

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 41  
3024191

BETWEEN            ELIZABETH ANN MCKENNA  
                                 Applicant

AND                    NEW ZEALAND  
                                 AUTOMOBILE ASSOCIATION  
                                 Respondent

Member of Authority:     Christine Hickey

Representatives:            James Pullar and Amy Kennerley, counsel for the  
                                 Applicant  
                                 Richard Upton, counsel for the Respondent

Investigation Meeting:     Christchurch, 3 and 4 October 2018

Submissions Received:    6 November 2018 from the Applicant  
                                 21 November 2018 from the Respondent

Date of Determination:    30 January 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1]     Ms McKenna claims that she was unjustifiably disadvantaged during her employment and then unjustifiably dismissed from her role with the New Zealand Automobile Association (AA) in May 2017.

[2]     The AA says that it did not unjustifiably disadvantage or unjustifiably dismiss Ms McKenna and that it acted in a manner that a fair and reasonable employer could have acted in all the circumstances at the time.

## **Issues**

[3] The issues the Authority is required to investigate and determine are:

- (a) Was the AA justified in issuing a final written warning on 3 March 2017? In particular, was it justified in reaching the conclusion that Ms McKenna's incorrect processing of a driver's licence in February 2017 could amount to serious misconduct?
- (b) Were the AA's decisions that Ms McKenna's behaviour on 12 April 2017 was serious misconduct and that she should be dismissed for it ones that a fair and reasonable employer could have come to in all the circumstances at the time?
- (c) If the AA's actions did not meet the test of justification, what remedies should be awarded to Ms McKenna?
- (d) Should any remedies be reduced for any blameworthy conduct by Ms McKenna that contributed to the situation giving rise to her grievance?
- (e) Should either party contribute to the costs of representation of the other party?

## **The Authority's Investigation**

[4] In advance of the investigation meeting the witnesses lodged written witness statements. Each witness attended the investigation meeting and, under oath or affirmation, answered questions about their statements. The lawyers representing both parties each had an opportunity to ask additional questions and to provide written submissions on the issues for determination.

## **What happened?**

[5] At the time of her dismissal Ms McKenna had worked for the AA for about sixteen years. She had worked in a number of different branches. After the Canterbury earthquakes in 2010 and 2011 Ms McKenna was moved to the Shirley branch. She understood that was to be her permanent role. At some point she was approached to take on a senior position in the Riccarton branch but she declined because the Shirley location suited her better.

[6] Ms McKenna considers that there were two key events in 2016 leading up to what eventually happened to her. First, in around February 2016, Amanda Dick became the Group

Centre Manager of the Christchurch area responsible for the day-to-day management of all the AA centres in Christchurch. Later that year the Shirley Branch manager resigned and Ms Dick took over some of her duties.

[7] Secondly, in July 2016 the New Zealand Transport Agency (NZTA) changed the processes that the AA needed to use to convert overseas licences to New Zealand licences. Ms McKenna considers that she was not given adequate training for the changed processes. She also considers that the changes were very detailed and it was easy to make mistakes through simple forgetfulness.

[8] The AA's system meant that first, a frontline staff member would complete the form while the customer was in the branch. Then, a senior staff member would check all of the completed forms from that day. The forms were sent to the NZTA only after they had been checked. There is an overseas licence team within the NZTA which completes a final check on the AA completed forms before any licence is issued.

[9] Ms McKenna did both the front line processing and, on some days, the end of the day check before forms went to the NZTA.

[10] Ms McKenna says she received a favourable performance review in September 2016. However, in October 2016 the NZTA undertook an audit in the Shirley branch and the auditor picked up a form Ms McKenna had completed with the incorrect date stamp and no user name. The error had not been picked up by the branch's internal checker.

### **20 October 2016 meeting leading to the letter of expectation**

[11] On 20 October 2016 Ms McKenna was called into a meeting conducted by Ms Dick and Sean O'Connell, the AA's Southern Regional Manager. She says she was not told in advance what the meeting would be about.

[12] Ms Dick called the meeting. She says it was the kind of meeting that she and the relevant centre manager would normally have had with Ms McKenna, but at that point there was no centre manager in the Shirley branch. Ms Dick says that she had experienced Ms McKenna as being "quite difficult" when receiving feedback and therefore she asked Mr O'Connell to attend with her.

[13] Ms Dick raised a number of mistakes that she had been made aware of that Ms McKenna had committed, in particular in relation to the conversion of overseas licences.

[14] Ms Dick says that after the meeting Mr O'Connell issued Ms McKenna with a letter of expectation in the hope that would see Ms McKenna's level of errors decrease. At the time Ms Dick and Mr O'Connell considered that Ms McKenna's error rate was unacceptably high.

[15] The letter of expectation was dated 1 November 2016 and reads:

The level of errors, when processing both Overseas Conversion and other general NZTA Driver Licencing forms is of concern, as is the lack of attention shown when you have been checking forms transacted by other staff members. Recently Amanda Dick discussed with you a group of 4-5 forms where you had failed to pick up errors. During the recent NZTA site audit, a serious breach was recorded against your login for an ID issue which you refused to accept as an error despite the fact that you had read and signed the NZTA Memo relevant to that process. Since our discussion another serious breach has been made by you, concerning a Canadian license conversion.

I have spoken to you informally about this before and provided you with suggestions and support on how this can be improved.

I am very concerned that this is now impacting on your performance in your role. As I said in our meeting, unless it is addressed it will become an issue which may be addressed through a disciplinary process.

[16] Mr O'Connell then went on to list the "behaviours and outcomes now required". These included following all the processes described in each NZTA Agent Memo, being more careful, following all NZTA processes for driver and vehicle licencing, making sure to check with her manager if Ms McKenna was unsure and following all instructions from her site manager. Mr O'Connell went on to say:

By following the above steps, your error rate will decrease to within acceptable limits.

