

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 107  
3029191

BETWEEN            AIDAN McCANN  
                                 Applicant  
  
AND                    WASTE MANAGEMENT  
                                 NZ LIMITED  
                                 Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:         Greg Lloyd, counsel for the Applicant  
                                 Daniel Erickson, counsel for the Respondent  
  
Investigation Meeting:    5 and 6 November 2018 at Wellington  
  
Submissions Received:    9 and 16 November 2018 from the Applicant  
                                 14 November 2018 from the Respondent  
  
Determination:            27 February 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Aidan McCann was employed by Waste Management NZ Limited (Waste Management) from 14 May 2012 until 18 July 2017 when his employment was terminated summarily for seriously breaching his employment obligations. Mr McCann claims his dismissal was unjustifiable and he claims compensation and costs.

[2] Waste Management asserts Mr McCann's dismissal was justifiable but, in the event the Authority finds otherwise, it says his contribution to the matter that led to his dismissal was significant.

## **Background**

[3] Mr McCann's role was as an "Operator – Materials Handling Equipment" working at Waste Management's Otaihanga resource recovery facility (ORRF). The Operations Supervisor responsible for the site at the time was David Jones, who had been in the role for less than six months when the events that ultimately led to Mr McCann's dismissal occurred.

[4] On 2 November 2016, Mr McCann was seriously injured at ORRF when he and a colleague were attempting to move a recycling 'tube' from the on-site compactor in the recycling shed to the outside of the employer's premises.<sup>1</sup> Mr McCann, who was crushed in the process, suffering broken ribs and vertebrae, was transported by helicopter to Wellington hospital where he spent the next two weeks. On discharge from hospital he undertook several months of recuperation at home.

[5] Shortly after Mr McCann returned to light duties at work in April 2017, Waste Management commenced an investigation into the November 2017 accident. It had already conducted an internal health and safety (H&S) investigation into the matter.

[6] This had resulted in a Serious Harm Report, a copy of which Mr Grennell sent to Mr McCann on 13 April 2017, along with a letter requiring his attendance at an investigation meeting. WorkSafe New Zealand had also commenced an investigation into the 2 November 2016 accident shortly after it occurred but had not, by April 2017, completed its report.

[7] Waste Management's investigation was undertaken by Peter Grennell, the company's Regional Manager, Taranaki/Manawatu. Julie Norton, an HR Business Partner, lower North Island, for Waste Management, assisted him in the process.

[8] Mr Grennell's investigation entailed interviewing Mr McCann, and three other people. These were the Operations Supervisor, Mr Jones; the colleague with whom Mr McCann was working when the 2 November accident occurred; and another employee, who was on the telephone to Mr Jones when the accident occurred. I will refer to the colleague and the other employee as, respectively, Mr X and Y. I have chosen not to identify them as neither employee was called as a witness and neither took any part in the Authority's investigation.

---

<sup>1</sup> The 'tube' was a metal container approximately five metres long with an opening at one end which contained compacted recycling material.

[9] Once the interviews were complete Mr Grennell and Ms Norton prepared a Preliminary Investigation Report which recorded findings Mr Grennell had made. These included that the matter should be escalated to a formal disciplinary process. There was a delay before that occurred, apparently due to Mr McCann requiring further leave to recover from his injuries.

[10] Mr Grennell wrote to Mr McCann on 13 July 2017, advising him that he was required to attend a disciplinary meeting on 18 July. Mr Grennell's letter informed Mr McCann he may have breached his employment obligations by:

- (a) Failing to follow known procedures and/or ensure all Waste Management's operations were conducted safely.
- (b) Failing to follow a known safety rule (the 5 metre rule).
- (c) Failing to follow the instructions of the on-site supervisor.

