

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 108  
5378269

BETWEEN                      JAMES MACDONALD  
   Applicant  
  
A N D                              LEAN MEATS OAMARU  
   LIMITED  
   Respondent

Member of Authority:      David Appleton  
  
Representatives:              Ngaire Alexander, Counsel for Applicant  
   David Jackson, Counsel for Respondent  
  
Investigation Meeting:      23 April 2013 at Oamaru  
  
Date of Submissions        1 May 2013 from the Applicant  
   13 May 2013 from the Respondent  
  
Date of Determination:      12 June 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      The Applicant was not unjustifiably dismissed.**
- B.      Costs are reserved.-**

**Employment relationship problem**

[1]      Mr MacDonald claims that he was unjustifiably summarily dismissed on 6 March 2012 from his employment with the respondent. He seeks reinstatement, loss of wages for 13 weeks, compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and his legal costs. The respondent denies that Mr MacDonald was unjustifiably dismissed.

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

[2] Mr MacDonald was employed by the respondent on the night shift as a boner/trimmer at their plant in Redcastle Road, Oamaru. During the night of 29 February 2012, whilst Mr MacDonald and other staff members were engaged in cleaning up, Mr MacDonald got into an argument with a colleague, Mr Foley. Mr MacDonald's account of the events was that Mr Foley asked Mr MacDonald to turn off Mr Foley's hose and that Mr MacDonald refused to do so as he was busy cleaning his own work area. Mr MacDonald says that Mr Foley started *yelling and swearing*, including calling him a *loudmouthed fat bully* and a *w\*\*\*er*. Mr MacDonald alleges that Mr Foley also made an offensive gesture at him.

[3] Mr Foley (who has passed away since the incident but prior to the Authority's investigation meeting) made a complaint to the supervisor, Ms Voyce, immediately after the exchange between him and Mr MacDonald that Mr MacDonald had abused him, and had deliberately squirted water from a high pressure hot hose at his face. Ms Voyce, who was upstairs at the time of the altercation, came down to speak to Mr MacDonald. As a result of the allegation in respect of the squirting of water, Mr MacDonald was stood down and an investigation commenced.

[4] The investigation by the respondent consisted of interviews with a number of staff members, as well as with Mr Foley and Mr MacDonald. Some of these interviews were carried out by the respondent's personnel officer, Ms Te Aho, and some by Mr Spillane, the General Manager of the plant at that time.

[5] The Authority saw Ms Te Aho's written notes, which record the following:

- a) On 1st March, Ms Te Aho interviewed Mr Foley, who described the incident as described above. He named a colleague, Mr. Kershaw Junior, as a witness;
- b) On 1<sup>st</sup> March, Ms Te Aho interviewed Mr Kershaw Junior, who said that there had been shouting and swearing from both men, but that he saw Mr MacDonald squirt Mr Foley in the face with his hose, believing that it had been deliberate;
- c) On 2nd March 2012, Mr. Spillane and Ms Te Aho met with Mr MacDonald and his union representative, Mr McNeilly. Ms Te Aho's notes record that Mr Spillane explained to Mr MacDonald the

reason why he had been stood down, and asked Mr MacDonald if he was happy with his representation (to which he replied *yes*). The notes also indicate that Mr MacDonald stated that he believed that Mr Foley was trying to get rid of him, that there was no intentional spray in Mr Foley's face and that both hot and cold water was being used because it helped with the pressure;