Please make sure you make the changes as soon as possible. They are directly under your control, so you should be able to do so immediately. I will monitor your progress closely and give you feedback and if required any training or other support.

If you have any questions or require clarification, please do not hesitate to talk to me otherwise I look forward to these expectations being met.

### **Transfer to Riccarton branch**

[17] In December 2016, shortly before Christmas Ms Dick told Ms McKenna that in the New Year she would begin work at the Riccarton branch. Ms Dick says that the reason Ms McKenna was transferred to the Riccarton branch was “to ensure that our staffing levels are optimal against customer demands”. She also says that Ms McKenna had a good knowledge of particular products that Riccarton needed to increase its sales on.

[18] Ms McKenna says she was unhappy with being transferred to Riccarton but tried to make the best of it.

### **Disciplinary meeting leading to final written warning**

[19] On 20 February 2017 Mr Lu, the Riccarton Branch Centre Manager, sent a letter to Ms McKenna inviting her to a disciplinary meeting with him and Ms Dick on 22 February 2017:

The purpose of this disciplinary meeting is to discuss a potential serious breach of NZAA and NZTA process and policy. On 3<sup>rd</sup> Feb you incorrectly processed a driver license which has resulted in a customer receiving a NZ Full Class 1 license when they were only eligible for a NZ Class 6 license.

At this stage, we need to point out that the issues are being viewed as potentially serious misconduct and if deemed to be so then disciplinary action may be taken against you up to and including dismissal from your employment. You may wish to have a support person or representative at this meeting.

[20] Mr Lu had already held a ‘coaching’ session with Ms McKenna about this error, had observed her processing some subsequent overseas licences and given her positive feedback based on that observation.

[21] Ms McKenna attended this meeting with her support person, Zylpha Kovacs. Ms Kovacs took notes and asked some questions on Ms McKenna’s behalf. Ms Kovacs and Ms McKenna asked what acceptable limits were for an error rate, as referred to in the letter of expectation. However, the AA did not give them an answer to that.

[22] After the meeting Mr Lu wrote a letter dated 3 March 2017, confirming his decision to issue Ms McKenna with a final written warning for serious misconduct:

On Friday 3 February 2017 you incorrectly processed a driver licence which has resulted in a customer receiving a NZ Full Class 1 licence when they were only eligible for an NZ Class 6 licence.

You explained that no-one is perfect and everyone makes mistakes. You felt that if a mistake is made it would be stopped by NZTA and it would have no impact on the customer and that a disciplinary meeting would not be held.

I fully considered your explanation and while it was unacceptable, I decided to issue you with a Final Written Warning rather than dismiss you from employment.

Going forward we agreed that you would adhere to the following:

...

[list of 14 actions required]

**Please be aware that this is a final warning and if there are any further instances of misconduct that would otherwise give rise to a warning, it will result in your dismissal.**

(emphasis added)

### **Ms McKenna's response to final written warning**

[23] On 5 April 2017, Ms McKenna's solicitor wrote to Mr O'Connell about the final written warning. The letter noted that Ms McKenna had some difficulty adapting to changes in the process for issuing overseas licences which she put down to "differences in how the Riccarton and Shirley branches approached certain transactions".

[24] The letter stated that Ms McKenna did not accept that her failure to correctly process a foreign licence conversion:

was serious misconduct as there was no breach of trust nor intent to breach NZAA and NZTA process and policy. Further, she does not accept that the customer received a full class 1 licence as a result of her error, her understanding is that this was caught by NZTA prior to any licence being issued.

Ms McKenna further disagrees with the list of agreed actions in the 3 March 2017 letter. These were not discussed or agreed in the meeting. There was no discussion at the time about the way forward.

We request that you review the information held by you about Ms McKenna and make a correction as appropriate. If you believe that the information you hold is accurate, we request that you hold a copy of this letter alongside the warning so that they may be viewed together in the future.

### **Was the AA justified in issuing a final written warning on 3 March 2017?**

[25] In deciding whether the AA unjustifiably issued a final warning to Ms McKenna the Authority needs to apply the test of justification in s 103A of the Employment Relations Act

2000 (the Act). The test requires me to assess whether the AA's decision that Ms McKenna's licence processing error amounted to serious misconduct, its decision to issue her with a final written warning, and how it reached those decisions, were what a fair and reasonable employer could have done in all the circumstances at the time.

[26] In relation to the process used, I need to assess whether, before deciding to issue the final written warning, the AA:

- sufficiently investigated the allegations against her,
- raised its concerns with her,
- gave her a reasonable opportunity to respond to the concerns,
- and genuinely considered any explanation regarding the allegations.

[27] I may also examine any other relevant factors. However, I must not find the final written warning to be unjustified solely because of procedural errors if those errors were minor and did not result in Ms McKenna being treated unfairly.

*Was Ms McKenna's incorrect processing of a driver's licence serious misconduct or poor performance?*

[28] It is sometimes difficult to assess whether employee behaviour amounts to misconduct or is an example of poor performance. In the Employment Court case of *Chief Executive of the Department of Corrections v Imo*<sup>1</sup> Judge Shaw wrote:

[49] The question of where any particular behaviour by an employee falls on the spectrum between the two extremes of poor performance and serious misconduct will depend on a number of factors. These include but are not limited to whether the employee's acts were deliberately inimical to the employer's interests; the effect of the employee's actions on the employer's business; and whether an employee could reasonably have been given an opportunity to mend his ways and show that he can do the job.

[50] All of these aspects must be examined in the light of the circumstances of the parties at the time which may include the nature of the employee's work; the training and support afforded to the employee; the background leading to the allegations including any outstanding performance issues which may have preceded the dismissal; the length and type of service of the employee; the nature and standards of performance reasonably to be expected by the employer; any statutory or policy expectations imposed on or by the employer.

