the performance of your contract of employment. You are employed to advise management, not to defy it". The memorandum concluded:

> *Last week in particular, your defiance and refusal to attend meetings disrupted the schedules of many management personnel while we consulted in an effort to remove the bee from your bonnet. Then, after we discussed matters and agreed to take no formal disciplinary action, you start the cycle all over again. This is totally unacceptable and serious. I see your constant challenge to management and refusal to work except on your terms, rather than on the terms of your contract of employment, as serious misconduct.*

The appellant was represented by Mr Shorter at the meeting which was attended by Mr Ahern, Ms Mounsey and Mr Broughton, who was the advocate for the respondent at the Tribunal hearing. Minutes were taken by Ms Mounsey and were circulated to the appellant. The appellant responded in some detail, taking issue with the way the minutes were recorded. In relation to the 25 January meeting with Mr Ahern the appellant confirmed that he had stated at the disciplinary meeting on 2 February that:

> *... after D. Wilkinson had left, myself and R. Ahern had a **"30 second discussion"** about the language in my written communications. R Ahern said he thought it was **"insulting"** whereas **I** said it was **"only critical with tones of sarcasm"**. It was just an exchange of opinions. Please insert all these facts.*

On 14 February Mr Ahern sent the following letter to the appellant:

> ***FINAL WARNING***
>
> *Having considered the submissions made on your behalf at the meeting we held on Thursday 2 February 1995 and your memo of 9 February, I intend to issue you with a final warning.*
>
> *On your behalf, Mr Jamie Shorter argued with some compulsion for either commuting the disciplinary action to a caution or, at most, a first warning for less than serious misconduct. His pleas were refuted by your own interjections which, like your memo of 9 February, showed that you do not appreciate the seriousness of your attitude, manner and disruptive conduct.*
>
> *You are hereby formally warned that your dismissal may result unless:*
>
> 1. *You co-operate with, rather than oppose, management;*
> 2. *You perform your duties without constant disruption to management and fellow staff;*
> 3. *You show civility to those to whom you report and with whom you work;*

4. *You work in accordance within the bounds of accepted work practice and house rules.*

The warning will stand against your record for a year from this date.

Robert, your future employment is in your hands. As I said above, I suspect that you do not appreciate the disruptive nature of your conduct, so I suggest that you consult with your adviser, Mr Shorter, and heed the counsel that he gives.

Some 10 days later the appellant submitted a personal grievance claim in relation to the final written warning, claiming that it was not justified and seeking its withdrawal and the sum of $5,000 for humiliation and injury to feelings, a payment for costs and an assurance that his future prospects would not be affected. The Tribunal found:

> *As to the facts, I conclude from Mr King's evidence, from the tone of his memoranda and from my observations of him in the course of his evidence that Mr Ahern's summary of the situation in evidence was a fair one. Mr Ahern said in paragraph 3 of his brief:*
>
> > *From the start it was apparent that Mr King had the ability to do the job for which he was engaged. However, some months later, by mid-1994, problems began to appear. Mr King had a way of rubbing people the wrong way, which was partly his personality and partly his personal conviction that he was the only person capable of solving problems and his ways were the only ways of dealing with them.*
>
> *I prefer Mr Wilkinson's evidence to that of Mr King. Accordingly I find that in face-to-face discussions Mr King was gratuitously offensive to Mr Wilkinson, as described in Mr Wilkinson's evidence. Likewise, I prefer Mr Ahern's evidence to that of Mr King. Accordingly I find that Mr King's behaviour in face-to-face communications with Mr Ahern was as described in Mr Ahern's evidence. This included Mr King calling Mr Ahern in one meeting "yellow-bellied" and "gutless". (Decision, p12.)*

The Tribunal cited from the Police Complaints Authority's review of the *Janine Alison Law Homicide Enquiry*[1] and *NZ Woollen Workers' Union v Distinctive Knitwear NZ Ltd* [1990] 2 NZILR 438 at 448 and extracted from these the proposition that although tolerance of robust exchanges in the workplace is to be expected and the law gives no comfort to the hypersensitive:

> *... views not honestly or reasonably expressed may be not only offensive to fellow employees but may also fall outside the protection afforded to free*

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[1] Report of Enquiry Established by Assistant Commissioner Brian Duncan, Region 1 Commander of the New Zealand Police, in the Janine Alison Law Homicide - 26 April 1988 - Conducted by Assistant Commissioner Ian N Holyoake and Reviewed by the Police Complaints Authority. 21 November 1995.

speech and may, according to the circumstances, constitute misconduct. Whether they constitute serious misconduct is a question of fact and degree in each case. A relevant consideration is whether the unreasonableness is an isolated incident or a persistent course of conduct. (Decision, p13.)

The Tribunal then found:

In his oral evidence, as in his written communications, Mr King showed a propensity to focus narrowly on his own perceived rights and to ignore the rights of others. It seemed to be beyond his understanding that if he wrote continually to his manager and to fellow-employees in such contemptuous tones he would eventually damage the working relationship irretrievably. Paradoxically, at the same time he was willing to take offence at any perceived slight, inconvenience or adversity in the work place. It appeared to me that, once he began to take legal advice, Mr King became mesmerised by the personal grievance procedure and by what he imagined it might ultimately deliver to him. His obligations to his employer and his exposure, at best, to a finding of significant contributory fault seemed to play little or no part in his thinking. (Decision, p14.)