- d) On 2nd March 2012, a meeting took place between Ms Te Aho, Mr Spillane and a staff member called Ms Gardner. The note records that Ms Gardner stated that the water in Mr MacDonald's hose would not have been hot, that she could hear a lot of swearing and yelling but that there was not too much to see, and that, *knowing Mr MacDonald he probably did it but didn't mean to*. The note also records that Ms Gardner said that she saw Mr Foley walk by and that he was rubbing his eyes after the incident.
- e) On 2nd March 2012, there was a meeting between Mr Spillane, Ms Te Aho and Ms Voyce in which Ms Voyce explained that Mr Foley had come up to her office to tell her that he had been squirted in the face/eyes by Mr MacDonald with a hot hose.
- f) On 2nd March 2012, Mr Spillane and Ms Te Aho interviewed another staff member, Mr Kershaw Senior. Ms Te Aho's note records that Mr Kershaw Senior said that he heard the yelling but did not see anything; that he thought the yelling was abnormal, that he saw Mr Foley after the incident and that he was wet but he had thought that that was because of the clean up.
- g) On 5th March 2012, a further meeting took place between Mr Spillane, Ms Te Aho, Mr MacDonald and Mr McNeilly. Ms Te Aho's notes record that Mr Spillane stated that they had conducted interviews and that the interviews had confirmed what Mr Foley had said. The notes also state that Mr Spillane then went on to read out the notes of the interviews, that he stated that he believed that the incident did happen, that Mr Foley had made a reasonable request for Mr MacDonald to turn

off the valve and that he was confronted by verbal abuse. The notes also record that Mr Spillane stated that he believed that the squirt in the face had been deliberate, based on two witness accounts. Mr MacDonald and Mr McNeilly are recorded as disagreeing with what Mr Spillane had read out from the notes and saying that it was not deliberate.

- h) The notes then record that Mr Spillane confirmed that it was serious misconduct and that he, Mr McNeilly and Mr MacDonald *needed to sleep on it* and come back the following day to have further discussions. Mr Spillane told Mr MacDonald that he was welcome to get some advice, that he had spoken about health and safety in the plant and that dismissal could be a possible outcome. Mr MacDonald and Mr McNeilly could put forward other alternatives but reiterated that Mr MacDonald needed to get some advice.
- i) On 6th March 2012, an interview took place between Mr Foley, Mr. Thomas, the secretary of the union, Ms Te Aho, Mr Spillane and another manager, Mr Dunbar. The note records that Mr Foley stated that he did not want Mr MacDonald to lose his job over the incident, but that Mr MacDonald needed help. He had suggested a two week suspension, counselling and a final written warning. Mr Thomas offered to supply a name and a number so Mr. MacDonald could get some help. The note records that Mr Spillane said he would ask someone for advice and that he would consider what was said.
- j) Another meeting took place on 6th March 2012 between Ms Te Aho, Mr Spillane, Mr Thomas, and Mr MacDonald. The note records that Mr Spillane stated that his concerns were that an argument had been initiated and that Mr MacDonald *went to another level* when he squirted Mr Foley in the face. Mr Spillane referred to Mr MacDonald's two previous warnings and that he believed that this was *middle serious misconduct, involving the head of a person*.
- k) Mr Spillane stated that Mr MacDonald did not have a very good disciplinary record. The note also records that Mr MacDonald stated that he had reacted to Mr Foley yelling back at him and calling him names. The note records that Mr Thomas asked for Mr MacDonald to have another chance and that Mr MacDonald disputed that it was

serious misconduct. A break then took place for Mr Spillane to consider the request of suspension and a final written warning.

- 1) The final note records that the meeting was reconvened at 4:30pm on 6 March and that Mr Spillane stated that Mr MacDonald was going to be summarily dismissed as he had initiated an argument which went on to a physical incident with the hose being squirted in Mr Foley's face. Mr. Spillane stated that it was a serious issue involving health and safety and that Mr MacDonald did not have a good previous track record. Mr Thomas is recorded as stating that he believed that it was low-end serious misconduct because it did not hurt Mr Foley. Mr MacDonald is recorded as saying that he believed that Mr Spillane had already made his mind up before the investigation had started and that nothing he said was going to change that.

