Employment Court of New Zealand

Kupa v Silver Fern Farms Beef Limited [2016] NZEmpC 87 (7 July 2016)

Last Updated: 12 July 2016

IN THE EMPLOYMENT COURT WELLINGTON

[2016] NZEmpC 87

EMPC 79/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN HALLAM NGARUPA KUPA Plaintiff

AND SILVER FERN FARMS BEEF LIMITED Defendant

Hearing: 13, 14 and 15 June 2016

Appearances: S Mitchell, counsel for the plaintiff

T Cleary, counsel for the defendant

Judgment: 7 July 2016

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] A meat processing worker, Mr Hallam Kupa, had his longstanding employment terminated because he was observed not wearing a bump-hat when working on a meat works' slaughter chain. He said he was overheated and had obtained permission from a supervisor not to wear it in a hot and humid work environment.

[2] The employer, Silver Fern Farms Beef Limited (SFF), believed he was wrong for two reasons. First, SFF conducted an investigation and concluded that Mr Kupa was not in fact wearing his hat when approached by his supervisor who noticed this failure; and that he then refused to put it on when asked. Secondly, there was a clear process for dealing with the issue; an employee who wished to remove this item of protection was required to ask a supervisor for permission to do so. Approval would

be given if the supervisor considered such a request was reasonable. Mr Kupa had

not followed this process. It concluded that Mr Kupa's failure to comply with instructions amounted to serious misconduct which warranted dismissal.

Issues

[3] Mr Kupa raised a dismissal grievance which the Employment Relations Authority (the Authority) investigated. He asserted that the termination of his employment was not justified; the company said it was. The Authority decided the company was right. Mr Kupa then brought a de novo challenge contending that the dismissal was not justifiable. The company again contested this assertion.

[4] When considering such a question, the Court is required to apply the provisions of s 103A of the Employment Relations Act 2000 (the Act). It provides that the Court must determine objectively whether the employer's actions were what a fair and

reasonable employer could have done in all the circumstances. In making that assessment, the procedural matters set out in s 103A(3) must be considered,

together with any other factors which the Court thinks appropriate.1 A dismissal or

action is not unjustifiable solely because defects and processes are minor and did not result in the employee being treated unfairly: s 103A(5).2

[5] In this Court, the parties were at odds as to how the analysis should proceed. Mr Mitchell, counsel for the plaintiff, submitted that the requirement to wear a bump-hat raised health and safety issues so that the seeking of a supervisor's approval was an unreasonable instruction; and that resolution of this issue was a necessary first step because if Mr Kupa's account was correct resolution of the issue would determine the grievance. Mr Cleary, counsel for the defendant, submitted that the Court should first determine what actually happened, and then consider whether the question of the reasonableness of the company's instruction to wear a bump-hat

unless authorised to remove it was even relevant in the circumstances.

1 Employment Relations Act 2000, s 103A(4).

2 An important decision with regard to these factors is that of the full Court in *Angus v Ports of*

Auckland Ltd (No 2) [2011] NZEmpC 160, [2011] ERNZ 466.

[6] In my view, both issues require consideration. But the Court should first consider the factual issues; any remaining issues, such as whether the company's instruction was reasonable, can then be considered in a correct factual context.

[7] Accordingly, the issues for the Court are whether a fair and reasonable employer could have concluded:

a) That the supervisor's account should be preferred.

b) That the company's instruction to seek a supervisor's approval was

reasonable in the circumstances.

c) That the dismissal was justifiable.

Relevant terms of the employment agreement

[8] I begin by summarising the relevant terms of the employment agreement.

[9] Mr Kupa was a member of the New Zealand Meat Workers Union (the Union), which entered into a collective employment agreement with SFF covering the period 1 November 2013 to 30 October 2016.3 Clause 30 of the agreement deals with personal conduct of employees. There are two relevant provisions in that clause.

[10] The first is at cl 30(e) which states:

Examples of misconduct, which would normally warrant dismissal, include the following:

...

iv) A deliberate refusal to comply with the recognised safety and health standards of the employer. While recognising the health and safety standards of the employer, this also recognises and does not take away the right of an employee to refuse work on the grounds of safety and health.

[11] The second is at cl 30(f) which states:

3 The Silver Fern Farms Pacific Collective Agreement 2013-2016.

The following items are examples of misconduct, which would normally incur a warning in respect of an offence if the supervisor decides that formal disciplinary action is required.

...

v) Failure to follow the reasonable instruction of a supervisor or other authorised agent of the employer.

...

ix) Personal protective equipment (PPE) is provided for the safety and wellbeing of all employees. Failure to use or wear agreed PPE as instructed is foolhardy and unacceptable.

[12] Then cl 31 deals with warnings for misconduct "outside that which would result in summary dismissal". It provides that warnings are to be issued in three stages and elapse one year from the date on which they are recorded. Warnings must be in writing.

[13] Finally, cl 32 deals with suspensions and dismissals. It relevantly states:

It is agreed that the primary response to misconduct should be to alter behaviour and support rehabilitation rather than imposing financial and social costs of job loss and incurring the costs of hiring, training and replacement. Therefore suspension of up to six months shall be the preferred disciplinary option to dismissal.

[14] Those provisions all require detailed consideration in this case.

Key facts

Background events

[15] At the time of his dismissal, Mr Kupa had been a meat processing worker employed by SFF at its Pacific plant near Hastings for some 16 years; and before then for some 10 years when the plant was owned by another entity. At the time of the events under review, Mr Kupa was a neck-boner, working in the Primary Butchery Department (PB).

[16] The evidence established that the PB is a very hot environment especially in summer months, having regard to the clothing which employees must wear, the use of very hot water to sterilise equipment, heat generated from stock, as well as

ventilation challenges in the workplace. Some employees considered that the additional obligation to wear a hat could lead to excessive head heat and consequential ill-effects, especially on a hot day.

Introduction of bump-hats

[17] In late 2014, bump-hats were introduced at the plant. This was part of a company-wide initiative to reduce head injuries, which constituted 10 per cent of total workplace injuries across all SFF plants involving a range of different circumstances.