---

<sup>1</sup> (2007) AC57/07, footnotes omitted.

[29] Ms McKenna's error in February 2017 consisted of mixing up what category of licence the driver already held. The allegation was that her error had resulted in someone with only a valid motorcycle licence obtaining a full car licence, without any further testing, which would usually be required. I accept Ms McKenna's evidence that during the disciplinary meeting Ms Dick told her that if that person, while driving a car, had an accident and killed someone their blood would be on her hands.

[30] However, I have not received any evidence to confirm that the driver actually received a full car licence. Instead, I understand that the error was picked up by NZTA and reported to the AA. The AA submits that does not lessen the potential seriousness of the problem it sought to avoid, and the fact that no such licence was issued simply demonstrates that its checks and balances were necessary and worked.

[31] I disagree that representing the issue as one in which a wrong licence was issued is not relevant. That representation caused greater anxiety to Ms McKenna than the true situation required. A fair and reasonable employer has a duty of good faith not to mislead or deceive their employees.

[32] I appreciate that the AA was becoming increasingly frustrated and exasperated with Ms McKenna's errors in processing overseas driver licencing transactions in particular. Mr O'Connell's evidence was that the AA put a high priority on maintaining its business with the NZTA and had fears that if its staff made a number of serious breaches or errors it stood to lose that business.

[33] However, Mr O'Connell also told me that the AA was not sure which errors the NZTA classified as "serious breaches". He told me that terminology was not the AA's but that of the NZTA and the AA adopted it when describing the Canadian licence conversion error in the letter of expectation.

[34] The AA did not have an internal policy about how many such serious errors or breaches over a period of time would be acceptable for an employee to make before it would consider such errors to amount to incompetence, which could lead to dismissal. There was no measurable external standard for employees imposed by the NZTA either.

[35] Instead, the AA's evidence is that each employee should aim for zero errors or breaches and that was an achievable goal. However, I do not consider that realistic. Human error is always possible. In practice, neither does the AA nor the NZTA consider it realistic, which is why there is an internal and an external check system in place.

[36] From evidence produced for these proceedings it appears that since the letter of expectation was issued on 1 November 2017 the 3 February error was the first significant processing error, meaning Ms McKenna had not made such an error for three months.

[37] It is possible for an employer to treat repeated or ongoing poor performance or incompetence as a serious matter that may lead to termination of the employment if fair processes have been used. Having set out clear expectations of Ms McKenna in its letter of expectation, of 1 November 2016, the AA was justified in bringing to her attention how seriously it viewed the error she made with the Canadian licence conversion. The AA was also justified in setting out the steps Ms McKenna was required to follow from then on.

[38] Ms McKenna's February error with the Canadian licence was a case of poor performance. Ms McKenna's error was not committed on purpose. It was not an act "deliberately inimical" to the AA's business. She did not refuse to obey a lawful and reasonable instruction and was not grossly incompetent or negligent. Her error was more like an example of "unsatisfactory work performance," which the Code gives as an example of simple "misconduct", as opposed to serious misconduct.

*Was the process used fair?*

[39] In this case it is difficult to separate the process from the outcome, in that the AA conflated two processes – that of dealing with poor performance and that of dealing with misconduct.

[40] A fair process for performance management before moving to a disciplinary process would entail at least:

- (a) raising the concerns with Ms McKenna;
- (b) considering Ms McKenna's explanation;

(c) giving Ms McKenna a reasonable specified timeframe to improve and setting measurable goals/objectives or standards to be met during that time;

(d) making clear to Ms McKenna what the consequences of failing to improve were likely to be;

(e) providing Ms McKenna with any support that was reasonably necessary to assist improvement; and

(f) reviewing the performance again at the end of a reasonable time period and hearing Ms McKenna's explanations if there had been no acceptable improvement.

[41] The AA had begun on a path by which it hoped to improve Ms McKenna's performance in that one area of her job. It effectively had started a performance management process when it issued the letter of expectation.

[42] In Mr O'Connell's letter of expectation he undertook to closely monitor Ms McKenna's progress and to give her feedback, as well as any other training or support. It is not clear to me that this happened. What was the time period during which Ms McKenna had to meet those expectations and when was feedback given to her by Mr O'Connell? It appears he did not give her the promised feedback during the three month period. In addition, Ms McKenna was not told that there was a finite time during which her performance would be monitored. For example, Ms McKenna says that Ms Dick completed a review of her driver licencing conversions in January 2017 and she was 100% error free.

[43] During the Authority's investigation meeting the AA provided a copy of the document that included the disciplinary process the AA was to follow with its employees:

There are 3 steps in the formal disciplinary procedure that will generally be followed:

1. First written warning
2. Final written warning
3. Dismissal

[44] However, in moving directly to a final written warning, instead of a first written warning, the AA failed to follow its own formal disciplinary procedure. It did not provide

Ms McKenna reasons why it considered the procedure it would generally follow was not appropriate for her in the circumstances.

[45] The ultimate decision to issue a final warning was made at least in consultation with an HR employee who was consulted after hearing from Ms McKenna and either suggested or made the decision to issue a final written warning.

[46] The AA submits that was not unfair because Mr Lu issued the final written warning to Ms McKenna and he had heard directly from her.

[47] I did not receive any evidence from that staff member during the investigation. Ms McKenna was never given an opportunity to make her explanation to that decision maker. I disagree with the respondent's submission that was not a procedural error. It was an error in the process that was more than minor and led to Ms McKenna being treated unfairly.

[48] I am also concerned at the wording of the warning that stated any further misconduct/errors that would otherwise give rise to a warning "**will** result in a dismissal." That wording suggested that no matter what processing error Ms McKenna made at any time in the future the AA had predetermined that she would be dismissed for it. Instead, an employer must investigate and assess the seriousness and appropriate disciplinary sanction for each occurrence of misconduct individually and not have decided beforehand what the sanction would be. The AA's witnesses deny there was any predetermination. However, even if that is correct, it is not the whole point. The warning conveyed predetermination and that was part of the disadvantage to Ms McKenna.