## **The law**

[6] The test that the Authority must apply when determining whether an employee has been justifiably dismissed is set out in s. 103A of the Employment Relations Act 2000 (the Act). This section provides:

*(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

*(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

*(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*

*(a) minor; and*

*(b) did not result in the employee being treated unfairly*

### **The issues**

[7] In determining whether Mr MacDonald was unjustifiably dismissed it is necessary to consider the following issues:

- a. Whether, as is alleged by Mr MacDonald, there was a failure to warn Mr MacDonald prior to the decision being made that the incident was regarded as potential serious misconduct and that Mr MacDonald faced possible dismissal.
- b. Whether the respondent failed to interview two crucial witnesses, despite Mr MacDonald naming them to Mr. Spillane.
- c. Even if the two witnesses had not been named by Mr. MacDonald, should the respondent have interviewed them in any event?
- d. Whether Mr Foley and Mr Kershaw junior should have been interviewed themselves by the decision maker Mr Spillane;
- e. Whether all the evidence had been put to Mr MacDonald prior to the dismissal;
- f. Whether the decision to dismiss was predetermined
- g. Whether a fair and reasonable employer could have dismissed Mr MacDonald, even if it had found that Mr MacDonald had deliberately squirted Mr Foley in the face with a hose.

***Was Mr MacDonald told that the matter could be serious misconduct and that he could be dismissed?***

[8] Mr MacDonald and Mr McNeilly both gave evidence to the Authority that they were not told until 5th March 2012 that Mr MacDonald faced possible dismissal, by which date Mr Spillane had already determined that the incident had taken place as

alleged by Mr Foley. On the other hand, Mr Spillane was adamant that he had told Mr MacDonald at each meeting that the matter was potential serious misconduct and that he faced possible dismissal.

[9] None of the witnesses appeared obviously to be lying in respect of their evidence on this point but, having reviewed the evidence, I come to the conclusion that Mr Spillane did make clear to Mr MacDonald and Mr McNeilly that the allegations were potentially serious misconduct and that Mr MacDonald faced the possibility of dismissal. I reach this conclusion because of evidence given by Mr Spillane that, shortly after the first meeting at which Mr MacDonald, Mr McNeilly and Mr Spillane had been present (on 2nd March 2012) Mr McNeilly had asked Mr Spillane separately, with no one else being present, not to dismiss Mr MacDonald. I accept Mr Spillane's suggestion that Mr McNeilly would not have done this if Mr Spillane had not made it clear that Mr MacDonald faced an allegation of serious misconduct and that he could be dismissed.

[10] In addition, Mr Spillane gave evidence that he had carried out several disciplinary investigations prior to Mr MacDonald's, including effecting dismissals, and that he was quite familiar with the company's disciplinary procedures. I believe that, on a balance of probabilities, Mr Spillane would have stated this information in his preamble at the beginning of the first meeting at least. I accept that Ms Te Aho's notes do not record Mr Spillane saying that, but the notes are brief and could not reasonably be considered to amount to a totality of the discussions.

[11] Therefore, I do not accept that Mr MacDonald was not told that he faced possible dismissal and that the matter could amount to serious misconduct.

***Did Mr MacDonald tell Mr Spillane that two witnesses needed to be questioned?***

[12] It is Mr MacDonald's case that Mr Spillane and Ms Te Aho failed to interview two members of staff who were present during the altercation. These members of staff were Ms Horn and Ms Maxwell. Both Ms Horn and Ms Maxwell gave evidence to the Authority. Ms Horn gave evidence that she witnessed the altercation but that she did not see Mr MacDonald squirt Mr Foley with the hose. She also said that Mr Foley did not look wet. Ms Horn also gave evidence that she did not see Mr Kershaw Junior and that he would not have been able to have seen Mr MacDonald and Mr Foley from where he should have been at that time. On this latter point, given Ms

Horn's evidence that the two men were shouting very loudly, I believe that it is possible Mr. Kershaw Junior may have heard the shouting and come out to see what was happening. Just because Ms Horn did not see Mr. Kershaw Junior does not mean that he did not witness the incident. (Mr. Kershaw Junior was unable to give evidence to the Authority because of on-going ill health).

[13] Ms Maxwell gave evidence that she had had a clear view of the two men during their argument and that, while Mr MacDonald may have splashed Mr Foley as he had continued to clean during the argument, she did not see him point the hose directly at Mr Foley.

