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## **Mallia v New Zealand Van Lines Limited (Wellington) [2012] NZERA 2045; [2012] NZERA Wellington 45 (18 April 2012)**

Last Updated: 17 April 2017

### **IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON**

[2012] NZERA Wellington 45  
5357525

BETWEEN TERRY MALLIA Applicant

AND NEW ZEALAND VAN LINES LIMITED

Respondent

Member of Authority: Michele Ryan

Representatives: George Larkins Advocate for Applicant

Michael Gould Counsel for Respondent

Investigation Meeting: 28 February 2012

Submissions received: 12 March 2012 from Applicant

20 March from Respondent

Determination: 18 April 2012

### **DETERMINATION OF THE AUTHORITY**

#### **Employment Relationship Problem**

[1] The applicant, Mr Terry Mallia, (“Mr Mallia”) was employed by the respondent, New Zealand Van Lines Limited, (“the Company”) for ten years as a furniture removalist prior to his dismissal. He was dismissed by the Company on 8

September 2011 for unauthorised use of a company vehicle during company time. In its decision to dismiss, the Company also relied on a previous final written warning issued on 28 February 2011. Mr Mallia says he was unjustifiably dismissed. He seeks reinstatement to his former position as well as reimbursement for lost wages, compensation and costs.

[2] The Company denies that it dismissed Mr Mallia unjustifiably and claims Mr Mallia’s dismissal was justifiable and is what a fair and reasonable employer could have done in all the circumstances at the time.

#### **The Facts**

[3] Mr Mallia was dismissed having received two warnings over the course of the year preceding the incident which led to his dismissal. I have set out the relevant portions of the Company’s ‘Disciplinary Procedure’ which provides a system of verbal, first written and final written warnings prior to dismissal.

#### **Verbal Warning**

*In cases of unsatisfactory performance or an instance of misconduct, a verbal warning may be given, which will be confirmed in writing.*

### **First Written Warning**

*Where there is a further instance of misconduct or poor performance or the level of poor performance or misconduct justifies going straight to a written warning, then a written warning may be given.*

### **Final Written Warning**

*Where there is a further instance of poor performance or misconduct after a written warning, or the level of poor performance or misconduct is sufficiently serious to justify going straight to a final warning, then a final written warning will be given.*

*Where the offence is serious enough to justify going straight to a final written warning, the warning issued will remain live throughout the period of employment, and any repeat of the offending behaviour may result in summary dismissal.*

### **Dismissal**

*Where unsatisfactory performance continues after a final written warning or there is a further instance of misconduct after a final written warning, then dismissal with notice will occur.*

### **Warnings**

*Each warning may be for unrelated matters – i.e. they may apply to any incident of misconduct. Warnings shall remain live for a minimum of 6 months from the date of*

*issue. Depending on the seriousness of the circumstances any warning may last longer than this. A copy of all warnings will be kept on the staff member's Personal File.*

### **The first written warning (September 2010)**

[4] The first written warning related to an incident whereby Mr Mallia and another employee finished a scheduled job early and had then visited the local Manufacturing and Construction Workers Union office, using a company vehicle.

[5] Mr Mallia says he sought to contact Operations Manager, Mr Kevin Fowell, via the RT (radio) and advise him of his intentions to visit the Union office but Mr Fowell had not answered the call. Mr Mallia made no further attempts to contact his manager.

[6] The Company initiated a disciplinary investigation and alleged that Mr Mallia had used a company vehicle, and had taken paid time off from work, each without its prior approval.

[7] Following completion of the disciplinary process the Company issued a first written warning dated 3 September 2010 which stated inter alia:

*As such I am issuing you with this written warning which will remain live for 12 months. This means if there is a repetition of this incident or any other breach of Company rules or policies within the next year you may be issued with a final written warning after which the penalty may be dismissal.*

[8] Mr Mallia says he contemplated formally challenging the first written warning as he considered his visit to the Union office was related to work issues. He spoke to the Company's Managing Director with a view to having the duration of the warning shortened but was advised that the warning would not change.