[49] The final written warning made Ms McKenna more unsure of herself and anxious at work and made her feel less secure about retaining her job of 16 years if she made any other mistake. That disadvantage was increased by the statement that any further misconduct would result in her dismissal.

[50] That is not to say that a fair and reasonable employer could not have acted, but the appropriate action was one related to performance management not misconduct.

[51] All the circumstances in this case include the AA's disciplinary policy, the fact that Ms McKenna had worked for the AA for about 16 years and the new processes had been in place for less than a year.

[52] In all the circumstances, a fair and reasonable employer could not have moved straight from the early stages of a performance management process to a final written warning, particularly one worded to suggest that any further misconduct, or errors, would lead to Ms McKenna's dismissal. Therefore, the AA unjustifiably disadvantaged Ms McKenna by issuing the final written warning.

### **Events leading to the dismissal**

#### *April 2017 meeting with Mr Lu*

[53] On Wednesday, 12 April 2017, Mr Lu called Ms McKenna into his office to have a discussion about errors that had been identified as having been made by her on the previous Saturday, 8 April 2017. Mr Lu did not tell Ms McKenna in advance what the purpose of the meeting was. Ms McKenna says that she understood the meeting would be her monthly review with her manager. Mr Lu says he intended it to be a coaching session and wished to remind Ms McKenna of the processes she needed to use.

[54] Mr Lu put three of Ms McKenna's completed licence forms in front of her and asked her to identify the errors. Two were original Chinese licences and one licence was from the UK. Mr Lu told Ms McKenna errors had been picked up in the branch and the forms had not sent on to the NZTA for processing.

[55] Ms McKenna says that ever since the final written warning she had been extremely anxious that any other mistake she made would result in her dismissal, as that is how she understood the written warning letter. She says she was tearful at home and anxious before going to work every day.

[56] Therefore, Ms McKenna says she was rattled by the 12 April 2017 meeting with Mr Lu being about errors rather than being her monthly review. She felt "blindsided" and says she was anxious she would lose her job.

[57] Some of the errors Mr Lu was concerned about were Ms McKenna's acceptance or use of black and white copies of the original foreign licences. Ms McKenna explained to Mr Lu that she had previously accepted copies of the back of licences in black and white rather than colour as the NZTA required. She realised that was not exactly what the NZTA directions were, but had rung the NZTA and been told that if the back of the licence was blank or did

not contain any information in colour it was permissible to copy it in black and white, or accept it as copied in black and white, in the interests of good customer service. She says she told Mr Lu that.

[58] Mr Lu did not accept that and told her she must follow NZTA's written directions.

[59] Mr Lu and Ms McKenna have different views of what happened during the meeting. Mr Lu says it was a routine training meeting. After Ms McKenna was unable to identify her errors he pointed them out, referred her to the relevant training materials setting out approved processes and asked her to sign them to record that they had been drawn to her attention and that she understood them.

[60] Ms McKenna says that Mr Lu took notes as she spoke but she did not want to sign the version of her explanation that Mr Lu had recorded as she says it was not accurate. She says Mr Lu began to get frustrated with her and she started to "get really shaky". Ms McKenna says she said:

"I can't do this, I am not doing this anymore I am leaving". I left Eric's office in tears. Eric followed me down the hallway and said "are you sure". I didn't turn to look at Eric and said "I am so fucking sick of this", I didn't swear at Eric, I wasn't even looking at him when I said that. I gathered my things from the common area. I said "I am so over this I am leaving".

[61] In contrast, the AA says, that Ms McKenna said:

"this is all rubbish, I am not signing it, you are trying to get me to sign, then get me into trouble." Ann then said "I had enough [of] this fucking crap, fuck this, I am leaving!". After that, Ann stormed out [of] office to back room.

While Ann was in the Safe room to collect her belongings, [Mr Lu] said to Ann: "Ann, we are all adults, are you sure you want to do this?" and she [shout] at [Mr Lu]: "yes, I had enough [of] this fucking shit, fuck this!" and stormed off.<sup>2</sup>

[62] There was another staff member in the staff room when Ms McKenna came in, collected her belongings and left. She did not give evidence at the investigation meeting but later that day she sent Mr Lu an email after he asked her to record what she saw and heard.

---

<sup>2</sup> This is from Mr Lu's email to Ms Dick at 11.55am on 12 April 2017. His witness statement is somewhat different.

[63] After Ms McKenna left Mr Lu phoned Ms Dick to report what had happened. After about an hour, when she had calmed down somewhat, Ms McKenna also telephoned Ms Dick to tell her she had walked out of work. Ms Dick made some notes at the time. They record:

I asked Ann what had happened with Eric and she said that he wanted her to sign all the training improvement documents that had the information regarding the overseas conversion process which she wasn't happy to do as she stated that he would hold it against her due to her current situation. I asked her what situation which she replied the disciplinary meeting held earlier this year. I advised Ann that this has nothing to do with what has happened earlier but in relation to the error found on the Saturday.

I asked Ann how do we run a business when we are unable to talk with our staff in relation to errors made and Ann replied "how about my mental health"?

I asked Ann why she felt she needed to swear at Eric multiple times which she stated that she did not at all. ...

[64] Ms McKenna took the remainder of 12 April 2017 off as sick leave with Ms Dick's approval and then went on pre-planned annual leave. She returned to work on 2 May 2017.

### **The disciplinary process leading to dismissal**

[65] On 2 May 2017, Mr O'Connell wrote to Ms McKenna inviting her to a disciplinary meeting:

... to discuss the incident that occurred on 12 April 2017 where you displayed disrespectful language and conduct towards Eric Lu – Riccarton Centre Manager as a result of a training improvement plan discussion.