[14] Ms Maxwell also gave evidence that she had been asked by Ms Voyce the following night what she had seen and that she told Ms Voyce that Mr MacDonald had not pointed his hose at Mr Foley directly but that he may have splashed him. The evidence of Mr Spillane and Ms Te Aho was that neither of them had known that Ms Voyce had spoken to Ms Maxwell.

[15] The evidence of both Mr MacDonald and Mr. McNeilly is that they told Mr Spillane that he should question Ms Horn and Ms Maxwell as part of his investigation. Mr Spillane's evidence was that he is sure that they did not tell him to do so and that he would have been very happy to have done so if they had.

[16] There is a direct conflict of evidence between Mr MacDonald and Mr McNeilly on the one hand and Mr Spillane on the other as to whether or not Mr Spillane was told to interview Ms Maxwell and Ms Horn. Again, none of the men appeared to be lying on this point but I must decide one way or the other who is correct. On balance, I believe that Mr Spillane is correct. This is because Mr McNeilly and Mr MacDonald differed in their account as to when they had told Mr Spillane to interview Ms Maxwell and Ms Horn. Mr MacDonald stated that they had told Mr Spillane to do so prior to viewing video footage. Mr McNeilly, on the other hand, told the Authority that they had suggested to Mr Spillane that he interview Ms Horn and Ms Maxwell after they had viewed the footage.

[17] As a result of this difference in their evidence, I believe that their memories are not as reliable as Mr Spillane's. Mr Spillane also appeared, generally speaking, to have a much clearer memory of the disciplinary process than Mr MacDonald did and,

whilst Mr McNeilly appeared to have a better memory than Mr MacDonald, it was still not as detailed as that of Mr Spillane.

[18] Therefore, on balance, I believe Mr Spillane's evidence when he denies that it was ever suggested to him that he should interview Ms Maxwell and Ms Horn.

***Even if the two witnesses had not been named by Mr. MacDonald, should the respondent have interviewed them in any event?***

[19] However, a further question arises as to whether Mr. Spillane should have interviewed Ms Horn and Ms Maxwell in any event. Mr Spillane's evidence was that there were only around seven people working in the room during the night in question. These were Mr Foley, Mr MacDonald, Messrs Kershaw (Senior and Junior), Ms Gardner, Ms Horn and Ms Maxwell. Five of those seven were interviewed by the respondent. Counsel for Mr MacDonald suggests that it was incumbent upon the respondent to have interviewed all people present during the incident to get a full picture of what had happened.

[20] Section 103A (2) of the Act states that the test to be applied when determining whether a dismissal or an action was justifiable is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal or action occurred. Subsection (3)(a) states that, in applying the test in subs (2), the Authority must consider whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee.

[21] It was Mr Spillane's evidence, basically uncontested by Mr MacDonald, that he met with Mr MacDonald and Mr McNeilly to review video footage of the incident in question. This was, partly, in order to ascertain who was present during the incident (as well as seeing whether the incident had been recorded – it turned out that it had not been because the video had frozen at the relevant time). Mr MacDonald's evidence was that the footage showed Ms Maxwell's hands as she was cleaning, but that she was otherwise hidden behind the belt. Mr Spillane's evidence was that he could not see Ms Maxwell and Ms Horn but that he may have been able to see Ms Gardner in the footage. (Although he was unsure of this). Ms Te Aho's evidence was

that she had viewed the footage separately, and that Ms Maxwell was not on the footage but that Ms Gardner was.

[22] I believe that the respondent did sufficiently investigate the allegations against Mr MacDonald when Mr Spillane asked him and Mr McNeilly who should have been spoken to. Given that I have already found that Mr Spillane did not hear Mr MacDonald and Mr McNeilly asking him to interview Ms Horn and Ms Maxwell, I believe that it was not necessary for Mr Spillane to take a further step and to interview Ms Horn and Ms Maxwell. The position would be different if, during the investigations, it had become clear that Ms Horn or Ms Maxwell had been visible on the video footage or otherwise might have had information that needed exploring. This was not the case, however.