[11] Mr Grennell wrote:

The above allegations are considered to be a breach of your employment obligations as follows:

- Breach of s.3 of your employment agreement by failing to comply with Company policies and procedures, specifically:
  - Breach of the Corporate Code of Conduct by failing to ensure that all Waste Management operations are conducted safely.
  - Breach of the Health and Safety Policy by failing to follow known procedures and/or failing to demonstrate accountability for your own safety and that of others and/or failing to SLAM the hazards/risks.
  - Breach of the five metre rule by failing to maintain eye contact or use a spotter when within five metres of plant/moving structures.
- Breach of s.3.2 of your Employment Agreement by failing to follow reasonable instructions given to you.

[12] The letter advised Mr McCann that, if Mr Grennell found he had breached his employment obligations, disciplinary action may result up to and including dismissal. It also reminded Mr McCann that he had a previous final written warning dated 1 April 2016 which was still considered to be active given that further alleged misconduct occurred less than 12 months after that warning had been issued.

[13] The letter also referred to a separate letter sent to Mr McCann on 13 July 2017 relating to his possible involvement in a recent breach of the five metre rule on 5 July 2017. Mr Grennell proposed that this matter also be discussed on the same day if time permitted.

[14] Attached to the letter of 13 July 2017 were several documents including the Preliminary Investigation Report; an extract from Mr McCann's employment agreement (IEA); a copy of Waste Management's Corporate Code of Conduct; copies of the minutes of the investigation meetings undertaken by Mr Grennell and Ms Norton with Mr McCann, Mr Jones, and Mr X; the telephone conversation with Mr Y; a copy of the notes from Mr McCann's interview as part of the H&S investigation; and a transcript of Mr McCann's interview with an inspector from WorkSafe New Zealand.

[15] Mr McCann attended the disciplinary meeting on 18 July with his wife, Fay McCann, and two other people as support, including one person from the Central Amalgamated Workers Union. In the meeting Mr McCann had the opportunity to respond to the allegations made in Mr Grennell's 13 July 2017 letter.

[16] After Mr McCann had given his responses, the meeting was adjourned, during which time Mr Grennell and Ms Norton discussed the next steps. When the meeting reconvened Mr Grennell advised Mr McCann he had concluded the breaches, as set out in the Preliminary Investigation Report, had occurred and he would be implementing a disciplinary sanction.

[17] At that point Mr Grennell asked Mr McCann whether he wished to comment on the outcome. Mr McCann did, and the meeting was adjourned again to consider comments Mr McCann had made. When it reconvened, Mr Grennell informed Mr McCann he had concluded the matter was serious, particularly in view of the fact Mr McCann had a final written warning on file already. He told Mr McCann he was proposing summary dismissal.

[18] On 21 July 2017 Mr Grennell confirmed his decision in writing, with the dismissal effective from 18 July 2017.

[19] Mr X was also subjected to an investigation and disciplinary process. He was found to have breached his employment obligations and received a final written warning on 21 July 2017.

### **Issues**

[20] The main issue I have to determine is whether Mr McCann's dismissal was justifiable. The test for determining that question is the test of justification set out in s 103A of the Employment Relations Act 2000 (the Act). The test entails consideration of 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.

[21] If I find Mr McCann's dismissal to have been unjustifiable, issues of remedies and contribution will arise.

### **The Authority's Investigation**

[22] I have not set out a record of all the evidence received nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of Mr McCann's claims in accordance with s 174E of the Act.

[23] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

### **The employment agreement**

[24] Mr McCann's terms and conditions of employment were contained in an individual employment agreement (IEA) signed by the parties in May 2012. The relevant parts of his IEA insofar as his dismissal is concerned are clause 3 and clause 21, which provide as follows:

#### **3 COMPANY RULES, POLICIES AND PROCEDURES**

3.1 You shall comply with our Rules, Policies and Procedures. We reserve the right at any time, for the good of the company and its employees, to amend our Rules, Policies and Procedures. Furthermore, we reserve the right to adopt new policies and procedures. Although these matters shall be solely within our discretion, we shall act reasonably. We

shall use our best endeavours to notify you of any such amendments or new policies and you, in turn, agree to comply with them.