The Tribunal stated that it had no difficulty in finding that the tone and frequency of the appellant's communications were so destructive of any climate of reasonable co-operation that they were in breach of his duties to his employer. The Tribunal found he was warned of this and promptly disobeyed the instruction and this led to the written warning. The Tribunal found that the respondent was entitled to treat the appellant's disobedience of a lawful and reasonable instruction as misconduct. The Tribunal found no unfairness in the process which led to the warning and concluded that it was a decision open to a fair and reasonable employer and considered that *"In the circumstances it was thoroughly justified"*. The unjustified disadvantage grievance claim was therefore dismissed.

The Tribunal found that after the final warning relations still remained strained and that there were skirmishes in May when the appellant learned he would not be receiving a bonus. In a memorandum to Mr Ahern dated 16 May the appellant contended that he had not received any adverse comments with regard to his performance. Mr Ahern met with him on 16 May to explain the position. Mr Ahern considered that the appellant had behaved offensively in that meeting. Mr Ahern had alleged that the appellant called him *"yellow-bellied"* and *"gutless"* at that meeting. Mr Ahern wrote on 17 May recording that there were positive aspects under some of the evaluation criteria but that these were *"clearly negated by your attitude, manner and disruptive conduct before and leading up to the disciplinary meeting on*

Thursday, 2 February which resulted in a final warning being given to you on 14 February". The letter went on to state:

> ***Serious Reminder.***
>
> *Robert, when I met with you on Tuesday, 16 May to discuss the bonus issue, your attitude and conduct during that meeting became hostile, abusive and critical to myself as your Manager and individually in regard to my skills as a Manager.*
>
> *I would like to remind of you (sic) the issues that resulted in your final warning on 14 February 1995. A copy is attached to this letter. I must warn you that I consider your outburst towards me on Tuesday afternoon is well down the track once again to going past what the company considers is acceptable under the points (1) to (4) listed in the final warning.*
>
> *Robert, I must warn you if you do not heed these warnings, then your dismissal may be the result.*

The Tribunal found that it was open to the respondent to conclude that the appellant did not deserve a bonus and continued its narrative of the facts:

> *It will be no surprise that Mr King did not accept the contents of Mr Ahern's letter. Relations worsened quickly. Within days, they finally broke down over the issue of passwords to Mr King's spreadsheets. The respondent says that, as a part of an overall security review, it instructed all employees who had keys of company property to make the keys available so that copies could be cut and held centrally. It says that, as part of the same exercise, it instructed those employees who had passwords to computer files to disclose them, so that they could be put on a central register, in case the employee who had nominated the password was unable to recall it or left the organisation. (Decision, p16.)*

There was evidence which the Tribunal appeared to have accepted that another employee had *"recently left"* without providing passwords and the respondent's inability to gain access to these documents had caused some inconvenience. The Tribunal records that it was part of the appellant's case in the Tribunal that in reality this was no security review and that he was being asked for his passwords in preparation for his dismissal a few days later. The Tribunal rejected that theory on the evidence and also concluded that even if there had not been a general review of security the respondent was entitled to instruct any employee to disclose passwords, particularly someone like the appellant whose job was to create computer based documents which belonged exclusively to the respondent and to which the respondent was entitled to have access at any time. The Tribunal found that the respondent was under no duty to justify the request and that the appellant

was not entitled to put any documents in his computer system beyond the respondent's reach.

The Tribunal found, contrary to the appellant's assertions, that he was instructed to supply his passwords at once and that the instruction was lawful and reasonable. The Tribunal recorded that the appellant was the only one to raise difficulties and to give excuses and to claim that he could not remember the passwords or that some were written on scraps at home. On 19 May the appellant declined Mr Ahern's request to go home and get the passwords which he alleged were kept there. The Tribunal found:

> *I conclude, as did the respondent, that Mr King was trifling with his employer. It suspended him. Initially he refused to accept that he was suspended and there was some difficulty in getting him to leave the building. (Decision, p17.)*

A final meeting took place on 23 May at which the appellant was again represented by Mr Shorter, the business of the meeting being to invite the appellant to show why he should not be dismissed. At that meeting the appellant produced some 50 passwords and denied that he had been told to produce them at once or within a stipulated time and challenged the genuineness of the respondent's reasons for seeking the passwords. The Tribunal recorded that he offered no other explanation. At the end of the meeting the appellant was informed that he would be told of the respondent's decision on 24 or 25 May. A further meeting took place on 25 May at which the appellant was told that he was to be dismissed with immediate effect but with a payment of 2 months' salary in lieu of notice.

The Tribunal found that by 23 May 1995 the respondent had ample evidence from which it could conclude that the appellant had not told the truth when he claimed he could not remember any of his passwords and that accordingly he had wilfully disobeyed a lawful and reasonable instruction and the explanation he had offered had, on reasonable grounds, been rejected by the respondent. The Tribunal found that, against the backdrop of the previous course of conduct which the appellant had maintained over several months, the respondent was entitled to conclude that his conduct was repudiatory, that it justified his dismissal and that therefore this was a decision which was open to a fair and reasonable employer in the circumstances.