[18] A bump-hat is not a hardhat. It is a light-weight plastic hat designed to provide protection against light bumps and lacerations to the scalp. The manufacturer specifically notes on a sign on the inside of the hat that:

This is not a safety cap and does not provide the protection against impacts caused by falling objects, heavy strikes against fixed objects or contact with electrical hazards.

[19] Although the intention of introducing the hats was to reduce the risk of frequency and severity of head injuries, SFF anticipated other issues such as heat stress could arise. But the company regarded such hats as being personal protection equipment (PPE) and considered that their introduction was a practicable step under the Health and Safety in Employment Act 1992.

[20] Recognising the potential for heat stress, a notice was posted by management which stated:

All PPE gear **must** be work unless instructed otherwise by Management, that is including **bump / Hard Hats**.

It is a Health & Safety requirement.

If [you're] struggling with the heat, talk to your Supervisor.

[21] Some employees considered the requirements for wearing bump-hats were uncertain, and even unnecessary in the PB having regard to a perceived low risk of head injuries in that particular location. I shall return to this topic later.

[22] Issues relating to the wearing of bump-hats became the subject of discussions, particularly between the Union and SFF management.

[23] By early 2015 the concerns had been discussed at meetings of the Health and Safety Committee. It had been suggested that Mr Kupa, who was a Union delegate, and another colleague would establish whether individual employees wanted fans to be installed at their job stations in the PB. However, the Assistant Manager at Pacific, Mr Frank Elliott, said at the time that he did not want Mr Kupa undertaking this role. He considered that Mr Kupa was being unduly strident about issues as to heat exhaustion, and that it would be preferable for the Health and Safety Representative only to undertake this task.

[24] On 15 January 2015, a Union official wrote to senior management raising concerns as to potential heat hazards in the PB which, it was stated, should be investigated so as to ensure that health and safety standards were maintained. He requested the company to look at better ways of cooling the work area; it was also emphasised that an employee who was suffering from heat stress should be able to remove his hat or be relieved so that he could cool down, and if necessary rehydrate. A request was made for paper-hats to be reintroduced, and for a meeting to be held. This would include Mr Kupa.

[25] The issue continued to feature at meetings of the Health and Safety Committee. By 13 February 2015, it was recorded that the issue of "helmet heat" was being worked through, and that a visit from a ventilation consultant was awaited. Some locations had been identified for the placing of fans, but these had not been installed. It was common ground that the ventilation of the plant was poor, and that on very warm days fans would in fact push hot air around.

[26] At a meeting on 18 February 2015 it was agreed that a store-man employed by SFF would check to see if vented bump-hats were available for acquisition; there is no evidence to suggest that this initiative was implemented.

[27] Mr Shaun O'Neill, the Plant Manager at Pacific and also the Regional

Manager for SFF, told the Court that a refrigeration company had advised as to

possible solutions, but as these were impracticable a more comprehensive solution which involved enhanced air-conditioning in that area was being considered. But he said this was not straightforward and was potentially very costly. Other witnesses referred to the possibility of holes being drilled in bump-hats, so that they would be more comfortable. Neither of these initiatives had been implemented as at the date of the hearing.

[28] On 11 March 2015, the Union produced a notice which emphasised that if at any time an employee felt light-headed or fatigued, they were to approach their supervisor or team leader and engage in "meaningful discussions about removing your PPE and ensure that it is recorded in the medical register by your supervisor or team leader before making any rash decisions". The notice went on to state that options for improved air-conditioning were being "worked on". Then there was a reference to s 19 of the Health and Safety in Employment Act 1992, which imposes an obligation on employees to take all practicable steps to ensure their safety while at work, including by using suitable protective clothing and equipment as provided by an employer.

[29] In mid March 2015, an incident occurred where Mr Elliott spoke to Mr Kupa because he was not wearing his hat at his work station on the PB floor early in a morning shift. At that stage he was the only employee not wearing a bump-hat. Mr Kupa said he was not wearing a hat because it was too hot. Then Mr O'Neill spoke to Mr Kupa. He concluded that Mr Kupa had not taken his hat into the work area and that he had no intention of ever wearing a hat that day. He was not following clear instructions. He told Mr Kupa he needed to wear his hat and that if he felt hot he was to speak to his supervisor who would make a decision as to whether it could be removed. It was emphasised to Mr Kupa that he did not make the rules, and that if these were not followed he could face the consequences, which could include losing his job.

[30] Soon after, Mr Elliott noticed two other employees were also not wearing their hats, Mr Kerry Burnstone and Mr Dennis Winterburn. He spoke to them both. Each said it was too hot to wear a hat. Mr Elliott did not agree and directed them to replace their headgear. Ultimately they did. They were reminded that they could not

remove the headgear if they felt too hot, without talking to a supervisor or team leader first. Mr Elliott considered these employees had removed their headgear to support Mr Kupa.

Events of 25 March 2015

[31] On 25 March 2015, Mr David Scott, a Supervisor, spoke to all staff at the commencement of their shift. He was of the view that it was not particularly hot that morning, and so he told employees they must wear their bump-hats "until at least smoko". They were also told that a group of managers would be visiting the plant that morning. Some staff said they understood they had to wear their hats until the visitors had departed.

[32] During the course of the first part of the shift, the visitors were shown over the plant, including the PB, by Mr O'Neill and Mr Elliott.

[33] During the visit, one of the visitors pointed out to Mr Elliott that a meat processor working on the logging stand was not wearing his bump-hat. Mr Elliott approached the worker in question, Mr Wiffen, who said he had removed it because he was hot. Mr Elliott told Mr Wiffen in strong terms to put his hat on at least until the visitors had left. He interpreted this as meaning that he could remove it after the visitors had departed; he restored his hat. He was not disciplined.

[34] Then the incident which is at the heart of this challenge occurred. Mr Kupa said that at about 8.40 am he told his Supervisor, Mr Ewing Taylor, that he was hot; and that Mr Taylor removed his hat from him. He said that staff had been told earlier in the day they needed to keep their hats on while the managers were present, and that the incident occurred after they had left the area.