[9] Mr Mallia told the Authority he did not take the matter any further because he did not think any additional action would affect the outcome and, in his role as union delegate, was involved in up-coming bargaining for a collective employment agreement between the Union and the Company.

### **The final written warning (February 2011)**

[10] A final written warning was issued on 28 February 2011 in response to an incident involving Mr Mallia and three work colleagues whilst travelling in a company vehicle. It was evident that there were factual disputes between Mr Mallia and the Company as to the timing of events surrounding the incident however it is common ground that Mr Mallia activated a hand-brake while he was a passenger in a moving vehicle, and that the incident also involved a truck belonging to local company, 'JETS'.

[11] Account Manager, Mr Craig Harris and National Operations Manager, Mr Stuart Tutt were appointed to investigate the incident following a complaint received from a local company 'JETS', and another from one of the Company's drivers. Mr Harris and Mr Tutt interviewed the two other passengers in the van as well as the driver, and Mr Tutt and Mr Fowell visited the location where the incident occurred and appraised a set of skid marks left on the road as a result of the incident.

[12] On 22 February 2011 the Company's investigators met with Mr Mallia and his Union representative, Ms Monica Tukaki. The statements of the employees who were in the Company's van at the time of the incident were put to Mr Mallia for his comment. Mr Mallia advised he had applied the hand-brake in response to a truck (belonging to 'JETS'), coming out of a nearby driveway, as he believed the driver of the Company's vehicle did not respond quickly enough to the truck.

[13] Mr Harris' evidence to the Authority was that he and Mr Tutt had doubts about Mr Mallia's account, and therefore proceeded to obtain a statement from the driver of the 'JETS' truck. Following receipt of the truck driver's statement, Mr Tutt and Mr Harris formed a view that Mr Mallia's actions were *"unwarranted, dangerous and a breach of the Company's Health and Safety policies which could have resulted in a serious accident"*. Mr Harris advised the Authority that it was their perception that Mr Mallia had utilised the hand brake as a means to *"wind up"* the driver of the Company's vehicle. Mr Harris and Mr Tutt reported their views to General Manager, Mr Warwick Woodley over the phone, and sent him all the information gathered during the investigation.

[14] Mr Woodley says he was fully appraised of the progress of the investigation throughout its duration, and advised the Authority that he made the final decision as to whether Mr Mallia's behaviour warranted disciplinary action and what disciplinary action was to be taken. He says he considered the information and decided Mr Mallia should be issued a final written warning in line with the Company's disciplinary processes. Mr Woodley did not meet and/or discuss with Mr Mallia any aspect of the investigation or his final decision. Notice of the final written warning was conveyed to Mr Mallia in a letter signed by the Wellington Branch Manager, dated 28 February

2011. The letter advised Mr Mallia that that any further breach of Company rules of policy within the next 12 months may lead to dismissal.

[15] Two to three weeks later Mr Mallia instructed Ms Tukaki to raise on his behalf a personal grievance in regards to the final written warning.

[16] Ms Tukaki was soon to commence annual leave in April 2011 and she arranged with another union organiser, Mr Graeme Clarke, to raise Mr Mallia's personal grievance with the Company. Mr Clarke made an informal attempt to raise the personal grievance but was asked to do so in writing. On 21 April 2011 Mr Clarke sent an email to Mr Woodley as follows:

*On Terry's behalf I submit his personal grievance. Terry's grievance is that he was recently issued with a final warning by the company. Terry contends this is an unjustified disadvantage in his employment. Failing the company's agreement to withdraw the warning the union will seek its removal and payment of compensation for injury to feelings in the Employment Relations Authority.*

[17] Mr Woodley did not respond to the personal grievance. He advised the Authority that he regarded the Union's position outlined in the email as a *"fait accompli"*. In his view there was nothing to respond to.