In relation to the appellant's claim that the procedures adopted by the respondent were unfair the Tribunal made the following finding:

> *In his evidence, Mr King attacked the form of the "serious reminder" which Mr Ahern included in his memorandum of 17 May 1995. It was characteristic of Mr King to attack the form and to ignore the substance. In his submissions, Mr Shorter attacked the process as being in breach of the respondent's house rules. In the end, the fundamental question is, was the process fair? I find unequivocally that it was. Slight or immaterial deviations will not vitiate an otherwise fair process which leads to dismissal for a good and sufficient reason. I find that the respondent was patient with Mr King and that he met the respondent's patience with a sustained pattern of defiance and gamesmanship. The responsibility for his dismissal rests firmly on his own shoulders. (Decision, p18.)*

The Tribunal then made a series of adverse comments about the appellant, to which objection was taken on appeal. It found that even if the procedure had been flawed in some way, any remedies granted would have been *"minimal or even non-existent"* because there was no evidence the appellant had sought paid work after the dismissal having instead undertaken full-time study at Otago University.

The Tribunal's decision on costs noted that the appellant had sought remedies of $95,000 and his case had failed in all respects. The Tribunal accepted the submissions of the advocate for the respondent that it had:

> *... incurred considerable costs in successfully defending the applicant's charges of personal grievance in a long, discursive hearing which was significantly prolonged by the applicant's refusal in cross-examination to address the questions put to him. His insistence on taking everyone on repeated Tiki Tours of his favourite viewpoints, despite numerous exhortations by the Tribunal to answer the questions put to him, extended an already protracted hearing. (Decision, p2.)*

The Tribunal observed that the larger the claim the greater the resources a respondent will feel obliged to throw into its defence and that the claims by the appellant were unrealistic and large. The Tribunal found that the claims were without merit and the unreliability of the appellant's evidence played a significant part in the outcome, this being a relevant consideration to the matter of costs, citing *Dowd v Gubay* 6 PRNZ 154 (HC) and 158 (CA). The Tribunal recorded that the appellant's own costs were in the vicinity of $19,500 and that he was not legally aided. It took into account that he was a student but observed that that was his own decision to

resume full-time study and that should not put him beyond the reach of an order for reasonable costs in accordance with equity and good conscience.

Both counsel on the appeal provided concise submissions which effectively joined issue on each of the many points in contention. Each point was developed in considerable detail with references to the voluminous evidence.

Mr Shorter's first point was that the respondent's house rules formed part of the appellant's contract of employment and the appellant was entitled to have the respondent comply with its house rules. Mr Eggleston did not dispute this and observed that this had been accepted by the Tribunal.

Mr Shorter cited *Purchase v John Sands NZ Ltd* unreported, Colgan J, 13 September 1996, AEC57/96 in which it was held that as the parties' contract incorporated the house rules the employees were contractually entitled to their benefit. Colgan J went on to state *"Even had they not had contractual effect, as a matter of equity and good conscience the Court should be reluctant to sanction the breach by an employer of either the letter or spirit of unilaterally imposed procedures for the orderly and fair inquiry into, and determination of, allegations of misconduct that might lead to dismissal"* (p11). Mr Eggleston observed that Colgan J had acknowledged that minor flaws in the procedure would not have resulted in a finding that the grievant had been treated in a procedurally unfair manner.

Mr Shorter also cited to similar effect *Magnum Corporation Ltd v Jenkins* [1994] 2 ERNZ 443 and see *Compass NZ Inc v Air NZ Ltd* [1994] 1 ERNZ 687 and *Stimpson v Auckland Health Care Services Ltd (t/a Auckland Healthcare)* [1993] 2 ERNZ 614 where Finnigan J stated at 627:

> *There is, however, in every employment contract an implied term of fair dealing between the parties and where an employer has published a formal disciplinary policy an employee is contractually entitled to expect that an employer will not contravene that policy. That is not to say, however, that the employee is contractually entitled to the benefit of the terms of the policy word by word. As the Court has remarked on more than one occasion ... judgment of the employer's disciplinary actions must ultimately rest on whether the employer's action was fair.*

Mr Eggleston also relied upon these passages and submitted that if there were any breaches of the house rules, which was denied, the breaches were not significant so as to invalidate the process.

The house rules open with the statement:

> *The purpose of the House Rules is to outline Taupo Electricity's general policy and procedures for the handling of situations where an employee's standard of conduct does not meet with the company's requirements. It is TEL's intent that all such matters be dealt with promptly, fairly and consistently.*

Mr Eggleston laid stress on the statement in the preamble that *"In general TEL expects its employees to: ... conduct themselves in a manner which reflects credit on the individual and the company"*, contending that over a period of time the tone and content of the appellant's memoranda did not reflect credit either on himself or the company. The house rules then list *"some examples of what the company considers to be misconduct"*. The first category is *"MINOR MISCONDUCT (resulting in an oral or written warning)"*. This includes:

> *(3) Being **discourteous** to other employees, customers or clients.*
>
> *(4) Use of **abusive** or **offensive language** to another employee or member of the public during the course of employment.*

The next category is *"SEROUS (sic) MISCONDUCT" (resulting in a written warning or dismissal)*. This includes:

> *(9) **Refusal** to **perform work assigned** within the scope of the employee's normal duties.*

The house rules then go on to describe a *"WARNING PROCEDURE GUIDELINE"* under which there is a *"PROGRESSIVE WARNING SYSTEM"* which is to be used *"where the behaviour or incident is such that instant dismissal would be too severe a penalty, and focus instead on*:

> *(1) Identifying the behaviour which is not acceptable.*
>
> *(2) Recommended that the employee seeks advice on the matter.*
>
> *(3) Confirm time and place for an interview to discuss the incident and, depending on the outcome of that discussion, the possibility that a warning may be issued.*

(4) Provide the employee an opportunity to explain the behaviour.

(5) Endeavour to establish the facts.

(6) Provide the employee with an opportunity to correct the behaviour.