[35] For his part, Mr Taylor said he noticed Mr Kupa was not wearing his bump-hat, and that everyone else was wearing theirs. He approached Mr Kupa and asked him to put his hat on. He said that Mr Kupa told him it was too hot and that he was struggling with the heat. He would not agree to replace his headgear. Then Mr Taylor said he noticed Mr Kupa's hat sitting on an apron-wash. He removed it

and took it to Mr Scott's office, telling him what had occurred. Mr Scott in turn

informed Mr Elliott of these events.

Investigation, disciplinary meeting and dismissal

[36] Later that day, Mr Elliott met with Mr Kupa, telling him he had received an allegation that he had not been wearing his bump-hat, and that he then refused to wear it when asked to do so by Mr Taylor. There was a brief discussion as to an intended investigation process which resulted in Mr Elliott determining that Mr Kupa should be stood down on full pay, which he said was for Mr Kupa's own safety. He said that the matter was being taken seriously by the company, and that serious misconduct may have occurred.

[37] On the same day, a local organiser for the Union, Mr Eric Mischefski, wrote to WorkSafe New Zealand Limited with regard to the implementing of the policy relating to the introduction of headgear at SFF processing plants. He said he had received complaints from members of the Union who said that they felt faint when required to wear the bump-hats when working in excessive heat. He asked that the matter be investigated as a health and safety issue. Mr Mischefski explained that he received a subsequent telephone call from a WorkSafe representative who said that the matter would not be formally investigated. I infer that WorkSafe considered it appropriate for the Union and the company to resolve the issue directly.

[38] A second meeting was held with Mr Kupa on 31 March 2015. He was supported by Mr Mischefski, as well as the local President of the Union, Mr Max McGregor, and its Secretary, Mr Jason Baker. The company was represented by Mr Elliott and by Mr Gary Williams, Manager, Employment Relations for SFF.

[39] At the commencement of the meeting there was discussion as to whether Mr Kupa had been stood down or suspended. Although the company took the view that he had been stood down for health and safety reasons, the short point is that he was not permitted to continue working when he wanted to, and he had in effect been suspended. However, no claim has been raised as to this aspect of the matter.

[40] In the course of the meeting, Mr Kupa repeated his account as to what had occurred; it was completely different from that of Mr Taylor. As a result, there was an adjournment whilst Mr Taylor was re-interviewed. He confirmed his earlier report as to what had occurred, and signed his statement. The meeting with Mr Kupa and his supporters then resumed.

[41] Mr Mischefski emphasised his concerns as to the health and safety issues which arose from wearing the bump-hats, when employees were too hot. He said he could not see the benefit of the hat, and felt that there was what he described as a "double standard" in that at times workers were required to wear hats, and at other times they were not. He emphasised that there needed to be consideration of the actual instruction given to Mr Kupa, and whether that instruction was reasonable. He felt that members of management were unwilling to engage on these issues.

[42] Mr Kupa was asked for a written account as to what he said had occurred; Mr Mischefski indicated that legal advice would first need to be taken as to the propriety of doing so.

[43] On 1 April 2015, Mr Mischefski wrote to Mr Williams stating that he had spoken to Mr Kupa who confirmed he had never placed his hat in the apron-wash; he said that there was room around the apron-wash where he had on occasion placed his hat, but never in it. This response led to an email discussion as to whether Mr Taylor's account as to what happened when he initially approached Mr Kupa was correct. A full statement of Mr Kupa's version of events was requested. Mr Mischefski responded by stating that Mr Kupa's written response had been given earlier. He said that the real issue was whether it was appropriate for workers to be required to wear headgear if it was causing discomfort, ill health or was a potential safety problem. Hygiene issues relating to the hats were also of concern. It was reiterated that these issues had been raised earlier with management by the Union's President.

[44] On 2 April 2015, there was a third investigation meeting. Mr Kupa repeated his previous account that he had been wearing his hat when Mr Taylor approached and asked him to take it off as it was too hot; and that he then passed his hat to

Mr Taylor. Mr Williams recorded that this would be taken as his response. Then he stated that given the differences between Mr Kupa on the one hand and Mr Taylor on the other, other employees would need to be interviewed. Mr Kupa's stand down would continue, and it was proposed that the parties meet the following week.

[45] The next meeting, which proved to be the final investigation meeting, was held on 9 April 2015. By that time, Mr Elliott and Mr Williams had interviewed a number of employees, taking statements. I refer to the most significant of these.

[46] Mr Dennis Winterburn, who also worked as a boner, had told Mr Elliott that on 25 March 2015 Mr Kupa had worn his hat most of the morning; that employees were confused as to when they could take their hats off if overheated; that Mr Kupa called Mr Taylor over and told him he was too hot and needed to take his hat off.

[47] Another work colleague, Mr Kerry Burnstone, said Mr Kupa had his hat on for about one and a half hours; he then heard him tell Mr Winterburn that he was too hot, after which he called Mr Taylor over and told him that it was too hot. Mr Burnstone said he knew about the procedure of informing a supervisor when such a problem arose.

[48] A statement had also been taken from Mr Kupa's Supervisor, Mr Scott. He said that he had told employees when coming onto the PB floor that there was a requirement to wear bump-hats, and that as it was a cool morning he would not have expected anyone to have issues with heat until after smoko at least. He realised Mr Kupa was not happy about this, because he started debating how an assessment of overheating would be made. He said he then spoke to Mr Kupa in a separate room, emphasising that hats would need to be worn until after morning smoko and that it was not a matter for debate as it was part of SFF's health and safety programme. If he did not comply he would be held accountable for his actions.

[49] Mr O'Neill was also asked for a statement. He referred to the incident which had happened approximately a week before 25 March 2015. Mr O'Neill recorded that on this occasion he had concluded Mr Kupa had no intention of wearing his hat having left it in his locker; furthermore Mr Kupa had said he could do what he liked.

He had told Mr Kupa that not bringing the hat to the work area confirmed he had no intention of wearing it, he was not following instructions, that if a heat issue arose he needed to speak to his Supervisor, and that if he did not follow the rules he would face the consequences which could include losing his job.