[18] No further action was taken by the Union to progress the personal grievance prior to the events which led to Mr Mallia's dismissal. Mr Clarke says the Union was waiting for the Company to respond to the grievance. There was also evidence before the Authority of some confusion as to which Union organiser would advance Mr Mallia's instructions.

### ***The incident leading to dismissal (The Upper Hutt – Plimmerton Incident)***

[19] On Friday 19 August 2011 during work hours Mr Mallia received a phone call from his partner who had locked her house and car keys in her car and was unable to gain entry to their home. Mr Mallia says his partner was pregnant at the time and was very distressed. Mr Mallia responded to the call by travelling with a co-worker in a company vehicle from Wellington to his home in Upper Hutt to assist his partner. Mr Mallia acknowledges he did not advise the Company prior to travelling to Upper Hutt or of his whereabouts during his travels.

[20] Having gained access to the house, Mr Mallia's next scheduled job was based in Wellington and was due to commence in two hours. He decided to drive to Plimmerton (approximately half an hours' drive from his home) and purchase a radiator he had found on Trade Me. Whilst travelling from Plimmerton back to Wellington, Operations Manager, Mr Kevin Fowell, located Mr Mallia on the Company's GPS system and contacted him to ask why he was not in the Wellington area. Mr Mallia advised Mr Fowell as to the events involving his partner and his decision to go to Plimmerton. He apologised to Mr Fowell by saying *"sorry about that"*.

[21] Mr Fowell reported Mr Mallia's actions to the Wellington Branch Manager, who in turn advised Mr Woodley. On 24 August 2011 Mr Mallia received a letter entitled 'Notice of a Disciplinary Hearing' and was asked to attend a meeting on 26 August 2011. The letter advised Mr Mallia of the Company's concerns as follows:

*...you used a Company vehicle to travel to both Upper Hutt and Plimmerton, for what appears to be private business, whilst in paid Company time.*

*...you need to be aware that if the allegations are proven this will be your third offence in the last 12 months (refer our letters of*

3rd September 2010 and 28th February 2011) and may well result in your dismissal from the Company.

[22] The disciplinary meeting of 26 August 2011 was attended by Mr Woodley and Mr Fowell on behalf of the Company and by Mr Mallia, his representative, Ms Tukaki, and another union representative.

[23] At the meeting Mr Mallia described the events relating to his travel to both Upper Hutt and Plimmerton and apologised for not contacting his manager. Mr Woodley said he would consider Mr Mallia's explanations but cited the two recent warnings as of serious concern. Ms Tukaki responded by stating the Company could not rely on the first written warning of September 2010 as it was due to expire, nor could it rely on the final written warning of February 2011 as it had been challenged as a personal grievance. Mr Woodley was surprised by Ms Tukaki's assertions as to the February 2011 warning. He acknowledged in the disciplinary meeting that he had not responded to the personal grievance but maintained that the February 2011 warning (which the personal grievance challenged) remained live.

[24] Ms Tukaki also drew Mr Woodley's attention to two other employees who she believed had used a company van for personal use as recently as two days previously. She expressed her view that those employees had "simply been given a stern talking to" even though she considered they too had engaged in previous misconduct similar to Mr Mallia. Mr Woodley undertook to make inquiries into Ms Tukaki's concerns.

[25] A further meeting was tentatively arranged for 2 September 2011 although the meeting ultimately occurred on 8 September 2011.

[26] Mr Woodley gave evidence that between the two meetings, he made inquiries as to the two other employees Ms Tukaki had referred to in the meeting of 26 August

2011 and that these two employees were issued with a warning as this was their first offence. Mr Woodley told the Authority that having made those inquiries he considered that subject to hearing anything else Mr Mallia may add at the next disciplinary meeting, he would dismiss Mr Mallia at the meeting scheduled in September.