These warnings may be verbal or written as appropriate to the incident. The employee has the right (and the employee organisations recommend) if being interviewed on a matter with respect to the House Rules, to have an employee representative present to assist them.

First Offence

(1) Explanation interview.

(2) Warning interview. The employee and Supervisor/Department Head present at the interview.

(3) Appropriate disciplinary action taken (may include training and or supervision). The duration of a formal warning to be specified.

(4) Recording of warning interview to be placed on personnel file and copy given to the employee.

Second Offence

(1) Explanation interview.

(2) Warning interview in the presence of the employee, their representative and management representative.

(3) Appropriate disciplinary action taken (may include training and or supervision). The duration of a written warning to be specified.

(4) Recording of a warning interview to be placed on personnel file and a copy given to the employee.

Third Offence or Following Serious Misconduct

(1) Explanation interview.

(2) Interview in the presence of the employee, their representative, management representative and the General Manager.

(3) Suspension while considering the facts (which may include professional advice).

(4) If actions warrant – dismissal.

(5) A letter to the employee confirming the dismissal, outline the interview and the reasons for the dismissal.

(6) A record of the interview and a copy of the letter to go on personnel file.

Mr Shorter relied on various passages from the evidence of the respondent's witnesses and in particular Mr Ahern's statement that in hindsight they could have followed the handbook a little better. Mr Shorter first dealt with the verbal warning issued by Mr Ahern on 24 January, contending that this was the first disciplinary action ever received by the appellant. He referred to the evidence of the respondent's witnesses which, in substance, accepted that the house rules were not followed when Mr Ahern purported to issue his oral warning. As Mr Shorter

submitted that warning was not referred to in Mr Ahern's memorandum later that day, nor does it ever seem to have been recorded in a file note suitable for attachment to the appellant's personnel file. Indeed it appears that the respondent regarded the warning as having been withdrawn on 25 January by Mr Ahern, although this fact was not communicated to the appellant until 2 February despite numerous requests by him as to the status of the warning. Mr Shorter contended that the issue of the verbal warning caused the appellant to send the memorandum to Ms Mounsey on 26 January and it was Mr Ahern's evidence that the language used in that memorandum was *"the straw that broke the camel's back"* and led to him to commence the disciplinary procedures which culminated in the issue of the final warning. That does not in anyway justify the language used in the 26 January memorandum which completely negated the effect of the conciliatory meeting of the previous day. This conciliatory meeting after the verbal warning effectively broke the chain Mr Shorter was trying to construct and I cannot therefore accept his submission.

It was the appellant's intemperate memorandum of the 26th following the day after the amicable meeting on the 25th that led Mr Ahern to reasonably form the view that the agreement they had reached for a new beginning was not going to be adhered to by the appellant. Had the appellant awaited Mr Ahern's return to clarify whether the verbal warning still stood or had written a more reasonable letter clarifying the position, the next disciplinary step would not have been taken. It was inappropriate for the appellant to have written in such a manner when he had recently been warned of the intemperate nature of his communications by both Mr Kadziolka and Mr Ahern.

It was not contested by Mr Eggleston that the verbal warning was issued in total disregard to the requirements of the house rules. Indeed he submitted that the respondent at all times accepted the attempt to issue the verbal warning was vitiated due to procedural errors, that no entry was made on the appellant's personnel file relating to the matter and that furthermore at the disciplinary meeting on 2 February the appellant was given an assurance that the verbal warning had been rescinded. He submitted therefore that any further reference to the verbal warning was a *"non-issue"*.

Mr Shorter contended that the withdrawal of the verbal warning set a precedent and that the appellant was entitled to assume that any further disciplinary action that was procedurally defective would also be withdrawn. I am not satisfied that the evidence went that far or that the appellant would have been justified in assuming that he was free to disregard any disciplinary warnings if they did not strictly comply with the house rules. I agree with the Tribunal's conclusion that the appellant showed more concern with the form than with the substance of what was being said to him and that he disregarded the warnings to his peril. Perhaps of more substance under this heading was Mr Shorter's submission that the verbal warning was a factor in the future disciplinary action taken by the respondent. I have considered the references in the evidence to which Mr Shorter referred and I am not satisfied that they establish that the respondent in any way took into account the issue of the verbal warning in either declining the bonus or in the subsequent disciplinary action. I accept Mr Eggleston's submission that Mr Ahern's withdrawn verbal warning was not material to the final warning or the dismissal.

Mr Shorter then turned to the issue of the final written warning on 14 February. He submitted first that the reasons for the warning were unclear in the letter of 4 February. I do not accept that submission. The issues were clearly delineated in Mr Ahern's letter of 31 January and in the minutes of the meeting of 2 February. The appellant's attitude at that meeting and as expressed in his memorandum of 9 February requiring the minutes to be amended to show that his communications were not insulting or offensive but ***"only critical with tones of sarcasm"***, demonstrated clearly that he did not accept the counselling he had received from Mr Kadziolka and Mr Ahern who had both drawn his attention to the problems with his earlier communications. This did not prevent him from writing the offensive memorandum of 26 January immediately after the conciliatory meeting with Mr Ahern.