- 3.2 You are also required to comply with any reasonable directions given to you.

## 21 TERMINATION AND SUSPENSION

...

- 21.8 The Employer reserves the right to take appropriate disciplinary action where an Employee's general behaviour is unacceptable and/or performance fails to meet the required standard. The following are examples of the type of behaviour and/or performance that may constitute misconduct, which may warrant appropriate disciplinary action. The list is not exhaustive:

- Insubordination, failure to comply with Company policies and reasonable instructions or displaying abusive or offensive behaviour.
- Failure to observe safety rules and use safety equipment or working in an unsafe manner.
- ....

- 21.9 The Employer also reserves the right to summarily (instantly) dismiss any Employee, for cause, and without notice or compensation of any kind for serious misconduct. The following are examples of the type of behaviour that constitutes serious misconduct warranting instant dismissal. The list is not exhaustive:

- Acts by the Employee within or outside of their workplace considered by the Employer to be dishonest or unethical or which may bring the Company into disrepute, or discredits its image.
- Operating Company vehicles or equipment without the appropriate licences or authorisation.
- Serious breach of Company policies or procedures, including failure to comply with our drug and alcohol policy.
- Removal or possession of Company property or documents without authorisation. This includes the waste products of our customers.
- Any type of harassment or bullying of another Company employee, or work related member of the public.
- Unauthorised or unacceptable use of the Company's internet/email/computer systems
- Dishonesty, theft or any falsification of documentation, records and/or evidence.

- Copying or divulging confidential Company information without specific management authority.
- Refusing to perform duties or walking off the job contrary to a lawful instruction.
- Working for a competitor whilst employed by the Employer.

For other serious misconduct, negligence, or incident not specified but of a similar nature, the Company reserves the right to summarily dismiss the employee.

### **Evidence, submissions and discussion**

[25] Mr McCann described the process used when he started his employment at Waste Management for moving tubes of plastic and cans from the compactor: the blue tubes. At that time he used a Furukawa loader to detach a full tube from the compactor and wheel it outside the building, later to be picked up and taken away by the hook truck driver. Mr McCann would then use the loader to wheel an empty tube inside the building and attach it to the compactor.

[26] A Kobelco digger was used for this process when the Furukawa was out of action. Mr McCann could not recall ever sighting a written instruction about this process but says it was what he had been shown to do. When the Furukawa loader eventually broke, the replacement loader purchased by Waste Management was less suitable for the process and Mr McCann and others devised a new method for dealing with the blue tubes.

[27] This entailed clearing an area adjacent to the compactor inside the recycling shed and using the loader to slide the full blue tube into this area. It was his evidence that this process became standard practice although it was never assessed by management and no work instruction was issued regarding the new method.

[28] Mr McCann described this as an example of how things worked at Waste Management. Problems would arise and employees would find solutions to them: it was his evidence that the general workplace approach was that employees were supposed to sort such matters out.

[29] By Mr McCann's account he was unable to carry out his usual procedure on 2 November 2016 because Waste Management had purchased a new digger which was parked next to the compactor. The digger had not yet been commissioned and was

unable to be moved. It was due to be commissioned the following day and Mr McCann was aware that it would need space around it. As he was unable to follow the normal process, Mr McCann decided the tube needed to be moved outside the building. He enlisted the assistance of his co-worker, Mr X, explaining what he intended to do.

[30] It was Mr McCann's evidence that he informed the site supervisor, Mr Jones, of his intended action as a courtesy, not for the purpose of asking Mr Jones' permission. He then embarked on the procedure, after discussing it with Mr X. Unfortunately, in the course of it Mr McCann was crushed between a large steel container and the bucket of the loader driven by Mr X.