[27] Ms Tukaki provided her contemporaneous handwritten notes of the meeting of

8 September 2011 to the Authority. The notes are significant and are replicated as follows:

*Comp Myself (WT) W Woodley T Mallia*

*K Fowell K Aitkins*

*11am start*

*WW: -Monica I have reviewing [sic] the 2 employees that u spoke of. I am happy with the process KF applied, not prepared to take the matter further.*

*-Terry I have taken into account that there was a need 4 u 2 go to help your partner, and I accept that.*

*-But then going 2 Plimmerton, that amounts 2 unauthorised use of a company vehicle which is in breach of your agreement. Terry this warning alone is not a sackable offense.*

*-But with the warning dated the 28/2/11 together they are a sackable offense there 4 you are dismissed effective immediately.*

*-Terry u can wk out your notice or u can leave now & we will pay-out your notice period.*

*TM: -I'll leave now*

*MT: -U'll be hear from us - amounts 2 an unjustified dismissal.*

*Mtg ended 11.15am*

[28] On 9 September 2011 Mr Woodley wrote to Mr Mallia and confirmed the

Company's decision and the reasons for dismissal in writing as follows:

...

*The reasons for this were discussed at our meeting, namely you had received a written warning on 28th February 2011 (your second) and I was unable to accept your excuses for the latest incident of misconduct – the unauthorised use of a Company vehicle for private business and in Company time on the 19th August.*

...

*As such, our disciplinary procedures, as noted within the Agreement under which you were employed, have been invoked.*

*You elected not to work out our notice period and your final pay, including a week in lieu, was paid into your account on Thursday evening.*

...

[29] On 16 September 2011 on Mr Mallia's behalf the union raised a personal grievance claiming an unjustified dismissal.

### **The issues and the law**

[30] The Company does not dispute that it dismissed Mr Mallia. It is therefore required to justify its decision to dismiss Mr Mallia according to the recent amendments<sup>1</sup> to [s103A](#) of the [Employment Relations Act 2000](#) ("the Act").

[31] The [s103A\(2\)](#) test requires the Authority to consider on an objective basis, 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 occurred.

[32] In applying the [s 103A\(2\)](#) test the Authority must also consider ss(3)-(5) as set out below<sup>2</sup>:

*(3) (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 the 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.*

[33] I am satisfied the Company was well resourced to undertake a fair investigation into its concerns with Mr Mallia. I have reached this conclusion on the basis that Mr Woodley advised the Authority that the Company has 12 offices between Auckland and Invercargill and employs approximately 300 permanent staff and

additional casual staff when required. He says the Company does not have in-house

<sup>1</sup> Section 15 [Employment Relations Amendment Act 2010](#)

<sup>2</sup> Section 103A subsections (3)-(5).

HR support but seeks professional advice when needed. In the circumstances of this particular employment relationship problem the Company says it obtained legal advice prior to reaching a final decision to dismiss Mr Mallia.

[34] Section 103A requires the Authority to consider all the employer's actions in the circumstances at the time of the dismissal. It is clear from the evidence that the Company raised its particular concerns with Mr Mallia about the Upper Hutt - Plimmerton incident and gave him a reasonable opportunity to respond to the specific allegation that he had used a company vehicle for personal use without permission. It is apparent that Mr Woodley genuinely considered Mr Mallia's explanations concerning the precise events of the Upper Hutt and Plimmerton excursion. In this regard the Company complied with the procedural requirements of s103A(3)(b)-(d).

[35] However the Union submits there are flaws, both procedural and substantive, in the way the Company dismissed Mr Mallia which resulted in an unjustifiable dismissal. The issues raised by the Union are factors that are appropriate for examination<sup>3</sup> when assessing the employer's actions.

## Discussion and determination

[36] The Union's claims are summarised below:

a. The Company applied its Disciplinary Procedure unfairly by issuing a disproportionately grave penalty in regards to the first incident of unauthorised use of a company vehicle. It says by issuing the first written warning Mr Mallia became at risk of receiving increasingly severe disciplinary action should issues of further misconduct arise.