[23] Although Ms Voyce apparently did speak to Ms Maxwell, this was not made known to Mr Spillane or to Ms Te Aho who, Ms Voyce knew, was conducting the investigation. In addition, neither Ms Horn or Ms Maxwell came forward to be interviewed. It is my belief that Mr Spillane or Ms Te Aho would have spoken to Ms Horn and Ms Maxwell if it had become clear that it was necessary to do so. I say this because Ms Te Aho did interview Mr Kershaw Junior after Mr Foley had referred to him during his interview. It is clear, therefore, that the respondent did follow up on its inquiries in order to investigate once further information had been given.

[24] Therefore, in summary, I do not believe that the failure by the respondent to interview Mr Horn and Ms Maxwell in the absence of any substantial reason for doing so amounted to an action that no fair and reasonable employer could have taken.

***Should Mr Foley and Mr Kershaw junior have been interviewed themselves by the decision maker Mr Spillane?***

[25] It is accepted as a minimum standard of fairness that the decision maker who takes the decision to dismiss an employee should be the person to whom the employee gives the explanation, not a third person who has not had the opportunity of questioning the employee or hearing the employee's response. See *Ioane v Waitakere City Council* [2003] 1 ERNZ 104 (EmpC) at [25], where Chief Judge Goddard held that:

*... the fair inquiry that must precede every dismissal for cause must be carried out by the decision-maker. Preliminary portions of that investigation can, and in many cases*

*must, be delegated to others. But in the end, the decision-maker must turn his mind not only to what those under him report and recommend, but also to what the employee has to say in reply.*

[26] There is no hard and fast rule, however, that other witnesses must also be interviewed by the decision maker. As Goddard CJ indicated in *Ioane*, preliminary investigations may be carried out by others. In some cases, of course, matters will arise which would require the decision maker to interview witnesses.

[27] In the present matter, what should have alerted Mr Spillane to a potential issue to be explored further was the statement by Mr MacDonald on 2 March 2012 that Mr Foley was trying to get rid of him. However, Mr Spillane did in fact speak to Mr Foley, on 6 March 2012, and Mr Foley is recorded as saying that he *would hate for anyone to lose their job over the incident*. Therefore, Mr Spillane did explore Mr Foley's motives in complaining about Mr MacDonald.

[28] I am not convinced that there was any other outstanding matter that required Mr Spillane to have to interview Mr Kershaw personally, or to raise additional matters with Mr Foley. The statements of both men as recorded by Ms Te Aho are unambiguous and clear, and do not give rise to any uncertainties that Mr Spillane needed to explore further, in my view. Indeed, Mr Foley admits his role in the argument quite candidly.

[29] In summary, therefore, I do not accept that Mr MacDonald suffered unfairness as a result of Mr Spillane not interviewing Mr Kershaw.

***Had all the evidence been put to Mr MacDonald prior to the dismissal?***

[30] Counsel for Mr MacDonald submits that additional information that came to light following the interviews on 2 March should have been disclosed to Mr MacDonald and an opportunity to comment should have been given. I agree with the general proposition. However, it is understood that this additional information refers to the contents of the interviews with Mr Kershaw junior on 1 March 2012 and with Ms Gardner, Ms Voyce and Mr Kershaw senior which took place on 2 March. However, the notes of the meeting with Mr MacDonald on 5 March 2012 record the following:

*[Mr Spillane] explains to JMacD that we have conducted our interviews & that the interviews (in particular 1 interview) confirmed what TF [Mr Foley] had said. JS went on to read out the notes. JS said that from those accounts that he believes that I*

*[sic] did happen, he believes that it was a reasonable request by Taff [Mr Foley] for Jim MacD to turn off the valve & he was confronted by verbal abuse. JS believes that the squirt in the face was deliberate, going by 2 x witness accounts. [Emphasis added].*

[31] The notes go on to record the following:

*JMacD & McN: disagrees with what JS has read out from the notes & that it was not deliberate.*

[32] These records demonstrate that Mr MacDonald was told what the evidence of the witnesses was. He had his representative with him and they could have asked for more time to consider what they had been told if they had needed it. Indeed, Mr Spillane then went on to confirm that *it is serious* misconduct, and that he, Mr MacDonald and Mr McNeilly all needed to *sleep on it for tonight and come back tomorrow and have further discussions*. He also stated that Mr MacDonald was welcome to get advice, that dismissal was a possible outcome and that Mr MacDonald and Mr McNeilly were welcome to put some alternatives forward. He reiterated that Mr MacDonald needed to get some advice.

[33] The following day Mr MacDonald met with Mr Spillane again (with Ms Te Aho present). Mr MacDonald was accompanied with a new representative, a Mr Thomas, who Mr McNeilly's evidence indicates is a much more experienced union official than Mr McNeilly. The notes of the meeting record that Mr Thomas makes representations to Mr Spillane about the appropriate sanction (suspension and a final written warning) but does not make any complaints about the process followed.

[34] Taking all this evidence into account, I am satisfied that Mr MacDonald was given a fair opportunity to consider the evidence relied upon by Mr Spillane in deciding that Mr MacDonald had committed serious misconduct.

***Was the dismissal predetermined?***

[35] Counsel for Mr MacDonald submits that a pre-prepared statement was read out to Mr MacDonald by Mr Spillane on 5 March 2012 which shows that Mr Spillane had already reached his determination prior to the meeting with Mr MacDonald and prior to Mr MacDonald having had the chance to respond as to whether he had committed *verbal abuse then leading to physical abuse*.

[36] The statement was shown to the Authority and read as follows:

*Complaint Taff Foley against Jim McDonald*

*During clean up on Wednesday 29/02/12, approximately 11.30 to 11.40pm,. Taff has asked Jim to turn off the foamer. Jim has responded with amongst other things verbal abuse that continued even after Taff has said "Don't worry I'll do it myself". Taff eventually responding back. More verbal abuse between the 2 with Taff adding that Jim was a "load mouth fat bully" and soon after a "wanker". At this point Jim and Taff were standing on opposite sides of the first 3 tiered boning belt when Jim raised his hose to squirt Taff directly in the face. Whilst the hose was not on full hot it did have some heat/warmth in the flow. The flow connected with Taff's face and in the eyes.*

*One eye witness has confirmed these events occurred in that order. Other witnesses claimed they did not view the incident but were aware it happened.*

*The incident is of concern as one beginning with verbal abuse then leading to physical abuse and as such classified as serious conduct.*

[37] This statement does two things. It sets out the essence of the allegations against Mr MacDonald and also classifies the incident as serious misconduct. This statement, on its face, does appear to record that Mr Spillane had already reached his conclusions that the incident had occurred as claimed by Mr Foley and that he regarded Mr MacDonald's conduct as serious misconduct. This would have shown predetermination, as he would not yet have heard Mr MacDonald's response to the contents of the interviews that Ms Te Aho had conducted.

[38] However, Mr Spillane's evidence during cross examination was that he read this statement out on 5 March and asked for Mr MacDonald's response. Mr Spillane said that there had been no plan to make a decision until the process had been exhausted. He had also sought responses on 6<sup>th</sup> March he said.

[39] Mr Spillane said that Mr MacDonald did not engage with the process very much, save to give denials. The notes of 6<sup>th</sup> March record that there was an adjournment of 15 minutes when Mr Spillane considered Mr Thomas's request that Mr MacDonald be suspended and given a final written warning.

[40] On balance, I accept the evidence of Mr Spillane that he did not have a predetermined view of the outcome when he prepared the statement replicated above, and I conclude that the statement had been prepared as a summary of his preliminary findings from the interview notes for Mr MacDonald to comment on. I therefore do not find that the dismissal was predetermined.