Mr Shorter next submitted that because the appellant had not received a formal warning for this type of behaviour he was unable to comprehend the seriousness with which his language may have been viewed by the respondent. Mr Ahern conceded in evidence that the appellant had not been formally warned on his use of language and Mr Kadziolka agreed that in his counselling of the appellant he did not advise him that he would get a written warning if he continued to use that type

of language in his written correspondence. Mr Shorter submitted that compliance with the progressive warning system in the house rules would have prevented the issue of the final warning because, after the first formal warning, the appellant's behaviour would have ceased. He endeavoured to support that proposition by passages in the evidence which confirmed that after the issue of the final written warning the appellant did not write any further memoranda which could have given offence. Mr Kadziolka had fairly conceded that if the respondent had gone through the correct procedures and issued a first formal warning instead of a final warning the appellant's offensive behaviour in his memoranda may have ceased. Mr Shorter submitted that the final warning was issued in breach of the house rules as there were no previous warnings and no explanation interview. He also submitted that the behaviour complained of was clearly categorised as minor misconduct in the house rules and therefore should not have formed part of a final warning.

Mr Eggleston contended that no prior warnings pursuant to the progressive warning procedure were required if the conduct amounted to serious misconduct. That is so, but the difficulty with that submission is that it was the respondent's case before the Tribunal, that it was the cumulative effect of the memoranda which amounted to serious misconduct and justified the issue of the final warning. There is force in Mr Shorter's submission that if a formal warning had been issued in relation to any one of those memoranda and this had not prevented a repetition, then after the repetition, the respondent could have proceeded to the more serious step of a final written warning.

Mr Eggleston relied upon the previous informal counselling sessions with Mr Kadziolka and Mr Ahern as constituting the warning and contended that the full and detailed memoranda issued by Mr Ahern on 31 January in substance, set out the material in far more detail than would necessarily have been available in a verbal explanation interview. He submitted that the provision of the memorandum provided the appellant and his advisor with a full summary of the respondent's position and therefore amounted to sufficient compliance. Mr Eggleston also pointed to passages in the evidence and in the appellant's response to the minutes which demonstrated that the appellant did not accept that his communications were offensive. Mr Eggleston contended that the final warning was effective in persuading the appellant to moderate his language to an acceptable level and there was no evidence to

suggest that this would have been the case if anything less than a final warning had been issued. He contended that the final warning was a step open to a fair and reasonable employer and it was not for the Tribunal or the Court to substitute its decision for that of the employer, citing *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483.

I am not satisfied that the steps taken by Mr Ahern to issue a final warning complied with the house rules. I agree with Mr Shorter that this matter should have been dealt with by way of a more informal warning at an earlier time which is what the house rules contemplate in relation to minor misconduct. The respondent allowed the appellant's minor misconduct to escalate into a course of conduct which might have been categorised as serious misconduct, but it was open to it, in terms of the house rules, to have called an earlier halt to such conduct by an informal warning. Whilst one might have considerable sympathy for the position Mr Ahern found himself in, I am not satisfied that it was justified for the respondent to have issued a final warning which could have had the deleterious affects on the appellant's security of employment referred to by the Court of Appeal in *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineers etc IUOW* (1989) ERNZ Sel Cas 575; [1989] 3 NZILR 785. The Tribunal accordingly should have reached the conclusion that the disadvantage grievance in relation to the final warning was established.

Mr Shorter submitted that the final warning was relevant in the decline of the appellant's bonus. The letter of 17 May which set out the reasons for that decision, in the passage set out above, made it clear that the positive aspects were negated by the circumstances which led up to the disciplinary meeting on 2 February which resulted in the warning. Even if the final warning itself was unjustified because the respondent did not carry out the process properly, the matters which led to the disciplinary meeting could have been properly called on by the respondent in aid of its decision not to pay a bonus and I agree with the Tribunal's conclusion on this aspect. The failure of the respondent to comply with its own house rules does not absolve the appellant from the consequences of his offensive communications which were repeated after informal warnings. I accept Mr Shorter's submission that the warnings were factors which were taken into account in the decision to suspend but find that they do not appear to have influenced the final decision to dismiss. From the matters discussed at the disciplinary meeting which led to the dismissal that was

expressed to have been made solely on the grounds that the appellant had disobeyed a lawful instruction although, as will be developed later, it appears that other reasons may have motivated that decision. Whilst the appellant would have been entitled to a ruling that the final written warning constituted unjustifiable action by the employer which affected the appellant's employment to his disadvantage, I am not satisfied that this played a material part in the dismissal. I shall deal with the claim for compensation of $5,000 further on.

The next matter dealt with by Mr Shorter was the material contained in Mr Ahern's letter of 17 May 1995 under the heading *"Serious Reminder"*. Mr Shorter categorised this as a written warning which was given in breach of the house rules. This letter was sent after the 16 May meeting during which the appellant had called Mr Ahern *"yellow-bellied"* and *"gutless"*. It was common ground that if this was a written warning it did not comply with the requirements of the house rules. Mr Eggleston submitted that the statement in the letter was not a formal warning but was merely a reminder to the appellant to watch his conduct and was entirely consistent with the respondent's duties as a good employer. He also submitted that the reminder was not relied upon by the respondent as a formal warning when the subsequent decision was made to dismiss and therefore there was no evidence to show any disadvantage suffered by the appellant as a result.