(b) The first written warning and final written warning were issued following unrelated matters of misconduct and the Company was unfair to issue progressive warnings to events which were not connected.

(c) The Company's investigation into the 'hand-brake' incident was unfair and resulted in an unjustifiable final written warning.

3 In accordance with s103A(4)

(d) The Company should not have relied on the challenged final written warning as justification for dismissal.

(e) The Company's investigation into the Upper Hutt – Plimmerton Incident was procedurally unfair and Mr Mallia was not afforded an opportunity to comment on the issues prior to dismissal.

(f) The Company treated Mr Mallia differently to other employees and he was discriminated against by reason of his union involvement.

[37] The Union referred to *Northern Distribution Union v Armourguard Security Ltd* (1989) 3 NZILR 262 as authority for the principle that when an employer is seeking to justify a dismissal on the basis of a series of warnings, the onus is on the employer to establish that each of those warnings was justifiable.

[38] Given that a significant factor in dismissing Mr Mallia was the Company's reliance on the two warnings issued to Mr Mallia in the year preceding the Upper Hutt

- Plimmerton incident, the Authority is required to examine whether each of the warnings were justified.

### **(a) The first written warning – claim of disproportionate penalty**

[39] I do not accept this aspect of Mr Mallia's claims. No issue was taken with the disciplinary process that was followed by the Company at the time the warning was issued. Mr Mallia did not challenge the First Written Warning until the events leading to his dismissal arose almost a year later.

[40] The Company's policy on warnings provides for warnings to remain in force for a minimum of 6 months from the date of issue but warnings may remain in force for a longer period depending on the circumstances. Dependent on the seriousness of the misconduct the policy allows the Company to issue a first written warning and does not confine it to respond by issuing a verbal warning first. Mr Woodley's evidence was that use of a work vehicle for personal use was not condoned by the Company. Mr Mallia conceded that at the time the incident occurred he was aware of the Company's policy on vehicle use.

[41] As the Court made clear in *Air New Zealand v Hudson*<sup>4</sup> the role of the Authority is to stand back and determine the actions of the employer on an objective basis. However, s103A does not entitle the Authority to substitute its views for that of the employer. On the evidence provided during the Authority's investigation I hold that the Company's actions in issuing the first written warning were justifiable.

### **(b) Unrelated matters of misconduct**

[42] I also do not accept this claim. The Company's Disciplinary Procedure, set out in its Code of Conduct, provides a system where issues of employee misconduct are dealt with in a fair manner. Mr Mallia's evidence was that he well aware of the Company's warning system both as an employee and as a union delegate. The letter advising him of the first written warning was express as to potential consequences for a final written warning if a further breach of Company policies was substantiated within a year. I find Mr Mallia was clearly on notice that any further incidents in breach of the Company's policies within the year may result in a Final Written Warning and the Company's procedure in this way were not unfair to Mr Mallia in the circumstances.

### **(c) Investigation into hand- brake incident resulting in a final written warning**

[43] The Company produced evidence of its investigation into the hand-brake incident including the substance of its concerns and the procedure it undertook.

[44] Mr Mallia submits that the final written warning was unjustified because he was not given a copy of the statement made by the 'JETS' truck driver nor provided with an opportunity to respond to that statement. He reported that he was also not provided with any opportunity to comment on the Company's conclusions about the skid marks.

[45] Mr Woodley's evidence was that he assessed all the information provided to him by Mr Tutt and Mr Harris following their investigation. He advised that he considered the 'JETS' driver's statement as "*quite critical*" on the basis that "*he had nothing to gain*" from raising the complaint. The inference I take from Mr Woodley's evidence is that each of the Company's employees may have held personal views that

coloured their individual versions of event.

4 [\[2006\] ERNZ 414](#)

[46] It became apparent from the evidence that Mr Woodley did not meet with Mr Mallia before he made his decision to take disciplinary action. The law provides that it is a fundamental right of an employee to have an opportunity to be heard by the person who is delegated to make the decision as to what, if any, disciplinary action is to occur<sup>5</sup>.