[31] Mr McCann accepted he could have done things differently and that he contributed to the accident that left him seriously injured. He found it unfair, however, that he was blamed entirely for it. He was critical of the investigation carried out by Mr Grennell and alleged it was neither fair nor impartial. Mr McCann was incredulous that his employer had not waited for the findings of the WorkSafe investigation before coming to its own conclusions and dismissing him summarily.

[32] Through counsel, Mr McCann submits a fair and reasonable employer could not have justified dismissing him in all the circumstances at the time. In his submission this is partly because the grounds on which Waste Management relied to dismiss him did not meet its own definition of serious misconduct. Counsel, Greg Lloyd, submits the employer relied on policies that were remedial in nature, not punitive, to justify its decision to dismiss. At most, in his submission, Mr McCann's actions could be described as misconduct under his employment agreement and not serious misconduct warranting dismissal.

[33] Mr McCann disputes that any of the three grounds Waste Management relied on in dismissing him could be sustained. The first of those grounds was Mr McCann's failure to follow known procedures and/or ensure that all Waste Management operations were conducted safely. Mr McCann submits it is relevant that he was not alleged to have failed to follow the documented work instruction for the action he was carrying out with Mr X. He observes that the "known procedure" for the operation they were carrying out was not the one recorded in the relevant work instruction.

[34] Mr McCann says the procedure they used on 2 November 2016 was the standard procedure when he commenced working for Waste Management, and was one with which he was very familiar. In his view the procedure did not present any obvious health and safety risks. The documented work instruction had proved defective and had never been used. The "known", as opposed to the documented, procedure, which I have referred to earlier, was one developed in part by Mr McCann and his co-worker Mr X. He submits he should not be criticised for exercising his professional judgement as to the appropriate procedure to use on 2 November when he and Mr X had always done so.

[35] With regard to the "5 metre" rule Mr McCann questioned whether or not it applied at the time and, if it did, to whom. He also submits the allegation regarding this breach was basically a restatement of the first ground on which Waste Management relied to justify his dismissal and should not be treated as a stand-alone allegation of wrongdoing.

[36] In Mr McCann's submission the 5 metre rule, which he was found guilty of breaching, was unclear and there was no precise formulation of the rule in any company documentation. He references Waste Management's *Top 12 Risks* document relating to the Otaihanga facility where the rule is recorded as follows:

**Traffic on Site** – (forklifts, trucks, pedestrians, children, machinery, speeding public, Keep 5 metre Safety Rule around vehicles, Speeding Trucks, 5km speed limit)

[37] In the employer's Site Induction document for the ORRF facility, the rule is referred to twice. The first time follows an instruction about never approaching any operating machinery from behind, and about loaders and excavators and fork lifts having the right of way:

Remember the 5 metre rule distance, must apply at all times with all vehicles and machinery (sic)

[38] The second reference to the rule is:

Do Not walk under raised machine booms/buckets, behind trucks or vehicles or raised tail gates. REMEMBER the 5m rule!

[39] Submissions on Mr McCann's behalf observed also that David Howie, the General Manager, lower North Island, for Waste Management, told the WorkSafe

inspector during his interview that the 5 metre rule put the onus on a machine operator to stop if they believe someone is within 5 metres of their vehicle. Mr McCann notes in this instance he was not operating the machinery: Mr X was. He submits it was the operator who had the responsibility to comply with the 5 metre rule as was made clear in the work instructions for the machine Mr X was operating:

5 metre rule – cease operating if personnel, plant or machinery enter  
5m safety zone

[40] Regarding the third ground for dismissal, failure to follow the instruction of the onsite supervisor, it was submitted on Mr McCann's behalf that the oral evidence of the supervisor, Mr Jones, under questioning in the Authority revealed there had been no clear and concise instruction to Mr McCann. This had been captured in the WorkSafe report in which the inspector stated:

Mr Jones (sic) instructions to Mr McCann prior to the accident were vague, and could not be interpreted as a clear prohibition against starting the task, albeit Mr Jones believed that was the case.