[50] Mr Williams stated at the meeting of 9 April 2015 that all the statements which had been taken and other information relating to the issues as to the wearing of bump-hats had been considered. There were two questions:

• Had Mr Kupa failed to wear his PPE as observed by his Team Leader?

• Had he failed to follow reasonable instructions to put on his PPE when requested?

[51] Mr Williams told Mr Kupa and Mr Mischefski there was a case to answer for serious misconduct. Copies of the notes which had been made were handed over, and a further meeting was arranged.

[52] That meeting took place on 13 April 2015. Mr Mischefski tabled a document relating to the hazards of heat stress; Mr Williams said that he was unsure of the relevance of this, because the key issue was whether Mr Kupa was wearing his hat, and that he failed to put it on when asked. The issues came down to a conflict between the two accounts given by Mr Kupa and Mr Taylor.

[53] After a short adjournment, Mr Williams read out a summary of findings. These were:

a) Mr Taylor's account was preferred, because he was specific and had given a consistent description of the events. Mr O'Neill's statement had also been considered. This was not the first time Mr Kupa had been observed not wearing his PPE. The finding of Mr Kupa's hat in the apron-wash was plausible because this was an area where Mr Kupa had placed his hat previously.

b) The next issue was whether the request to replace his headgear was a reasonable request. It was concluded that the company had a procedure

to go through if any employee was uncomfortable due to heat; this procedure was well understood by staff. Mr Scott had earlier explained to all staff that hats would be worn until at least after the morning break. Mr Kupa had debated this point with his Supervisor so that he was well aware of the position. All staff in the area were wearing hats at the time Mr Taylor observed Mr Kupa not wearing his. The temperature in the room was moderate. The request was accordingly regarded as reasonable.

c) Then there was consideration of the question of whether Mr Kupa understood his actions, and was aware of the potential consequences. Reference was made to the previous incident as described by Mr O'Neill, as well as the instruction given by Mr Scott on the day of the event. Mr Kupa clearly understood the requirements and the consequences of his actions.

d) It was concluded that there had been a breach of the Code of Conduct and the employment agreement in that Mr Kupa had deliberately removed his headgear despite being required to wear it; and when he was asked to replace it he had refused. The explanation given that it was too hot was rejected. Mr Kupa had deliberately failed to follow a reasonable instruction from his Team Leader, which amounted to serious misconduct.

e) When that tentative conclusion had been given to Mr Kupa previously, and he was asked whether there were any mitigating circumstances, Mr Kupa had simply insisted that his version of events was correct.

[54] Having read out the summary, Mr Williams stated that a disciplinary meeting would be scheduled. This took place the next day. Mr Kupa said again that his account was correct. Mr Mischefski repeated the concerns that had been raised previously as to the inappropriateness of this item of PPE. Mr Williams indicated that dismissal was being considered.

[55] Mr Mischefski responded by saying he was surprised that a decision to terminate was being considered given the issues which had been raised. He emphasised that warnings (only) had been imposed for such issues at Takepau, that Mr Kupa had a clear record with no previous warnings, and that there was "nothing serious about this issue".

[56] After a further adjournment Mr Elliott said all factors had been considered and that he was unconvinced that the

decision to terminate should be changed. He advised that as a result of serious misconduct Mr Kupa's employment at SFF was terminated with immediate effect.

[57] On 17 April 2015, Mr Mischefski raised a dismissal grievance for Mr Kupa. He repeated the concerns which had been outlined previously. He said that the requirement to wear a hat was on this occasion an aesthetic one, rather than a requirement for safety purposes. Staff had been required to wear hats whilst company managers had undertaken a visit of the plant. It was contended that the requirement to wear them was predicated on a desire to create a positive image rather than providing a safe work environment. Reinstatement and other remedies were sought.

Could a fair and reasonable employer have concluded that Mr Taylor's

account should be preferred?

[58] Mr Cleary submitted that the company's investigation was extensive. It involved several meetings and interviews with numerous staff members, both those suggested by Mr Kupa as well as others. Then SFF genuinely considered all the information it had. A fair inquiry had been undertaken.

[59] Mr Mitchell submitted that Mr Kupa's account was unreasonably rejected, despite evidence from other employees which was consistent with the information he provided and inconsistent with the information which Mr Taylor provided. In particular the evidence of Mr Winterburn and Mr Burnstone should have been accepted. It was also submitted that the decision-makers did not advise why they simply accepted Mr Taylor's views, or why those views were not subjected to critical

examination. The investigation was superficial. Statements made by each witness were not put carefully to other witnesses. The clear dislike of Mr Kupa by SFF managers influenced the decision. Moreover the reliability of Mr Taylor's statement that the hat had been found in the apron-wash was not properly tested; nor was the issue as to whether Mr Taylor was protecting his own position.

[60] It is appropriate to consider first the submission that SFF simply accepted Mr Taylor's account when there was no basis for rejecting the views expressed by Mr Kupa and other staff members.

[61] The reasoning process adopted for SFF was contained in the "Summary Conclusions" document which was summarised earlier.4 The record of what Mr Elliott, assisted by Mr Williams, decided on this topic is as follows:

1. Was Hallam wearing his PPE (hat)?

Ewing Taylor's account versus Hallam and Winterburn.

Ewing is very specific and describes the details of the situation repeatedly and consistently.

Based on statements from Shaun O'Neill, it is not the first time

Hallam has been observed not wearing his PPE.

On balance, I believe the Team Leader – a few minutes after the conversation he found Hallam's hat in the apron wash – an area Hallam had also said he had put his hat previously.

[62] It is not correct to say that the employer simply preferred one account over the other for no apparent reason. A brief statement as to the conclusions as to credibility was prepared; it was then read out to Mr Kupa and Mr Mischefski at the final investigation meeting on 13 April 2015.

[63] That said, there was no reference to an evaluation of the evidence of Mr Winterburn, and no reference at all to the evidence of Mr Burnstone, in the summary document. Mr Elliott told the Court that he disbelieved the evidence of these two employees, because they had previously taken their hats off without proper excuse when Mr Kupa had been removed from the chain for not wearing his hat,

about a week prior to the incident of 25 March 2015. He considered they were

4 At [53] above.

acting consistently with that behaviour in backing Mr Kupa's version as to what had occurred on 25 March. He said this topic was discussed at one of the meetings, and that Mr Kupa would have been aware of his concerns in that regard.