As you are aware, you are currently on a final written warning issued on 1 March 2017 for serious misconduct.<sup>3</sup>

[66] Mr O'Connell's letter stated that "the latest concerns" were being viewed as serious misconduct.

[67] Ms McKenna attended the meeting on 5 May 2017 with Ms Kennerley. Mr O'Connell, Ms Dick and Courtney Byrne, AA's HR Business Partner, also attended the meeting. Mr O'Connell led the meeting and proceeded through a pre-written document containing the allegation and questions.

[68] Mr O'Connell was the decision maker, although he discussed matters with Ms Dick and received advice from Ms Byrne before coming to his decision.

---

<sup>3</sup> It is the letter dated 3 March 2017 containing the final written warning that Mr O'Connell is referring to.

[69] The allegation was, as set out in Mr O’Connell’s letter, that Ms McKenna had displayed disrespectful language and conduct towards Mr Lu.

[70] Ms McKenna gave her explanation. She said she did not consider that she was being disrespectful. When she described what she said she said she only swore once when she said “I’m over this fucking shit” as she left the building. She clearly stated that “I did not swear at Eric”. She admitted that her conduct had probably not been appropriate.

[71] Later, she said that she had sworn but there were “mitigating circumstances.” She also said that she “cracked” partly because she had been unsure what the AA’s response was or would be to her lawyer’s letter of 5 April disputing the final warning. In fact, Mr Lu did not know about that letter.

[72] Mr O’Connell, Ms Dick and Ms Byrne left the meeting for half an hour. When they came back Mr O’Connell conveyed AA’s decision that Ms McKenna’s behaviour on 12 April 2017 amounted to serious misconduct and terminated her employment that day, although with a month’s pay in lieu of notice. He wrote a letter on 8 May 2017 confirming his decision:

You confirmed that whilst you did use inappropriate language, you did not consider it to be disrespectful as it was not towards anyone.

I fully considered your explanation and found it unacceptable. As you have ignored the Final Warning issued to you on 1 March 2017, your continued misconduct has destroyed the basis of confidence and trust that is essential to our employment relationship. As a consequence your employment has been terminated.

### **Was the dismissal justified?**

[73] The same test of justification applies to the decision to dismiss Ms McKenna as that used to examine the unjustified disadvantage claim. I need to consider whether the decision to dismiss and how that decision was made were within the range of what a fair and reasonable employer could do in all the circumstances at the time.

[74] In relation to the process used, I need to assess whether, before deciding to dismiss Ms McKenna, the AA:

- sufficiently investigated the allegations against her,
- raised its concerns with her,
- gave her a reasonable opportunity to respond to the concerns,

- and genuinely considered any explanation regarding the allegations.

[75] I may also examine any other relevant factors. However, I must not find the dismissal to be unjustified solely because of procedural errors if those errors were minor and did not result in Ms McKenna being treated unfairly.

[76] I also need to be satisfied that the AA had reasonable grounds for concluding that Ms McKenna's behaviour amounted to serious misconduct.

[77] Mr Lu's meeting with Ms McKenna on 12 April 2017 took place with the final warning letter in the background. It is unclear whether disciplinary action would have followed what Mr Lu intended as a training update that morning. However, Ms McKenna was aware that before the final written warning was issued she had also had a coaching session.

[78] The errors pointed out to Ms McKenna in the meeting were of the type she believed the AA was primed to treat as serious misconduct that would lead to her dismissal. However, whether the AA would have proceeded that way was overtaken by Ms McKenna's heated outburst.

[79] As with every type of misconduct allegation it is a matter of fact and degree whether behaviour that occurred can be found to be such serious misconduct, or perhaps the 'final straw' in a chain of misconduct, for which dismissal is an possible appropriate outcome.

[80] In relation to the use of "bad" language in the workplace, in the Employment Court case of *Macadam v Port of Nelson Ltd (No 1)*<sup>4</sup> Chief Judge Goddard wrote:

What amounts to bad language justifying summary dismissal is very much a matter of subjective opinion which varies from time to time and concerning which even Judges would be unlikely to always agree or hold the same view consistently for any length of time. Objective considerations revolve around the nature of the words employed and the persons to whom they were addressed or by whom they were heard or read.<sup>5</sup>

... one act of disobedience or misconduct could justify dismissal "only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions,"... this must be seen as the better

---

<sup>4</sup> [1993] 1 ERNZ 279.

<sup>5</sup> Note 4, pages 287 and 288.

view today, even in relation to an angry outburst directed by an employee to a manager.<sup>6</sup>

[81] Ms McKenna's alleged outburst was in two parts: inside Mr Lu's office; and outside his office. However, effectively it was one event. The AA's allegation is that both parts of her outburst were disrespectful to Mr Lu and therefore justified her dismissal, when her existing final warning was taken into account and the fact that she had "ignored" the warning.

[82] There is no debate about whether the language Ms McKenna used was "bad" language. However, Ms McKenna's point is that while she admits to swearing, to saying "fuck", she did not consider that she swore "at" Mr Lu. That is a distinction she maintained throughout the investigation meeting process. To her it meant that while she accepted she swore<sup>7</sup> she did not call Mr Lu any names or direct her swearing at him. She says she was frustrated with and upset about the situation and swore about that.

[83] The AA Code of Conduct makes a distinction between "disrespectful conduct or language", which it classifies as simple misconduct and "insubordination" and "abusive language or behaviour", which it classifies as "serious misconduct".

[84] Mr O'Connell was justified in alleging Ms McKenna's outburst was potentially disrespectful language and conduct.

*Was there a sufficient investigation?*

[85] The initial steps of the investigation were undertaken by Ms Dick, who Mr Lu and Ms McKenna called in the aftermath of the event.