[41] Mr McCann acknowledged there were multiple contributing factors and these included Waste Management's failure to have up to date and effective work instructions as well as communication failure between those involved. He noted in particular the communication failures between himself and Mr X, and between himself and Mr Jones.

[42] Waste Management, through counsel Daniel Erickson, submits it undertook a thorough investigation and disciplinary processes and fairly and reasonably reached the conclusions it did regarding failures on Mr McCann's part that resulted in his sustaining serious injury on 2 November 2016.

[43] Having fairly reached those conclusions, Mr Erickson submits Waste Management was entitled to conclude it could no longer have trust and confidence in Mr McCann to protect his own health and safety and that of others on the work site. In those circumstances Waste Management submits its decision to dismiss Mr McCann was one a fair and reasonable employer could make.

[44] Counsel acknowledges that the process used at ORRF for removing recycling tubes from the compactor and preparing them for transport was different from the applicable work instruction. However, in Mr Erickson's submission, that process was

understood by employees on the site and was considered safe. It was also known to Mr McCann who decided to adopt a different process on 2 November 2016.

[45] After considering the evidence and submissions of the parties I am not satisfied that a fair and reasonable employer could have dismissed Mr McCann in all the circumstances at the time. Firstly, I find a fair and reasonable employer could not have concluded that Mr McCann had failed to follow the instruction of an onsite supervisor.

[46] The instruction was claimed to have been given by Mr Jones to Mr McCann when he advised Mr Jones of how he intended to manage the removal of the tube on 2 November 2016. However, there is significant doubt whether Mr Jones issued an instruction, made a suggestion or simply stated his intention about contacting Mr Y to ask when he could bring the hook truck to ORRF to remove the tube.

[47] Mr Jones acknowledged in the Authority he had made an assumption Mr McCann would await the outcome of his contact with Mr Y. Making an assumption an employee will act in a certain way is a different matter from giving an instruction that they do so. Moreover, while it is the information that was available to Mr Grennell at the time of conducting his investigation that is important, I find there was relevant information that was either overlooked or not sought during his investigation.

[48] In Mr Grennell's interview with Mr McCann on 27 April 2017 as part of his preliminary investigation, Mr McCann was clear that, while he had a positive recollection of discussing with Mr X the removal of the tube outside the recycling shed on 2 November 2016, he had no recollection of discussing the matter that day with Mr Jones. Furthermore, while he said his memory was "cloudy" on some matters, he was firm in his memory that the Operations Supervisor had not instructed him not to move the tube.<sup>2</sup>

[49] Having received that information from Mr McCann, a fair and reasonable employer would, in my view, have investigated further. Amongst the information Mr Grennell had available to him were interviews conducted as part of the internal H&S investigation.<sup>3</sup> During the preliminary investigation meeting with Mr McCann, Mr

---

<sup>2</sup> As recorded in the transcript of the interview.

<sup>3</sup> Mr Grennell's preliminary report, sent to Mr McCann on 13 July 2017, referred to documentation referred to by the "investigation team", which included Mr McCann's statement to the internal health and safety investigation.

Grennell referred to the Serious Harm Report and there was reference to some of the interviews conducted by Waste Management's National H&S Manager, Guy Smith, in the process leading to the completion of that report.

[50] There was no reference in Mr Smith's notes of his interview with Mr McCann to any question about his manager's approval to undertake the removal of the tube outside the shed on 2 November 2016. Nothing Mr McCann was recorded as saying to Mr Smith indicated he had received an instruction not to undertake that action. Nor did the record of Mr Jones' interview with Mr Smith make any reference to instructing Mr McCann not to undertake that action.

[51] When asked by Mr Smith on 3 November 2016 about work procedures, Mr Jones had said the work instruction in place for the activity Mr McCann and Mr X undertook the previous day was not followed. He did not say, and his interview with the WorkSafe inspector on 10 May 2017 indicates he was unaware at the time of his interview with Mr Smith, that the work instruction was incorrect.