[64] Although there is no specific reference to this topic in the notes of the meetings held after 8 April 2015 when Mr Winterburn and Mr Burnstone were interviewed, there is specific reference to their statements being considered in the notes made by Union officials for the meeting of 13 April 2015. I accept Mr Elliott's evidence that Mr Kupa and Mr Mischefski were advised of the concerns over the reliability of the information raised by Mr Winterburn and Mr Burnstone.

[65] In short, the decision-makers reached a conclusion for reasons that were open to them and advised Mr Kupa and Mr

Mischefski of these.

[66] The next issue relates to Mr Taylor's statement that after speaking with Mr Kupa, he saw his hat "sitting in the apron-wash" so he picked it up and took it to the office and that "this was due to us getting hammered by the Vet for hanging [them] in the wrong places".

[67] Mr Mischefski said at the start of the meeting held on 14 April 2015 that Mr Taylor's statement should be checked by a practical demonstration. It was his point that if the hat had been placed in such a location, it would have become wet when the wash was used. He said an experiment should be conducted since there was no evidence that the hat when removed was wet.

[68] Mr Williams responded by saying this was unnecessary. In the course of the investigation, Mr Elliott had asked to be shown the apron-wash area. Furthermore, there were three people who used the area, one of whom was Mr Kupa. The other two were also interviewed. One was Mr Winterburn whose account did not refer to the hat being on the apron-wash because he said Mr Kupa was wearing it; and the other, Mr Mears, said he had seen nothing relevant. I also note that Mr Taylor told the Court that the hat had been balanced above the shower-rose of the wash, not below it. In these circumstances, the decision not to conduct a practical demonstration was justifiable.

[69] What Mr Kupa had said was that he had on occasion previously placed his hat "around the wash", and "never in the wash". Mr Kupa had said he had placed his hat "on top of the paper towel dispenser". That dispenser was immediately adjacent to the apron-wash. It was accordingly permissible to conclude that Mr Kupa had placed his hat in the "apron wash area"; and that just as he had positioned his hat in this area previously, he had done so again on 25 March 2015. It was open to the investigators to take this information into account when assessing credibility and to reach the conclusion they did.

[70] The next point arises from Mr Mitchell's submission that Mr Kupa's account should have been put specifically to Mr Taylor for comment. Mr Taylor was interviewed on two occasions. On the first his observations were recorded by Mr Elliott. On the second he was interviewed again by Mr Elliott and Mr Williams, following which he signed a statement which recorded what he had said at the first interview. Mr Elliott said he told Mr Taylor that Mr Kupa said he passed his hat to Mr Taylor on request; Mr Taylor had said: "that's not true". It is clear he was aware that Mr Kupa's account differed from his own. I find his information was scrutinised carefully. I do not consider there was any material flaw in the way in which he was interviewed.

[71] Mr Mitchell also submitted that a fair process was not followed on the credibility issue because the employer failed to consider whether Mr Taylor had a reason to protect his own position. This submission was based on the fact that Mr Scott had told employees at the start of the shift that they had to leave their hats on until smoko; the incident involving Mr Kupa occurred before smoko; if Mr Kupa's account was correct that Mr Taylor had allowed him to remove his hat taking it away, then this was contrary to Mr Scott's instructions. It was submitted in effect that this was an issue which went to Mr Taylor's credibility. The essence of the submission was that Mr Taylor had lied in his account.

[72] It is clear from the notes made by the decision-makers that Mr Taylor's reliability was assessed. There was a live issue as to whether Mr Taylor had given a correct statement. This was checked by Mr Taylor being re-interviewed. Evidence was taken from other witnesses. A range of information was considered. Having

regard to the totality of factors considered by the decision-makers, I am satisfied that adequate consideration was given to Mr Taylor's reliability.

[73] At the hearing some weight was placed on the fact that at the various meetings, Mr Mischefski was reluctant to argue the question of whether Mr Kupa's account was correct; his efforts were directed to arguing that the instruction to wear a bump-hat was unreasonable. I have considered the question of whether the decision-makers accordingly drew an inference that Mr Mischefski did not believe Mr Kupa, and that this reinforced their own preference for Mr Taylor's account. I am satisfied, however, that the effect of the representations made by Mr Kupa on the one hand where he consistently repeated his assertion that he had been wearing the hat when Mr Taylor approached him, and the concerns raised by Mr Mischefski on the other hand as to the propriety of the employer's instruction, meant that both issues were on the table. In their decision-making process, Mr Elliott and Mr Williams dealt with both issues. Whilst they pointed out that Mr Mischefski seemed reluctant to express a view as to whether Mr Kupa's evidence was reliable, it is not established that the decision-makers placed any weight on this fact.

[74] Finally, I consider the issue raised by Mr Mitchell that a clear dislike of Mr Kupa should have been considered and was not. It is apparent that Mr Kupa's persistent resistance to the introduction of the bump-hats was an irritant, and that Mr O'Neill had found Mr Kupa frustrating as a result of the various discussions he had with him, including one that occurred approximately a week before the incident of 25 March 2015.

[75] While this factor may be relevant to later issues I am required to consider, I find that there is no evidence that this factor played a part in the assessment of credibility which Mr Elliott and Mr Williams undertook when deciding whether to prefer Mr Taylor's or Mr Kupa's account.

[76] Mr Mitchell referred to dicta of the Court of Appeal in *Whanganui College*

Board of Trustees v Lewis,[5] echoed in *Timu v Waitemata District Health Board* to the

5 *Whanganui College Board of Trustees v Lewis* [2000] NZCA 136; [2000] 1 ERNZ 397 (CA).

effect that when faced with a clash of evidence, an employer may make findings of

credibility but such a process is always subject to "the standard of reasonableness".6

[77] In this case, I find that on the question of what actually occurred, Mr Elliott assisted by Mr Williams adhered to this standard; they reached a conclusion which was open to them on the information they had obtained and for the reasons they gave. I conclude that a fair and reasonable employer could have reached this conclusion, and that the process for reaching that conclusion so was not procedurally flawed.