[86] In Ms Dick's notes of Ms McKenna's call she wrote that the call was at 11.24am. She had already had a telephone discussion with Mr Lu by then because she asked Ms McKenna "why she felt the need to swear at Eric multiple times." However, there are no notes from the telephone conversation with Mr Lu. Therefore, all we know of what Mr Lu told her is as she reflected back to Ms McKenna and recorded in her notes of that telephone conversation.

[87] Ms Dick noted that in response to her question of Ms McKenna about swearing at Eric multiple times, Ms McKenna stated she did not at all.

---

<sup>6</sup> Note 4, pages 288 and 289.

<sup>7</sup> Although not as many times as Mr Lu alleges.

[88] There is an email addressed to Ms Dick from Mr Lu at 11.55am in which he sets out the problem that had arisen with Ms McKenna from his point of view.

[89] I find that Ms Dick asked him to get the staff member who witnessed part of the outburst to write her account of it. He did so and at 2.36pm on 12 April she wrote in an email that Mr Lu forwarded to Ms Dick:

Regarding morning tea incident: I saw Ann storm in and chuck her name badge on the fridge and she said "I'm leaving!".

I asked her why and she walked off down the hall way and said "I've had a fucking gutsful of this shit I'm leaving, fuck this" then I saw Eric come out and try to stop her and she just repeated it again "no I'm leaving fuck this" and slammed the door behind her.

[90] I note that this is different again from what Ms McKenna and Mr Lu say Ms McKenna said once out of Mr Lu's office. In the staff member's statement, in Mr Lu's presence once out of his office Ms McKenna swears once rather than the twice that Mr Lu records.

[91] Mr O'Connell took over the investigation from Ms Dick once he became aware of the incident. He spoke to Mr Lu, Ms Dick and to the staff member who had been in the staff room. He did not make notes of those conversations. Therefore, what they said to him was not able to be conveyed to Ms McKenna and her representative before the disciplinary meeting. I cannot be sure that Mr O'Connell investigated the difference between what Mr Lu said Ms McKenna had said and what the other staff member says she said.

[92] Mr O'Connell decided that he accepted what Mr Lu said over what Ms McKenna said but I am not sure that he took into account the other staff member's recollection, so far as it was different from what Mr Lu said.

*Were all the AA's concerns raised with Ms McKenna?*

[93] In Mr O'Connell's decision letter he wrote that Ms McKenna had "ignored the Final Warning". He can only have meant that the subsequent errors that Mr Lu talked to her about on 12 April meant that she had ignored the warning.

[94] However, the AA did not put an allegation to Ms McKenna that she had ignored the final warning and therefore no investigation into that occurred.

[95] It certainly raised its concern about Ms McKenna's language and that it considered her behaviour to have been disrespectful.

*Did the AA give Ms McKenna a reasonable opportunity to respond to its concerns?*

[96] There was no opportunity for Ms McKenna to respond to Mr O'Connell's allegation that she had ignored the final warning.

*Did the AA genuinely consider Ms McKenna's explanation before deciding to dismiss her?*

[97] I do not consider that the AA approached the disciplinary investigation meeting with a truly open mind. Mr O'Connell's opening remarks were:

The purpose of this disciplinary meeting is to discuss the incident that occurred on 12 April 2017 where you displayed disrespectful language and conduct towards Eric Lu.

[98] An open mind could have been demonstrated by a statement along the lines of:

The purpose of this disciplinary meeting is to discuss the incident that occurred on 12 April 2017, in particular, whether you displayed disrespectful language and conduct towards Eric Lu.

[99] Despite Mr O'Connell's evidence at the Authority's investigation meeting that he had not predetermined what Ms McKenna had said, that question and his subsequent recitation of background information that the AA had written before the meeting in which Mr O'Connell read out Mr Lu's report of what Ms McKenna said as if it was established fact, rather than still an allegation, lends weight to a degree of determination, even if it was unconscious. My conclusion on that is reinforced by, pre-prepared, written question 3 which Mr O'Connell asked:

Do you believe that the disrespectful language and conduct displayed by yourself is acceptable in the workplace?

[100] Prior to hearing from Ms McKenna a fair and reasonable employer could not have concluded that Ms McKenna displayed disrespectful language and conduct in the workplace. A question such as the above, without more, could only have been framed during or after the meeting, not prior to it.

*Was the outburst itself sufficient to amount to the kind of misconduct that could lead to dismissal?*

[101] If it were not for the existing final written warning, how could a fair and reasonable employer have viewed Ms McKenna's outburst?

[102] In the Employment Court case of *Dodd v D E & L M Spence Ltd (T/a Pak 'n' Save)*<sup>8</sup>, Ms Dodd had been approached in an open area in front of other staff and asked whether she had done something that was the subject of a complaint from a customer. As part of her response to that Ms Dodd told her manager to "fuck off". When he stood back but did not leave, Ms Dodd said "what are you still doing here, I told you to fuck off out of here." In addition, when her supervisor asked her to go to his office she refused to do so. All of this happened in front of other staff.

[103] Judge Travis agreed with the Authority's decision that the procedure used by the employer to dismiss Ms Dodd was unjustified. However, he considered that Ms Dodd's contribution to the circumstances leading to her dismissal was sufficiently blameworthy to amount to repudiatory conduct and to deprive her of any remedies.

[104] I consider Ms McKenna's outburst to be different in quality to Ms Dodd's. In comparison, Ms McKenna is correct that she did not swear *at* Mr Lu. It was less disrespectful and insubordinate than Ms Dodd's outburst.

[105] In addition, only one other staff member than Mr Lu heard part of her outburst, which makes it less insubordinate than Ms Dodd's outburst where a number of staff were present.

[106] The AA code of conduct lists "abusive language or behaviour" as serious misconduct. "Disrespectful conduct or language" is defined as simple misconduct.