[52] Mr Jones also did not say that management was aware of this and that a different procedure was followed, which was generally considered safe. Mr Jones told Mr Smith, in his interview for the internal H&S investigation, he felt he "had failed the team by not knowing the requirements of the WIs and RAs<sup>4</sup> to know if they are following the correct procedures."

[53] The Serious Harm Report included a paragraph stating that there had been a discussion between the Site Supervisor (Mr Jones), Mr McCann, and Mr X on the morning of 2 November 2016 about the potential need to move the tube from the shed. The report contained the following statements:

During the investigation it was identified that the task of moving the tube outside had not been agreed to, nor authorised by the Site Supervisor.

During the morning the tube became full and (Mr McCann) made the decision to remove the tube and store it outside knowing this had not yet been approved by the Site Supervisor.

[54] The basis for those statements is unclear as there is nothing in Mr Smith's notes of the interviews he conducted with Mr McCann or Mr Jones to support them.

---

<sup>4</sup> Work Instructions and Risk Assessments.

Mr Smith's account of his interview with Mr Jones contained nothing to suggest Mr McCann was knowingly carrying out an unauthorised act.

[55] As noted above, Mr Grennell clearly had access to the interviews. Given the seriousness of the allegation he put to Mr McCann that he "may have failed to follow the instruction of your onsite supervisor", it could reasonably be expected he would have reviewed the notes of the H&S investigation interview with Mr Jones.

[56] During Mr Grennell and Ms Norton's interview with Mr Jones on 27 April 2017 as part of their preliminary investigation, Mr Jones initially said that Mr McCann "came to ask me about moving the tube". Later in the interview he said "...to be honest I wouldn't describe it as asking, (Mr McCann) basically came in to tell me what he was going to do rather than ask me if he could do it. But I told him to wait and let me call (Mr Y)".

[57] When asked by Ms Norton how long the conversation had been, Mr Jones responded "It was a short conversation- literally 'I'm going to do...'. I replied 'are we sure we should put it outside?' (I was worried it might leak) to which he replied 'we need it out of the way'". Mr Jones also told Mr Grennell and Ms Norton:

"To be honest I was surprised that (Mr McCann) even came to tell me, he's the sort of person who would normally just do it."

[58] Mr Jones later in the interview told Mr Grennell and Ms Norton he was "very clear" he had told Mr McCann to wait until he had spoken to Mr Y, the hook truck driver. However, taking the interview notes in their entirety, I find the decision maker, Mr Grennell, could not safely rely on that statement because of the equivocal nature of Mr Jones' responses before that assertion.

[59] The WorkSafe report, dated 10 July 2017, also found that Mr Jones' "instructions to Mr McCann prior to the accident were vague, and could not be interpreted as a clear prohibition against starting the task...". It was Mr Grennell's evidence he did not receive a copy of the report until after 16 August 2017, which was four weeks after Mr McCann had been dismissed.

[60] A further reason for finding a fair and reasonable employer could not have dismissed Mr McCann in all the circumstances at the time relates to Mr Grennell's

decision that Mr McCann had failed "to follow a known procedure and/or ensure that all WM operations are conducted safely".

[61] I accept submissions made on behalf of Mr McCann on this matter that the "known" procedure was not the procedure recorded in the work instruction but one developed by employees, including Mr McCann, because the written instruction was defective. Their initiative was tacitly accepted by the employer in that instance, as shown by Mr Grennell referring to it as the "known procedure". I accept Mr Lloyd's submission that "the task was within Mr McCann and Mr X's responsibility and they cannot be fairly criticised for simply exercising their professional judgement, as they had always done."