Could a fair and reasonable employer have concluded that the instruction

to seek a supervisor's approval was reasonable in the circumstances?

[78] Although the decision-makers also reached a conclusion that it was reasonable for Mr Taylor to request that Mr Kupa wear his PPE, Mr Cleary argued that this question was not in fact relevant. He said that since Mr Kupa had argued he had complied with the rule which required him to obtain approval to remove his headgear, he was estopped from contending the reasonableness of that rule. I do not agree. As I shall now explain, the authorities are clear that when considering justification for dismissal on the grounds there was a failure to obey instructions, a relevant factor is whether the instruction was in fact reasonable. And, as just noted, the company itself recognised this at the time by specifically addressing this issue.

[79] Both counsel referred to the first instance decision in *Sky Network Television Ltd v Duncan* where Judge Travis endorsed a remark made by Judge Finnigan in *Samuels v Transportation Auckland Corporation Ltd,*7 that "ultimately the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal".8 Subsequently, the

Court of Appeal approved this statement.[9]

6 *Timu v Waitemata District Health Board* [2007] ERNZ 419 (EmpC) at [103].

7 *Samuels v Transportation Auckland Corporation Ltd* [1995] 1 ERNZ 462 (EmpC).

8 *Sky Network Television Ltd v Duncan* [1998] 1 ERNZ 354 (EmpC) at 360-361.

9 *Sky Network Television Ltd v Duncan* [1998] NZCA 246; [1998] 3 ERNZ 917 (CA) at 923.

[80] This has long been the case with regard to health and safety issues. So, in *New Zealand Printing etc IUOW v Tasman Laminating Ltd* the Arbitration Court held that no worker could be criticised for refusing to work with something which was potentially unsafe.10 A refusal to work on safety grounds must, however, be objectively reasonable: *New Zealand Labourers Union v Joint Venture Zueblin-Williamson.*11 It is clear that these factors may be relevant to an assessment of justification under s 103A of the Act.

[81] Mr Elliott's and Mr Williams' reasoning as to whether a reasonable request had been made was recorded in their summary document in this way:

2. Was asking Hallam to put his hat on a reasonable request?

The reason for not wearing the hat or in Hallam's case – 'giving it to the supervisor' was because he said it was too hot – i.e. uncomfortable.

The company had a procedure to go through if any employee was uncomfortable if hot – we have established by interviewing a number of staff that [this] was well communicated and understood.

Was it a reasonable request to ask Hallam to put his hat on?

The supervisor – Dave Scott, had earlier explained to all staff that due to the moderate temperature conditions all hats will be worn until at least after morning break (smoko) i.e. no requests would be expected or accepted for [temporarily] removing headgear – Hallam debated this point with the supervisor, Dave Scott – so he was well aware of the position.

All staff in the area were wearing hats at the time Ewing observed

Hallam not wearing a hat.

Ewing noted the time was 8.40am, the temperature in the room was moderate.

It was reasonable for Ewing to request that the PPE be worn.

[82] In the course of the investigation, debate focused on the potential difficulties of over-heating. It was not argued that the actual temperature, humidity and any

10 *New Zealand Printing etc IUOW v Tasman Laminating Ltd* [1986] ACJ 234 at 235.

11 *New Zealand Labourers etc IUOW v Joint Venture Zueblin-Williamson* (1988) 2 NZELC 96,

188; See also *Northern Distribution Union v Mount Cook Group Ltd* [1991] NZLabC 159; [1991] 1 ERNZ 1190 (LC). For more recent dicta see Judge Perkins' observation to similar effect in *Belsham v Ports of Auckland Ltd* [2013] NZEmpC 190, (2013) 11 NZELR 313 at [42]. In short, the right of an employee to legitimately refuse to work on health and safety grounds is a factor an employer may need to consider which is then relevant to the test under s 103A of the Employment Relations Act 2000.

other related factors which existed on 25 March 2015 were such that it was unreasonable for Mr Taylor to have required Mr Kupa to recommence wearing his hat on that particular day. Rather, the parties focused on whether it was reasonable for the company to require employees to wear bump-hats at all.

[83] As already explained, SFF were concerned that 10 per cent of its workplace injuries across its various plants were head injuries, and that the hat had been introduced to all plants to reduce the risk to both the frequency and severity of those. This was regarded as a practicable step under the health and safety legislation.

[84] This gave rise to numerous concerns, some of which have already been explained. The bump-hat itself was not a hardhat, and its protection was limited to "light bumps". The Union had raised significant concerns about the requirement in January 2015, as had employees including Mr Kupa. Heat issues had been raised and discussed at several meetings of the Health and Safety Committee. There was a significant air-conditioning problem. The installation of fans was assessed but did not provide a satisfactory solution. Steps were being taken to address this although the scope of that problem was such it could not be resolved promptly.

[85] The company accordingly developed its rule. Employees such as Mr Kupa felt that a rule which meant, in effect, that a bump-hat would be worn until a supervisor agreed it could be removed, meant that there was doubt as to the utility of this item of PPE. It was contended that the safety benefit of the bump-hats had not been established, and indeed no real evaluation of the prospect of heat-stress; the fact that individuals would react differently meant that the company had in fact created a different hazard.

[86] The company's response to this was that it had introduced the rule so that individual circumstances could be addressed by a supervisor, and that was in itself a practicable step.

[87] In *Fuiava v Air New Zealand* Judge Travis observed:[12]

12. *Fuiava v Air New Zealand Ltd* [2006] ERNZ 806 (EmpC) at [68]; and see *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 (EmpC) at 95.

... This Court and its predecessors have frequently noted the need to exercise caution in reaching a decision contrary to that of the employer where safety issues are involved.

[88] Taking account of that observation and all other circumstances, I consider a fair and reasonable employer could have concluded that it was appropriate to persist with its health and safety initiatives as to bump-hats, but that a balancing of the competing arguments would be achieved by assessing a request to remove a hat on a case by case basis. Such an arrangement could be regarded as appropriate for a reasonable time so as to enable heat issues to be satisfactorily resolved.