[107] Even if I accept Mr Lu's evidence of how many times Ms McKenna swore and the language she used, some of which she disputes, while disrespectful, Ms McKenna's outburst was not so serious as to be abusive language or behaviour.

[108] "Abusive" is defined in the Oxford Online Dictionary as "extremely offensive and insulting". Ms McKenna did not insult Mr Lu. Even if he found her language to be offensive in the context it was used in, I do not consider that a reasonable employer in Mr Lu's shoes

---

<sup>8</sup> [2002] 2 ERNZ 572.

could have found it extremely offensive. That is partly because Mr Lu's own evidence was that at times the staff did use the word "fuck", although, admittedly, not in any work related one-on-one meeting with him.

[109] Ms McKenna's outburst was not of such a calibre that it was a repudiation of her employment relationship with the AA.

[110] In this case, Ms McKenna was not just having a meeting with her manager who was reminding her about the correct processes; it was not just a routine training meeting. It was natural for her to become agitated and upset in those circumstances. Indeed, Mr O'Connell's decision that Ms McKenna had "ignored" the final warning formed part of his decision to dismiss her. Mr Lu's meeting with Ms McKenna was a meeting that, even without her outburst, could have led to a process resulting in her dismissal in reliance on what I have found to be an unjustified final warning.

[111] I am also concerned that the AA did not follow up with Ms McKenna her report to Ms Dick in her telephone call reporting the incident about her mental health status and the fact that she disclosed that she had been having problems for some time related to her work situation in the Riccarton office. She also stated she had been using the AA's employee assistance programme counselling services "but you only receive a certain amount of sessions with them and she had been seeing them for some time."

[112] At the Authority's investigation meeting Mr O'Connell said he has discretion to approve further AA funded counselling sessions. However, despite having Ms Dick's notes available to him and therefore being aware of Ms McKenna's state of unhappiness he did not offer to provide more sessions to her before the disciplinary meeting while she remained employed.

[113] In all the circumstances, which include the existence of and reliance on an unjustified final written warning, the decision to dismiss Ms McKenna was not a decision that a fair and reasonable employer could have made. The AA unjustifiably dismissed Ms McKenna. Therefore, she is entitled to a consideration of remedies.

## **Remedies**

### *Lost wages*

[114] The AA dismissed Ms McKenna with four weeks' pay in lieu of notice, which took her until 2 June 2017. I am satisfied Ms McKenna mitigated her loss. Despite her level of distress from being unjustifiably dismissed, she looked for and eventually found new temporary work which required her to live away from home, with consequent travel and accommodation costs she would not have faced had she remained employed by the AA. In addition, she was required to live in a caravan in a camping ground during the winter.

[115] I agree with Ms McKenna's submissions that she is entitled to the income she would have received from the AA for the months of June and July 2017, less the amount she earned in July 2017 from October Logistics Limited. That accounts for three months' worth of income lost as a result of her unjustified dismissal, under ss 123(1)(b) and 128(1) and (2) of the Act.

[116] Ms McKenna also asks me to exercise my discretion under s 128(3) of the Act to order lost wages up until the date of this determination. In order to consider that, I need to assess whether but for the unjustified final written warning and the unjustified dismissal, which the warning contributed to, Ms McKenna would have remained employed by the AA.

[117] Ms McKenna submits that she loved her job and having worked for the AA for 16 years she expected to work there until her retirement. Although I do not know Ms McKenna's age, I estimate she would have 10 or fewer years until she could retire and receive NZ government superannuation.

[118] Ms McKenna says that it has been very difficult to get ongoing replacement work. As at the date of the investigation meeting, Ms McKenna had not secured any ongoing employment amounting to the number of hours/days she worked for the AA.

[119] On the other hand, the AA had considered Ms McKenna's performance and behaviour had been less than acceptable for a number of months.

[120] I do not consider it sufficiently certain that Ms McKenna would have remained employed by the AA until the date of this determination, or even the date of the investigation meeting. She was dissatisfied with Ms Dick's overall management of the Christchurch

branches, unhappy with her move to the Riccarton branch and unhappy with how the AA was managing her performance. However, had she not had the unjustified written final warning, things may have been very different. It is not possible to know what the outcome of a fair performance management process could have been, because there was not one put in place.

[121] I consider that it is likely that without the two personal grievances Ms McKenna was likely to have remained employed by the AA at least up until the end of March 2018, even if she was looking for replacement work during that time.

[122] Therefore, under ss 123(1)(b) and 128(2) and (3) of the Act, the AA must pay Ms McKenna from the date her paid notice expired until 31 March 2018, less the sums earned by her in the interim and subject to my determination on contribution, below.

[123] In considering the total amount of Ms McKenna's lost wages the AA should pay, I have taken into account that in accepting the fixed-term job in Kaikoura, Ms McKenna faced costs that she would not have faced had she remained employed by the AA and able to live in her own home in Christchurch.

[124] I leave it to the parties to calculate the amount payable. If the parties are unable to reach agreement on the amount to be paid, Ms McKenna has leave to return to the Authority for me to determine the amount of lost wages to be paid.

### *Compensation*

#### **Unjustified disadvantage**

[125] Ms McKenna has claimed \$7,500 under s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to her feelings for the unjustified disadvantage. In these circumstances, I consider that consideration of a separate award of compensation is fair because Ms McKenna was badly emotionally affected from the date of the warning on 1 March 2017 for two months until her dismissal. Ms McKenna's evidence is that the warning had a huge impact on her wellbeing. Every day at work felt like a "battle" and she had:

... sleepless nights because I was not coping with the continuous pressure of perfectionist work.

[126] Ms McKenna accessed counselling sessions in relation to her work related anxiety and told Ms Dick on 12 April 2017:

... it is not nice to go home at night and cry from being at work and ... that she had wanted to call [Ms Dick] many times during this time but was unsure if she could or who to talk to.

Ann advised that she is terrified of doing the overseas conversion and is freaked out. ... her confidence has gone out the window.