[47] Mr Mallia should have had a reasonable opportunity to discuss with Mr Woodley his perspective of the events, the information gathered and relied on before he was given a final written warning. He was not provided with an opportunity at all. I accept Mr Mallia's evidence that he was "*left out of the process*" and the Company's failure to allow Mr Mallia an opportunity to put his case to the decision maker was procedurally unfair.

**(d) The Upper Hutt – Plimmerton investigation and previous final written warning** [48] Mr Mallia claims the Company's continued reliance on the final written warning despite the challenge to it by way of a personal grievance was unfair.

[49] I consider that this claim has been determined by my finding that the final written warning issued to Mr Mallia was unjustified on procedural grounds. It follows that the Company could not rely on the final written warning as justification for dismissal without first ensuring that the warning was valid.

[50] I do not consider the delay by the Union in progressing the personal grievance entitled the Company to ignore the personal grievance. The Company's failure to respond to the grievance (even if only to say it did not agree) did not comply with its statutory obligations as an employer to be responsive and communicative<sup>6</sup>. However I accept Mr Woodley's view that the union's failure to actively pursue the matter substantially contributed to his perception that the final written warning was a "*red*

*herring*", introduced as a means to distract the Company away from its investigation

into the Upper Hutt – Plimmerton incident.

<sup>5</sup> *Irvines Freightlines Ltd v Cross* [\[1993\] 1 ERNZ 424](#)

<sup>6</sup> Section 4(1A)(b) [Employment Relations Act 2000](#)

**(e) The investigation into the Upper Hutt – Plimmerton Incident was procedurally unfair**

[51] The Union claims the Company's investigation into the Upper Hutt –

Plimmerton Incident was procedurally unfair and Mr Mallia was not afforded an opportunity to comment on the issues prior to dismissal.

[52] During the first disciplinary meeting to hear Mr Mallia's response to the allegations against him on 26 August 2011, the Company accepted Mr Mallia's explanation as to his reasons for travelling to Upper Hutt, but did not accept Mr Mallia's reasons for then travelling to Plimmerton. The notes taken during the meeting of 26 August 2011 show that at the conclusion of the meeting Mr Woodley undertook to give further consideration to Mr Mallia's explanations before deciding upon an outcome, and that the parties agreed to meet again in the near future to discuss an outcome.

[53] During the Authority's investigation Mr Woodley agreed that the notes taken by Mr Tukaki during the 8 September 2011 meeting were an accurate reflection of the contents of the meeting.

[54] In response to the Authority's questions as to the purpose of the 8 September

2011 meeting, Mr Woodley said that he was well aware of the processes required and of the employee's right to be provided with an opportunity to add any further information for the employer's consideration before any final decision was made. Mr Woodley further stated that during the 8 September 2011 meeting "*he would have asked Mr Mallia if he had anything to add*".

[55] I accept that Mr Woodley genuinely believes he did provide an opportunity to allow Mr Mallia to comment on the allegations and/or Mr Woodley's concerns before he advised Mr Mallia of his dismissal. However the notes do not contain any evidence that an opportunity was provided to Mr Mallia to respond to any aspect of the disciplinary investigation. In this regard there is a conflict between the notes taken at the time of the meeting and Mr Woodley's recall as to what he considers occurred during the meeting.

[56] The meeting was recorded as concluded in 15 minutes. Mr Woodley's Brief of Evidence confirms Mr Mallia was provided

with an opportunity to respond to concerns during the meeting of 26 August 2011 as well as Mr Mallia's responses. However Mr Woodley's Brief of Evidence contains no reference to an opportunity for Mr Mallia had to comment on issues during the meeting of 8 September 2011 or what, if any, comments were made.