[89] I also conclude that a fair and reasonable employer could have concluded that the manner in which that rule was applied to Mr Kupa on 25 March 2015 was not unreasonable. Mr Taylor had said that all other workers in the area were wearing their hats; this observation supported his conclusion that it was not too hot for the headgear to be worn.

[90] Accordingly, a fair and reasonable employer could conclude that the instruction was reasonable.

Could a fair and reasonable employer have concluded the dismissal was justifiable?

[91] The third issue relates to the substantive justification for determining that particular breaches of the collective employment agreement warranted summary dismissal.

[92] It is appropriate to deal with each of these aspects of the decision-making process separately.

The misconduct findings

[93] Mr Mitchell submitted that SFF erred by invoking the deliberate refusal clause which would normally warrant dismissal.13 He said the provisions relating to

a failure to follow a reasonable instruction and failure to wear PPE were more appropriate. Either of these would normally incur a warning.14

[94] Mr Cleary submitted that the wearing of the bump-hat was a PPE matter, and that reasonably interpreted it was part of the plant's recognised health and safety standards, justifying the use of cl 30(e)(iv). He said the difference between the use of that provision and the relevant provision of cl 30(f) was the notion of deliberate refusal. The former was appropriate where there was aggravating misconduct; the latter would apply where there was a mere failure to comply with rules. Mr Kupa had shown he had deliberately refused to comply in two ways – first by placing his bump-hat on the apron-wash without approval, and secondly by refusing Mr Taylor's requirement to wear it. It was submitted he knew about the standard but made his own safety rules.

[95] In my view, the following issues must be considered:

a) When giving his evidence Mr Elliott said he could not identify any improvement in Mr Kupa's work situation by the requirement to wear a bump-hat. He agreed that the issue was one of standardisation across SFF plants. This confirmed that the real issue was Mr Kupa's failure to do as he had been told more than anything else. He also accepted that this would appear to be a warning matter. I agree.

b) Mr Elliott emphasised that a significant matter which was considered related to what had happened the week before. He said that Mr Kupa had misled Mr O'Neill by telling him that he was too hot and had taken his hat off; Mr Kupa's hat was actually still in his locker, and he had not worn it at all for that shift. But he also said he was not sure that he had raised the fact of the misleading with Mr Kupa in the investigation process. This is confirmed by considering the notes which were taken of the investigation meetings. The focus of discussions about the prior incident was on the fact that Mr Kupa had been unwilling to wear his hat; and not on the fact that he had misled Mr O'Neill. If this

misconduct was to be relied on, Mr Kupa was entitled to know about it and should have been given an opportunity to comment on it. The omission was significant.

c) Mr Elliott said there had been a discussion with Mr Mischefski and Mr Kupa to the effect that the matter could be resolved by the issuing of a warning, if Mr Kupa would accept this. Whilst such an outcome would have meant there was a specific acknowledgment of culpability on Mr Kupa's part, it would also have confirmed that SFF accepted that the problem was able to be dealt with by a warning, rather than by dismissal; and that it was willing to retain Mr Kupa as its employee. These views were inconsistent with the ultimate decision made by SFF.

d) Mr Elliott accepted that Mr Kupa could be "a pain at times". It was felt that he was "grandstanding" and that he was a "dog with a bone". I find that Mr Kupa's persistent quibbling over the obligation to wear the bump-hat created a situation where SFF used the opportunity to make a more serious finding than that which was justifiable, having regard to the factors I have just discussed.

e) Finally, there was uncontested evidence that similar offences at another plant had been dealt with by way of warnings rather than dismissals.

[96] Together, these factors lead to a conclusion that a fair and reasonable employer could not have concluded that the more serious offence under cl 30(e)(iv) was appropriate. Such an employer could have concluded, however, that findings under cls 30(f)(v) and (ix) were appropriate; and that such a conclusion would normally have resulted in a warning.

Decision to dismiss

[97] There is a further aspect of the decision to dismiss which requires consideration.

[98] The collective employment agreement contained an unusual provision which emphasised the importance of altering behaviour and supporting rehabilitation, rather than job loss and of hiring, training and replacement. The clause went on to state that suspension of up to six months was to be the preferred disciplinary option to dismissal.

[99] Mr Elliott said this provision had been used on a number of previous occasions, with suspensions of two or three months imposed.

[100] The evidence as to genuine consideration of this possibility was scant. None of the minuted accounts of the various meetings refer to this possibility; and nor did any of the company witnesses refer to the issue other than in cross-examination when the issue was put to them.

[101] Mr Williams was not sure whether the possibility had been discussed in any of the meetings; furthermore he did not

know what the pros and cons would have been had the provision been considered. He said that this would have been a matter for Mr Elliott to consider.

[102] For his part, Mr Elliott said that he thought the Union had brought the possibility up in one of their conversations. However, the incident which occurred the week before 25 March, and all other factors which were reviewed, led him to conclude there was not a good working environment so that the possibility of supervision was rejected. This was in spite of the fact that Mr Kupa had specifically acknowledged he would henceforth wear the hat; and it was obvious that he wanted to keep a job he had held for many years. There was no evidence that the specific factors referred to in cl 32 were considered.

[103] I find that the option of suspension was not genuinely considered. I conclude that a fair and reasonable employer could have proceeded on the basis that in the absence of an agreement that the matter be resolved by way of the imposition of a warning, a suspension for three months was appropriate for the wilful disobedience issue.

Conclusion as to dismissal

[104] In summary, whilst a fair and reasonable employer could conclude that a disciplinary outcome was appropriate, such an employer could not conclude that dismissal was justifiable.

Remedies

Reinstatement

[105] Mr Kupa said he was very keen to return to his job at Pacific. He had very good support from staff who had prepared a petition to support him after he was dismissed. He said he had worked at Pacific for some 26 years. He had an excellent attendance record. He had not previously been the subject of disciplinary action. He said he would make a good contribution to the work at Pacific. He told the Court he could put the present issues behind him, and get on with the job.