***Was the dismissal substantially justified?***

[41] Mr Spillane explained that, in deciding to dismiss Mr MacDonald, he had reached the conclusion that the allegation was proven. In reaching this conclusion, he said, he took into account the fact that Mr Foley had made his complaint immediately and that a staff member (Mr Kershaw Junior) had witnessed the event. He said that he did not believe that Mr Foley was making up the allegation because Mr Foley had asked that Mr MacDonald not be dismissed for the matter. That fact belies Mr MacDonald's assertion that Mr Foley wanted to get rid of him.

[42] Mr Spillane said that he also took into account the potential for harm in squirting a high pressure hose at someone's face. Although Mr Spillane accepted that the water in the hose was not hot at the time, he said that the water had the potential to reach 60-65 degrees Centigrade, which was capable of taking someone's skin off.

[43] Mr Spillane said he also took into account Mr MacDonald's record, including his skills as a boner, but that he was also mindful of Mr MacDonald's previous written warnings. The Authority saw copies of two warnings which had both been live at the time of the incident in question, one of which was for throwing meat (the other not being similar to the type of incident under investigation).

[44] Mr Spillane said that he also looked at the issue of whether Mr MacDonald had been provoked and decided that Mr MacDonald had contributed to the altercation and that, whilst both men had engaged in abusive language and yelling, Mr MacDonald had *stepped over the line* by indulging in a physical action which had the potential of serious harm. During his cross-examination Mr Spillane also emphasised the dangers inherent in the meat industry and how important adherence to health and safety standards were.

[45] The respondent's Oamaru Employee Handbook sets out examples of *offences, which will be regarded as serious misconduct and shall result in instant dismissal*. One such example is:

*Hitting, fighting, offensive personal abuse and threatening or intimidating people are all examples of failure to control anger, are potentially dangerous and are unacceptable forms of behaviour in a decent workplace.*

[46] The conduct for which Mr MacDonald was being investigated falls squarely into this category of potential serious misconduct in my view. Given the evidence that Mr Spillane had before him, (the evidence of Mr Foley of the altercation, the evidence of Mr Kershaw junior who saw the incident, and the evidence of Ms

Gardner, who saw Mr Foley rubbing his eyes) I believe that a fair and reasonable employer could have concluded that Mr MacDonald did deliberately squirt a hose at Mr Foley. I also believe that a fair and reasonable employer could have concluded that such conduct was capable of being serious misconduct, as it involved an action that could have had serious health and safety consequences. Accordingly, I believe that dismissal was an avenue that was open to a fair and reasonable employer.

### **The determination**

[47] In deciding whether Mr. MacDonald's dismissal was justified or not, it is not necessary for me to determine whether Mr. MacDonald did in fact deliberately squirt water in the face of Mr. Foley with a high pressure hot hose, but to determine whether a fair and reasonable employer could have dismissed Mr. MacDonald in all the circumstances at the time the dismissal occurred.

[48] Applying the test in s 103A of the Act it is my finding that the respondent did comply with its obligations under s 103A(3) in that, before dismissal, it:

- a. sufficiently investigated the allegations against Mr MacDonald;
- b. raised its concerns with Mr MacDonald;
- c. gave Mr MacDonald a reasonable opportunity to respond to its concerns and the evidence it had gathered, and;
- d. genuinely considered Mr. MacDonald's explanation in relation to the allegations (and his representations in respect of the appropriate disciplinary sanction) before dismissing him.

[49] It is my conclusion that Mr MacDonald's dismissal was both procedurally and substantively justified and that dismissal was an action that could have been carried out by a fair and reasonable employer in all the circumstances. Accordingly, Mr MacDonald's personal grievance application is dismissed.

### **Costs**

[50] The parties are to seek to agree how costs should be dealt with but, in the absence of such agreement within 28 days of the date of this determination, the respondent may serve and lodge a memorandum of counsel seeking a contribution to

its costs and Mr MacDonald will have a further 14 days within which to serve and lodge a memorandum of counsel in response.

David Appleton  
Member of the Employment Relations Authority