The wording is consistent with that of a written warning. Mr Ahern states *"I must warn you"* and continues *"if you do not heed these warnings, then your dismissal may be the result"*. In the letter of 19 May which suspended the appellant it is said *"You have been given written warnings on 14 February 1995 and again on 18 May 1995 on related matters ..."*. Mr Kadziolka in cross-examination accepted that the letter of 19 May may have been *"technically incorrect"* in that statement and would have preferred the paragraph to have read *"You've been given a written warning on the 14th and reinforced by serious reminder on the 18th"*. The contemporary written material demonstrates that the respondent regarded the letter of 17 May as a written warning. Although this matter is referred to in the statement of claim lodged with the Employment Tribunal no separate head of relief is sought for this particular grievance. On the evidence relating to the meeting of 16 May, which was accepted by the Tribunal and was not challenged on appeal, the appellant's conduct would have justified a formal warning or even more serious disciplinary

action. By dealing with this issue in the way Mr Ahern did, the respondent acted fairly, albeit in breach of its house rules. The serious reminder did not therefore constitute unjustified action to the appellant's disadvantage. To the contrary, it should have provided him with clear guidance that no more misconduct would be tolerated.

The next matter challenged by Mr Shorter was the suspension of the appellant on 19 May. The letter of that date states that the suspension was on full pay pending a meeting to discuss the appellant's actions over the past 2 days:

> *Namely your continual challenges to management and your deliberately obstructive attitude and actions. This includes you being deliberately obstructive in not providing your computer file passwords after several direct requests.*

The letter then goes on to refer to the two written warnings mentioned above. The appellant was initially suspended verbally by Mr Ahern after a confrontation between the two of them over the appellant's refusal to supply the passwords or to go home to find where he had written the passwords.

Mr Shorter submitted that this action was in breach of the house rules in that prior to the suspension there was no interview in the presence of a representative or the general manager and that the appellant was neither given the opportunity to seek advice or warned that if he did not provide the passwords he would be suspended. Mr Shorter submitted that these breaches were particularly important because Mr Ahern was directly involved in the incident, was not impartial and should have distanced himself or at least given the appellant the opportunity to be represented before hearing any explanation as to why he should not suspended. Mr Shorter submitted that this was particularly important because the appellant provided the passwords once he had consulted his solicitor.

Mr Eggleston relied upon the house rules which provided that if there was a third offence or serious misconduct, suspension could follow and he pointed to the evidence that the appellant had accepted that he had refused two requests by his manager to go home and look for the passwords. The appellant refused to accept the initial suspension and Mr Ahern then requested the attendance of Mr Kadziolka. When Mr Kadziolka arrived on the scene and explained the situation to the appellant,

the appellant again replied that he was not refusing to give his passwords but could not remember them or find them. After repeating the request and getting the same answer Mr Kadziolka then advised the appellant that he was suspended, which was followed up by the written advice. Mr Eggleston contended that the discussions with Mr Ahern and Mr Kadziolka constituted the explanation interview in terms of the house rules although he accepted that there was no meeting with the appellant's representative prior to the suspension. Mr Eggleston submitted that in the end, while in all instances the procedures stipulated in the house rules may not have been followed, the overall test was whether what had been done was fair.

I observe that there are difficulties with the house rules because they contemplate an interview where everyone is present, including the representative and the chief executive, prior to the suspension, then followed by the dismissal. If the suspension was designed to investigate the matter further and new material turned up as a result, the procedure does not expressly provide the opportunity for a further interview and explanation prior to the dismissal.

Whilst I find that the suspension did not follow the procedure contained in the house rules in the respects isolated by Mr Shorter, I do not accept his submission that if that procedure had been followed the suspension would have been avoided. Mr Shorter's submission was based on the contention that if the appellant had been represented at an interview he would then have supplied the passwords, as in fact eventually happened. The difficulty with that submission is that such an interview would have only taken place because by that stage the appellant had refused a lawful and reasonable request. Later compliance with such a request would not necessarily mean that the initial refusal did not constitute serious misconduct. I accept Mr Eggleston's submissions that the reasons offered by the appellant for refusing the instructions could have been viewed by a reasonable and fair employer as unconvincing and lacking in merit. I also accept Mr Eggleston's submission that the conduct which led to the suspension and subsequent dismissal had occurred prior to any requirement in the house rules to have a meeting with the employee's representative present and any later meeting with the employee's representative would be relevant to the question of whether the employee's request was reasonable or whether any other explanation should be taken into account in deciding the outcome of the disciplinary enquiry, rather than in relation to the suspension.

Mr Eggleston also observed that no disadvantage was pleaded nor any outcome sought as a result of the suspension. Mr Shorter referred to the evidence from the appellant of the humiliation he suffered by being threatened with the Police being called in after he refused to leave the building. I am not satisfied that the suspension in itself from the late afternoon of Friday, 19 May to the meeting on 23 May, even though not carried out in accordance with the rules, would in itself prevent the respondent being able to justify the subsequent dismissal. The way the suspension was carried out however is another factor in viewing the overall result of the respondent's actions.

The next issue raised by Mr Shorter was the termination of the appellant's employment at the meeting of 25 May. A meeting had previously been held on 23 May with the appellant and Mr Shorter and Messrs Kadziolka and Ahern for the respondent. The transcript of that meeting demonstrates that Mr Ahern and Mr Kadziolka considered that requests for the supply of the passwords had been made to the appellant and that the appellant had refused to comply with these requests. The appellant said that he had asked for a reason to stop what he was doing to supply the passwords and that when he asked for that reason he was then suspended. He said that after he was suspended in Mr Kadziolka's presence he refused to answer any questions. The suspension was continued until 25 May when there was a further meeting at which point Mr Ahern advised the appellant that they had considered the events leading up to the suspension and the written communications from the appellant and the explanations given at the Tuesday meeting and they went on to state:

> *We don't believe that we have been given a satisfactory explanation on Robert's behaviour that led up to the suspension. We have decided therefore to terminate his employment "with notice".*

Mr Shorter submitted that this meeting did not provide a satisfactory explanation of the behaviour that had led up to the suspension or the dismissal, that in breach of the house rules no letter was sent to the appellant confirming the dismissal and the reasons for it, and that a copy of such a letter had not been placed on the appellant's file in breach of the house rules. The last two matters were of no moment. The first was of more substance.