[57] Mr Mallia was represented by an experienced organiser and I consider it more likely than not that had Ms Tukaki been afforded an opportunity to add any more information on behalf of Mr Mallia she would have, particularly when the question of the Company's reliance on the warnings raised at the previous meeting remained unresolved.

[58] On the information provided to the Authority I consider the hand written notes to be the most accurate record of the meeting and conclude that Mr Mallia was not given any opportunity to comment on any aspect of Mr Woodley's reasons for dismissal before being advised of his dismissal. I consider the Company's procedural failure in this regard was significant and were not the actions a fair and reasonable employer could take.

#### ***(f) Discrimination and disparity of treatment***

[59] Mr Mallia says he was discriminated against by reason of his union activities and that the Company was "*looking for reasons to discipline him*". Mr Mallia told the Authority that prior to the events commencing with his first written warning in 2010 and his dismissal in 2011, he had received three formal written warnings between 2002 and 2004. He says during this period and on the occasion of the third written warning he sought union assistance. He further adds that his relationship with the Company "*went downhill*" from 2004 when he became a union delegate. Mr Mallia also referred to a time in or around 2004 when he says he had been given difficult jobs and the Company had tried to "*break*" him so he would leave. I accept that a part of the factual matrix which resulted in the first written warning was that Mr Mallia had visited the Union office, but it is clear that on that occasion and in regards to the events in which he was dismissed, Mr Mallia conceded he had engaged in the misconduct alleged. Mr Mallia did not provide any evidence to support a claim of

discrimination on the basis of his union activity other than his assertions as recorded and on this basis I do not accept this aspect of his claims.

[60] Mr Mallia asserts he was treated differently from other employees by receiving harsher disciplinary action than others in relation to similar conduct. Mr Mallia points to the actions taken by the Company with regard to the two employees referred to by Ms Tukaki and he questioned as whether those employees received the same penalty as he had. However no evidence was presented to the Authority that either of those employees had a prior warning for similar or the same misconduct as Mr Mallia, nor did either of those employees present themselves to the Authority to provide evidence on the matter. In contrast, Mr Woodley's evidence was that he made inquiries as to the two other employees and attested that they were issued with a warning for a first offence. I prefer the evidence of Mr Woodley on this aspect of Mr Mallia's claims and do not accept that he was treated disparately.

#### ***Summary***

[61] I do not accept that the first written warning was substantially or procedurally unfair. I also do not find on the evidence available to the Authority that Mr Mallia was discriminated against by reason of his union activities or that he was treated differently from other employees facing similar disciplinary action.

[62] However I conclude that the Company's processes during the investigations involving the hand-brake incident and the Upper Hutt - Plimmerton incident were separately and collectively flawed. I find that these procedural flaws were enough to have negatively impacted on Mr Mallia and can not therefore be considered to be minor or insignificant. In relation to the 'hand-brake' investigation I find the Company's omission to allow Mr Mallia to speak with the decision maker and discuss the matters on which the Company relied, prior to receiving a final written warning, were unfair. So too, with regard to the Upper Hutt - Plimmerton incident, the failure by the Company to provide Mr Mallia with a final opportunity to discuss the outcome of the investigation, despite having scheduled a meeting to do so, was unfair. I find Mr Mallia has a personal grievance for unjustified dismissal.

#### ***Remedies***

[63] Having found that Mr Mallia's dismissal was unjustified, I turn to remedies. Mr Mallia seeks reinstatement, lost wages, an unspecified amount of compensation for hurt and humiliation, and costs.

#### ***Contribution***

[64] In considering whether Mr Mallia is entitled to any remedy for his unjustified dismissal the Authority must apply [s124](#) of the Act, which requires that remedies are to be withheld or reduced where there has been contribution or fault on the part of the employee. I find there is a significant causal connection between Mr Mallia's actions in travelling to Plimmerton for personal reasons during work time without seeking permission, and the situation that gave rise to his personal grievance. Mr Mallia had received a written warning within the previous 12 months which had also related to his unauthorised use of a company vehicle without permission during work hours. I am satisfied that Mr Mallia was well aware of the potential for

dismissal as a result of his travel to Plimmerton. He conceded in evidence that he was aware these actions were in breach of the employer's Code of Conduct. I assess Mr Mallia's contribution to the situation that gave rise to his personal grievance as being 75 percent.