[62] Mr Grennell relied on findings that Mr McCann had breached his employment in three respects, two of which I have found the employer could not fairly have made. While questions have been raised over the meaning of the 5 metre rule and to whom it applied in the 2 November 2016 situation, I find those arguments less persuasive and take no issue with Mr Grennell's conclusions in that respect. While there may be several iterations of the rule, the message is clear that there are obligations on both the operators of machinery and on those people who are in the vicinity of that machinery.

[63] I have considered whether Waste Management could fairly dismiss Mr McCann for breaching the 5 metre rule, which it deemed to be a breach of clause 3 of his individual employment agreement. I conclude it could not, even taking into account the final written warning dated 1 April 2016 Mr McCann had received for matters unrelated to health and safety concerns.

[64] I am persuaded in this matter by submissions made by counsel for Mr McCann regarding Waste Management's health and safety policy. He submits the policy is remedial, rather than punitive in scope, with an emphasis on learning from performance; constantly improving processes and work practices; sharing lessons learned with others; fully investigating incidents and identifying the causal and contributing factors in order that appropriate corrective actions are taken.

[65] In Mr Lloyd's submission that policy is consistent with the induction documentation for the ORRF site. This refers to individuals identified as working in an unsafe manner being "counselled and the unsafe actions remedied". I accept that

submission and the further point he makes that neither the health and safety policy nor the induction documentation conveys a message that "one mistake and you're gone".

### **Conclusion**

[66] For the reasons given above, I conclude Waste Management's decision to dismiss Mr McCann was not one a fair and reasonable employer could have reached in all the circumstances at the time. Mr McCann's dismissal was, therefore, unjustifiable.

[67] Waste Management failed to satisfy the requirements of s 103A of the Act in that its investigation was insufficient in relation to the instruction allegedly given by the Operations Supervisor to Mr McCann, and in relation to the allegation Mr McCann had failed to follow known procedures and/or ensure all Waste Management operations were conducted safely.

[68] I also conclude Waste Management gave insufficient consideration to Mr McCann's explanations of these matters.

### **Remedies and contribution**

[69] Mr McCann has been in receipt of ACC since his accident and accepts he is therefore not entitled to compensation for wages lost as a result of his grievance. He seeks compensation under s 123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings he has suffered from his unjustifiable dismissal.

[70] Mr Lloyd submits that Mr McCann's dismissal was particularly egregious. He cites the employer's failure to apply the proper clauses of the IEA, in that a matter described as misconduct under clause 21 of the IEA was treated as serious misconduct. He also canvasses other matters already referred to in this determination as well as the employer's failure to consider relevant information, referring in particular to the WorkSafe report.

[71] Mr McCann provided evidence to the Authority of the effect on him of his dismissal. While the accident caused him great physical distress, the actions of his employer had at least an equal impact on his emotional and psychological wellbeing. Fay McCann also gave evidence of the effect she observed on her husband following his dismissal. I do not find it necessary to elaborate on their evidence but note that it

was compelling and I accept it. Subject to any findings of contribution I set the amount of compensation at \$20,000.

[72] I am obliged to consider whether, and to what extent, Mr McCann's actions contributed to the situation that gave rise to his personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.<sup>5</sup>

[73] Mr McCann accepts that his actions contributed to the accident that ultimately led to his dismissal and gave rise to his personal grievance. Communication with his colleague Mr X was one area in which a few more minutes' discussion could have minimised the potential for the accident that occurred. I agree with Mr McCann's assessment that, while there were things he could have done to avoid the accident, there were other factors that contributed to it, including Waste Management's failure to have a current and relevant work instruction for the procedure.

[74] Taking these matters into account I assess Mr McCann's contribution to be 30 percent. The compensation is accordingly reduced by that percentage.

### **Orders**

[75] Waste Management NZ Limited is ordered to pay Mr McCann the sum of \$14,000, without deduction, under s 123(1)(c)(i) of the Act.

### **Costs**

[76] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**

---

<sup>5</sup> In accordance with s 124 of the Act.