Mr Eggleston submitted that the reasons for dismissal were readily apparent from the letter of 19 May suspending the appellant, namely continual challenges to management and deliberately obstructive attitude and actions in not providing the computer file passwords after several direct requests against a background of written warnings. These matters were also set out in the respondent's first schedule letter replying to the submission of the grievances. However the matters canvassed at the disciplinary hearing related solely to the refusal of the request to provide the passwords and did not deal with the warnings or the appellant's previous conduct.

What is of even more moment is Mr Shorter's submission that not all the allegations and facts relied on by the respondent were put to the appellant for explanation at the time of the dismissal and yet these matters were taken into account in the final decision. Mr Shorter pointed to the passage in the written brief of evidence of Mr Ahern that on the Monday after the suspension he had carried out an investigation and found that the appellant had used several password protected files in the previous week, and that on the day of the suspension, when the appellant had professed not to be able to recall any of his passwords, he had changed and removed the passwords from at least six files between 1.07pm and 1.14pm. Mr Ahern had given evidence that it was impossible to do this with the particular software unless one knew the password to gain access to the files. He gave evidence that he obtained a report from Mr Wilkinson and that it appeared from his own observations and from Mr Wilkinson's report that the appellant had used his passwords to gain access to files only 30 to 40 minutes before Mr Ahern had requested the appellant supply them.

Mr Ahern also gave evidence that immediately prior to the dismissal he expressed disbelief at the appellant's explanation that he could not remember any of his passwords. Because the appellant was using them on a regular basis Mr Ahern said that he told the appellant he thought he was lying and that immediately after he went to his own computer terminal and checked through some of the appellant's files which he found were password protected. He said that he also noted that some of those files had been modified and saved in the preceding few days. He went on to state:

This confirmed my belief that Robert was lying when he said that he couldn't remember his passwords, because he had used them in the last few days. I also recalled that when I had been in his office on the Monday, 15 May, that he had opened up a passworded file without hesitation or reference to any recorded list. That was Monday and this was Friday, just a few days later. I couldn't believe that he had lost his memory in that time.

He also gave evidence that prior to calling Mr Kadziolka into the office at the time of the suspension he had already told Mr Kadziolka of his discovery that the appellant had obviously been using his passwords over the last few days.

These matters were not put to the appellant in cross-examination. Even more telling they were not canvassed in the transcript of the meeting of 23 May. That meeting concentrated on the question whether there was a deadline for the provision of the passwords, the true reasons for the request to produce them and whether there had been an actual refusal. It was never put to the appellant that as a result of the investigations carried out by Mr Ahern on the Friday and his recollection of the events as early as the Monday of that week, that the appellant was lying when he said he could not remember the passwords. Nor was Mr Wilkinson's report ever put to the appellant. It is difficult to escape the conclusion that these matters influenced Messrs Ahern and Kadziolka in their decision to dismiss and yet they were never put to the appellant and he was not given the opportunity to offer an explanation. Further it appears that at least Mr Ahern had concluded that the appellant was lying and that he had carried out his check on the 19th prior to his discussion with the appellant when he requested the appellant supply the passwords. He was cross examined on this point and was asked why he did not tell the appellant that he knew he had just used some of the passwords. Mr Ahern replied:

I was giving him the opportunity to actually supply them. I'd given him several, make sure that he clearly understood what I wanted, was requesting of him, and give him a chance to respond to that.

SHORTER Well why didn't you say to him well look, I've just checked your computer and you've just accessed some of the passwords

RODNEY AHERN I wanted to be 100% sure he was going to continue to lie to me.

SHORTER So you were setting him up for dismissal weren't you?

RODNEY AHERN If he continued to tell me that (sic) the lies, and to be obstructive like he had been the previous afternoon and the previous morning at lunchtime on the Friday, if he continued it, that was my intention, was to suspend him, pending dismissal.

Mr Eggleston submitted that during the hearing the appellant did not seek to dispute the respondent's further investigations and that the appellant had the right to present further evidence in rebuttal pursuant to reg 49(e) of the Employment Tribunal Regulations 1991 which provides:

> *(e) If the Tribunal is satisfied that evidence adduced by the respondent included material that could not reasonably have been foreseen by the applicant, it may, if that material requires an answer, allow the applicant to adduce evidence in rebuttal:*

Mr Eggleston submitted that the appellant chose not to exercise this right and there was no evidence to suggest that the appellant had been prejudiced. However the consequences of failing to cross examine on an issue are clearly laid down by the authorities, see *Z v A* [1993] 2 ERNZ 469.

I accept Mr Shorter's submission that the cross-examination of Mr Ahern supports the view that Mr Ahern was setting the appellant up for dismissal. The evidence suggests predetermination on the part of Mr Ahern on a matter which was not ever clearly put to the appellant. In all these circumstances it cannot be said that the respondent discharged the burden of proving that after a fairly conducted enquiry that it was entitled to conclude that the appellant was guilty of serious misconduct in lying to the respondent about his knowledge of the passwords. These matters went to the substance of the decision to dismiss and they cannot be excused in the way the Tribunal did. To this extent the appeal must succeed. The conclusion that there was no unjustified dismissal was wrong and must be set aside.