[127] Also that day Ms McKenna told Ms Dick that the AA did not provide enough free counselling sessions.

[128] Having considered awards in comparable cases, I consider it is reasonable for the AA to pay Ms McKenna \$5,000 in compensation for the effects on her of the unjustified disadvantage.

### **Unjustified dismissal**

[129] Ms McKenna has claimed \$20,000 under s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to her feelings for the unjustified dismissal.

[130] Ms McKenna's evidence of the effect of the dismissal on her includes:

- She was very disappointed to have had to cancel a planned regular biannual trip back to the United States where all her children and grandchildren live, for a family reunion, because she was unsure how long she would have to live on her holiday pay from the AA.
- She had a very hard time meeting her financial obligations in Christchurch and those of her travel to and from, and accommodation in, Kaikoura – “it was a really tough time but it was the only job I could find.”
- The travel and the 12 hour days she had to work while in Kaikoura affected her physical health.
- She was embarrassed and unwilling to explain to her friends and family how she lost her job. It was “totally humiliating to explain the reason”. She felt her impeccable reputation was lost. She had been very proud of working for the AA.

- Leading up to mediation the emotional toll “came rushing back” and she struggled with sleeping and eating.
- Her relationship with her partner started to suffer.
- She found it hard to explain why she got so upset about everything.
- Job searching remained overwhelming up to the investigation meeting as the first question in an interview is often why she left the AA. She believes her age plays a large part in not being able to find suitable employment.
- She has discussed “the possibility of depression” with her doctor and has been referred to counselling. Her doctor prescribed sleeping tablets.
- She remains in disbelief that she was dismissed by an organisation she had “such respect for for such a long time”.

[131] Ms McKenna’s evidence of the effect on her of the dismissal is backed up by evidence from her partner of 20 years. His evidence is that her self-esteem had dropped by how she was being treated at work prior to the dismissal but that it “dropped even more and she started to doubt herself a lot and overthink things”. He says that Ms McKenna believes that her age is holding her back from getting other work which combined with not having a reference from a job she was in “for 17 years doesn’t help.”

[132] I consider the effects of the dismissal on Ms McKenna, when compared against similar cases, make it reasonable that the AA must pay her \$20,000 in compensation for the unjustified dismissal.

### *Contribution*

[133] Having determined Ms McKenna has two separate personal grievances, s124 of the Act requires me to consider the extent to which her actions contributed to the situation giving rise to her personal grievances.

[134] If there was a causal connection between those actions and the situations that gave rise to the disadvantage and the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[135] **Unjustified disadvantage** – as I have already determined Ms McKenna’s error was just that, it was a matter of poor performance and a mistake. It may have arisen from inattention or it may have arisen for any number of reasons. It contributed to the AA’s consideration of whether she had committed serious misconduct. It was not blameworthy conduct, and certainly not of the kind that it requires any diminution of the remedy of compensation I have awarded.

[136] **Unjustified dismissal** – It is not until this point in my determination that I have had to determine what is more likely than not that Ms McKenna said on 12 April 2017.

[137] I accept Mr Lu’s evidence that Ms McKenna swore in his office. I rely on his 12 April 2017 email as being more accurate than his later witness statement because he wrote it closer to the time of the outburst when his memory was more fresh.

[138] That is not to say that I consider Ms McKenna not to have told the truth, but I consider that she was so emotionally overwrought that her memory was less likely to have been clear. I cannot exclude the possibility that over time Ms McKenna has downplayed what she said, even if unconsciously.

[139] However, I consider the un-named staff member’s email more likely to be an accurate record of what Ms McKenna said once out of Mr Lu’s office, simply because I consider her email to have been more objective and less affected by emotion than either Mr Lu or Ms McKenna on the day. That is particularly since, unlike Mr Lu, she had not been witness to Ms McKenna’s previous outburst. I also note that Mr Lu’s recall of what Ms McKenna said has hardened over time. I do not accept that Ms McKenna said “fuck the AA” outside of Mr Lu’s office as Mr Lu believed by the time his witness statement was written.

[140] However affected Ms McKenna was by the unjustified final warning letter, I consider her behaviour contributed to the circumstances leading to her dismissal in a blameworthy way, in relation to her swearing only. There is no question that she was frustrated, anxious and upset in Mr Lu’s office but she could have taken her leave from his office and from the workplace in a more professional and less heated manner. I consider that her actions should lead to a reduction in the compensation available to her in relation to her dismissal.

[141] Therefore, I reduce the compensation payable for the unjustified dismissal to \$18,000. In setting the date to which lost wages are due I have already considered Ms McKenna's behaviour leading to the dismissal. That amount should not be reduced for contribution under s 124 of the Act.

## **Orders**

[142] The New Zealand Automobile Association must pay Elizabeth Ann McKenna:

- (i) Lost wages as ordered in paragraph [124] of this determination. The parties are to agree on the amount to be paid, and how the tax is to be handled. Ms McKenna has leave to return to the Authority for a determination of the amount if agreement is not possible; and
- (ii) \$5,000 compensation for humiliation, loss of dignity and injury to Ms McKenna's feelings under s 123(1)(c)(i) of the Act for the unjustified disadvantage grievance; and
- (iii) \$18,000 compensation for humiliation, loss of dignity and injury to Ms McKenna's feelings under s 123(1)(c)(i) of the Act for the unjustified dismissal grievance;
- (iv) Costs are reserved and the timetable is below.

## **Costs**

[143] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs, subject to factors I remain unaware of, such as a Calderbank offer.

[144] I invite the parties to agree on costs. The investigation meeting took almost two full days. I am likely to adopt the Authority's notional daily tariff-based approach to costs, which is \$4,500 for the first day and \$3,500 for the second day.

[145] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply.

Christine Hickey  
Member of the Employment Relations Authority