[106] Mr Mitchell submitted that the test for reinstatement in s 125 of the Act was met, so that it was both practicable and reasonable to make such an order. The company had called no evidence which would suggest that reinstatement was not practicable. There was no complaint about Mr Kupa's work and no disciplinary record. Nor was there a suggestion that other employees would be troubled by Mr Kupa's return. Accordingly, not only was reinstatement reasonable, it was the only viable remedy given the dismissal.

[107] SFF strongly opposed reinstatement. Mr O'Neill said that through his actions Mr Kupa had shown he could do whatever he thought right rather than abide by the health and safety rules set by the company. He said that Mr Kupa was a Union delegate and should have set an example. He had no confidence that Mr Kupa's attitude would change.

[108] Mr Cleary submitted that in these circumstances it was both impracticable and unreasonable for the company to be compelled to re-employ Mr Kupa. He pointed to the general aversion of the law to specific performance in the context of personal services, particularly where serious health and safety issues were genuinely raised.

[109] This topic is governed by s 125 of the Act which provides:

125 Remedy of reinstatement

(1) This section applies if—

(a) it is determined that the employee has a personal grievance; and

(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).

(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[110] The authorities with regard to s 125 were reviewed by a full Court in *Angus v Ports of Auckland (No 2).*15 This Court must apply the statute in light of the principles expressed in that decision.

[111] In my view, there is no evidence that were Mr Kupa to be reinstated, there would be no work for him to undertake. It was not suggested that it would not be practicable in that sense for Mr Kupa to be reinstated to his former position.

[112] A concern was raised as to whether Mr Kupa would, however, comply with the employer's reasonable instructions. He said he would. Given the significant consequences of his failure to do so on 25 March 2015, I consider it is more probable than not that Mr Kupa has learned his lesson. He is well aware of the fact that personal misconduct can have very significant consequences.

[113] Standing back and assessing the broad equities of the parties' case as far as the prospective consideration of reinstatement is concerned, I am satisfied that Mr Kupa's claim for reinstatement should prevail. He is a long-serving

employee, who on the whole has been regarded as a good worker. He should be able to continue as such. But I am also satisfied that each party will respect the obligation which each has to conduct their employment relationship in good faith, and that it can be successfully re-established.

[114] Mr Cleary submitted that the mandatory consideration of contributory factors under s 124 of the Act meant that Mr Kupa should be awarded no remedies.

15 *Angus v Ports of Auckland (No 2),* above n 2 at [63] – [64].

Although it appears that submission was directed primarily at Mr Kupa's claims for financial remedies, for the avoidance of doubt I make it clear that even were contributory conduct be considered for the purposes of an application for reinstatement, I am not satisfied that Mr Kupa's contribution to the events giving rise to his grievance should preclude this remedy.

[115] Accordingly, Mr Kupa is to be reinstated to his former position, at the same level of seniority as applied at the time of his dismissal. This order is to take effect seven days following this judgment.

[116] The factor of contribution will, however, be relevant to financial remedies, the topic to which I now turn.

Financial remedies

[117] Mr Kupa seeks reimbursement for lost wages. Following his dismissal, Mr Kupa did not obtain substitute employment elsewhere on a paid basis. Mr Mitchell submitted this was due to the fact that Mr Kupa's work skills are limited to meat processing. He said that accordingly the Court should not limit an award for lost wages to the statutory period of three months; he argued that the Court should exercise its discretion to extend that period.16

[118] Mr Kupa also sought compensation for humiliation, loss of dignity and injury to feelings. He gave evidence of the personal consequences of dismissal. He said he found SFF's decision unfair, and upsetting. He had been unable to discharge his family responsibilities as a result, and this had significant consequences. He outlined other personal effects, the description of which I accept. Mr Mitchell submitted that an award in the vicinity of $15,000 to $20,000 was accordingly appropriate.

[119] Mr Cleary submitted that there were significant blameworthy aspects to Mr Kupa's behaviour which impacted on the situation giving rise to his grievance; as already mentioned, it was his argument that there should be a nil award.

[120] I deal first with the issue of lost wages. I accept that Mr Kupa had difficulty in locating further work after the dismissal. I accept that he mitigated his loss by attempting to find other jobs.

[121] However, I am satisfied that Mr Kupa contributed to the circumstances giving rise to his personal grievance, through his wilful disobedience. But for that factor, I would have awarded six months' lost wages; the award is limited to a three month period; in effect I find there should be a 50 per cent reduction for contributory factors.

[122] Turning to the claim for humiliation, loss of dignity and injury to feelings, I accept Mr Mitchell's assessment of the range within which such an award should fall. Having regard to recent decisions of this Court, particularly *Hall v Dionex Pty Limited*, I am satisfied that the non-financial consequences have been significant.17

In my judgement, the appropriate starting point is $14,000. However, that sum should be reduced by 50 per cent to reflect Mr Kupa's contributory conduct, so that he is entitled to an award of $7,000.

Conclusion

[123] I have found that a fair and reasonable employer could have concluded that Mr Taylor's account as to what had occurred be preferred over Mr Kupa's; and that SFF's instruction to staff to seek a supervisor's approval if hot when wearing a bump-hat could be regarded as reasonable in the circumstances. However, I have concluded that the decision to dismiss does not satisfy the test of justification, so that Mr Kupa's personal grievance is established.

[124] The appropriate remedies are:

a) Mr Kupa is to be reinstated to his former position seven days after the date of this judgment, and at the same seniority as applied at the time of his dismissal.

b) He is to receive three months' lost wages.

c. He is to be paid $7,000 for humiliation, loss of dignity and injury to feelings.

[125] The determination of the Authority is accordingly set aside.

[126] As to costs, I confirm that the appropriate classification is Category 2, Band B. On the face of it, Mr Kupa should receive costs on that basis, unless there are other factors on this topic unknown to the Court. Against that possibility if any cost issues

have not been resolved within 21 days, an application may be made supported by a memorandum; any response is to be made within 21 days thereafter.

B A Corkill

Judge

Judgment signed on 7 July 2016 at 12.45 pm