### **Reinstatement**

[65] From 1 April 2011 reinstatement is no longer the primary remedy in proceedings for unjustified dismissal. In the recent decision of *Angus and McKean v. Ports of Auckland Ltd* [2011] NZEmpC 160 the Full Court held at [61]:

*Reinstatement is now no longer the primary remedy for unjustified disadvantage and, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or no less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if sought.*

[66] Mr Mallia seeks reinstatement. However, his evidence portrayed a gradually deteriorating relationship over a lengthy period of time. He said that in 2007 "he had lost trust that the Company would treat him fairly" and that he continued to hold that view. He reported to the Authority that if he was reinstated he "hoped the relationship would get better".

[67] On questioning Mr Woodley said reinstatement of Mr Mallia would be both unreasonable and impracticable. Mr Woodley attested that Mr Mallia was a long serving employee who had been well aware of the Company's views as to personal use of its vehicles without permission but that Mr Mallia had admitted to breaching those rules on two occasions that Mr Woodley was aware of over the previous year. He advised that "the trust the Company had in Mr Mallia had been picked away and was gone". He further stated that although Mr Mallia was an experienced packer he was divisive in the workplace. He advised reinstatement would be a difficult process to manage but did not provide detail as to why or how it would be difficult to manage.

[68] [Section 125\(2\)](#) provides that the Authority may provide reinstatement if it is "practicable and reasonable" to do so. In *Angus and McKean*<sup>7</sup> the Court discussed the dual requirements of practicability and reasonableness at [68] as follows:

*As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

[69] I have found that Mr Mallia was unjustifiably dismissed although my reasons for forming this view are largely based on the procedural omissions and defects occasioned by the employer when it conducted its disciplinary processes. I have also found that Mr Mallia contributed to the situation which led to his dismissal.

7 [\[2011\] NZEmpC 160](#)

[70] I conclude in circumstances where each of the parties attested they had lost trust and confidence in each other I do not think it is reasonable or practicable to order Mr Mallia back into an employment relationship with the employer. I decline to make an order for reinstatement.

### **Lost Remuneration**

[71] [Section 128\(2\)](#) of the Act stipulates that where the Authority determines the employee has a personal grievance, the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration.

[72] The evidence is that four weeks after his dismissal Mr Mallia obtained casual work albeit at a lower rate of pay than when he worked for the Company.

[73] As a consequence the Company must reimburse Mr Mallia at his ordinary time remuneration for three months following the dismissal, less his gross earnings of

\$4939.60 from his alternative employment during that period, with the difference then reduced by 75% to reflect Mr Mallia's contribution. Because of his contribution I decline to order reimbursement for lost remuneration beyond three months.

### **Compensation**

[74] Mr Mallia gave modest evidence as to the effect his dismissal had on him. He says his friends and all his work colleagues knew he had been dismissed and he felt humiliated. He says for two to three weeks after his dismissal he wanted to stay

inside and keep away from people.

[75] On the basis of the evidence available I award \$5000 as compensation under [s123\(1\)\(c\)\(i\)](#). However this sum is reduced by 75% to \$1250.00 to reflect Mr Mallia's contribution.

### **Costs**

[76] Costs are reserved.

### **Summary of Orders**

A. NZ Van Lines Ltd is ordered to reimburse Mr Mallia his ordinary rate of remuneration for three months, less gross earnings of \$4939.60 with the difference then reduced by 75%.

B. NZ Van Lines Ltd is ordered to pay Mr Mallia \$1250.00 as compensation pursuant to [s123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act](#).

**Michele Ryan**

**Member of the Employment Relations Authority**

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