Mr Shorter then dealt with a number of matters alleging inconsistencies in the evidence of the respondent and defects in the Tribunal's decision but I do not consider there is anything of substance in those matters which would independently warrant the decision of the Tribunal being set aside.

Mr Shorter's submissions did not address the matter of remedies. When asked by the Court to make submissions on the course that ought to be adopted pursuant to s95(5) of the Employment Contracts Act 1991 if the appeal was allowed, Mr Shorter advised that it was his firm instructions for the Court to deal with the matter of remedies and not to refer them back to the Tribunal. Mr Eggleston agreed

that the Court should determine the remedies. I pointed out to Mr Shorter that the Tribunal had made strong findings of credibility which led to conclusions that the appellant was guilty of serious misconduct and referred to the Tribunal's conclusion that even if it had found the procedure leading to the dismissal in some way flawed *"any remedies granted would have been minimal or even non-existent"*. The Tribunal then went on to find that the appellant had not sought any paid work after the dismissal, deciding instead to go to University. The Tribunal concluded that the appellant did not prove that he had lost any remuneration as a direct result of the dismissal because he had never made himself available for work. Mr Shorter accepted that he could not seriously challenge these conclusions. I agree with the Tribunal's findings and consequently no reimbursement award can be made under s40(1)(a) or 41(1) of the Act as the appellant did not prove that he lost remuneration as a result of his personal grievances.

This left the claim for compensation which the statement of claim sought in the global sum of $50,000 pursuant to s40(1)(c)(i) in respect of the dismissal. For the separate disadvantage grievance relating to the final written warning the appellant had sought $5,000 as compensation. Mr Shorter accepted that the appellant would have difficulties with the Tribunal's findings that there was conduct which could be taken into account as having contributed to the situation that gave rise to the personal grievance, in terms of s40(2) of the Act. Mr Eggleston submitted that there was significant contributory fault on the part of the appellant and that this had been acknowledged by the Tribunal. He submitted that on the Tribunal's factual findings the extent of the appellant's contribution was so high that it would deprive him of any compensation award. He cited *Finsec v AMP Society* [1992] 1 ERNZ 280 and other authorities to the effect that if the contribution was significantly more than 50 percent it may well be regarded as being total.

The Tribunal did make strong findings of fact, in particular that the respondent had ample evidence on which it could conclude that the appellant had not told the truth when he claimed that he could not remember any of his passwords. The Tribunal found that the appellant had wilfully disobeyed a lawful and reasonable instruction against a background of a confrontational style of communication and that the appellant *"met the respondent's patience with a sustained pattern of defiance and gamesmanship. The responsibility for his dismissal rests firmly on his own*

shoulders". These findings have not been seriously challenged on appeal and it is clear that these proven actions on the part of the appellant contributed to the situation that gave rise to the personal grievance and were so substantial that they would deprive the appellant of any remedies. Thus although the appellant has succeeded in establishing his two personal grievances, his claim for compensation which, in any event, was based on very slim evidence of distress, must fail on the basis of the Tribunal's findings. I find that that is the order that the Tribunal ought to have made in the first place.

Although the appeal has succeeded against the orders made by the Tribunal, no remedies are to be awarded.

I turn now to the appeal against the order for costs. Mr Shorter submitted that the Tribunal failed to take into account that the appellant's evidence was prolonged by the production by the respondent of detailed file notes of the various interviews, whereas if these had been made available to the appellant prior to the hearing considerable time would have been saved. He also referred to the adjudicator's failure to place any weight upon his submission that the respondent had refused to attend mediation.

Mr Shorter referred to the fact that the closing submissions of the respondent were well outside the time period directed in the Tribunal's decision. However, as Mr Eggleston properly pointed out, the Tribunal possessed a discretion to extend the time for allowing submissions and obviously accepted the respondent's application for such an extension. I accept Mr Eggleston's submission that the appellant could not show any prejudice as a result of the short extension granted.

Mr Eggleston acknowledged that the preparation of an agreed bundle of documents before the hearing would most likely have reduced the duration of the trial but submitted that there was no evidence that the appellant had suggested such an approach and that the respondent had refused. He referred to the option of discovery which was not used by either party. Mr Eggleston submitted that the appellant was totally unsuccessful at the hearing and that a refusal of mediation would only have been relevant if the appellant had been successful or even partially

successful. He referred to the wide discretion the Tribunal possesses under s98 of the Act.

The difficulty with Mr Eggleston's position on the question of costs is that it depended upon his prime submission that the appellant was totally unsuccessful at the hearing. That is not the decision that ought to have been reached by the Tribunal, as I have determined in the substantive appeal. I have ruled that the appellant should have succeeded in establishing his two personal grievance claims but should not have been awarded any remedies. In these circumstances I consider that the order that should have been made is that the costs at the Tribunal hearing should have been allowed to lie where they fell. The appeal against costs is accordingly allowed and the award of $6,500 is set aside. An order that there be no order for costs in the Tribunal is hereby substituted.

In view of that finding it is not necessary to determine the appellant's application for a stay in respect of the order for costs which has now been set aside.

At the request of counsel costs in relation to the appeal are reserved and may be the subject of memoranda if they cannot be agreed. My preliminary view is that as both parties have succeeded in part and failed in part, no costs should be ordered. That is not a fixed view and counsel are free to persuade me to any contrary position in their memoranda.