

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 406
5431908**

BETWEEN KEERITHI MERENNAGE
Applicant

AND RITCHIES TRANSPORT
HOLDINGS LTD
Respondent

Member of Authority: Eleanor Robinson
Representatives: Helen White, Counsel for Applicant
Gemma Mayes, Kerry Amodeo Joint Counsel for Respondent
Investigation Meeting: 25 & 26 August 2014 at Auckland
Submissions received: 26 August 2014 from Applicant and Respondent
Determination: 6 October 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Keerithi Merennage, claims that he was unjustifiably dismissed by the Respondent, Ritchies Transport Holdings Ltd (Ritchies), on 16 October 2013 as a result of a complaint made against him by a female passenger (the Complainant).

[2] Mr Merennage further claims that he was unjustifiably disadvantaged as a result of his being suspended from his employment without pay with effect from 16 December 2011 until 10 June 2013.

[3] Ritchies denies that Mr Merennage was unjustifiably dismissed and claims that he was justifiably dismissed based on three separate findings of serious misconduct in the course of his employment, resulting in a complete loss of trust and confidence in him as an employee.

[4] Ritchies further claims that Mr Merennage was not disadvantaged as a result of the unpaid period of his suspension.

Issues

[5] The issues for determination are whether or not:

- Mr Merennage was unjustifiably dismissed by Ritchies, in particular:
 - Did Ritchies carry out a full and fair investigation into the three allegations of misconduct?
 - Was the decision made by Ritchies to dismiss Mr Merennage a decision a fair and reasonable employer could have made in all the circumstances at the relevant time?
- Ritchies's decision to convert Mr Merennage's paid period of suspension to unpaid suspension with effect from 16 December 2011 until 10 June 2013 was a breach of contract or entitlement to wages.

Background Facts

[6] Ritchies is the largest private transport operator in New Zealand with approximately 1,000 vehicles operating nationwide. Mr Merennage commenced employment with Ritchies as a bus driver on or about 27 September 2009. He was one of approximately 130 drivers based at the Auckland North Shore Depot (the Depot).

[7] Prior to his employment at Ritchies Mr Merennage had been employed during 2008 for a period of approximately 3 months as a care-giver at Creative Abilities, an organisation which working for people with physical and other needs, providing 24 hour flatting with the focus on lifestyle 'normalisation'. In this capacity he had assisted the Complainant with some cleaning in her accommodation. He had also been aware that the Complainant suffered from epilepsy and seizures.

[8] In January 2011 a female bus passenger (not the Complainant) made a complaint of sexual assault against Mr Merennage. He had been charged by the police, however the charges had been subsequently discontinued, which Mr Merennage said he had understood was as a result of the claims alleged by the female passenger not being supported by the evidence the police obtained, namely camera footage at the bus stop involved.

[9] Mr John Harvey, Human Resources and Training Manager, said his understanding had been that the charges against Mr Merennage had been discontinued as a result of the

passenger who had made the allegations leaving in New Zealand. He confirmed that Ritchies had taken no disciplinary action against Mr Merennage in relation to this complaint.

[10] Between 7 January and 31 July 2011 Mr Merennage was a driver on Ritchies North Shore 880 bus services loop route which commenced from, and ended at, the Massey University terminus. This was the service the Complainant used when travelling to and from her care centre to the gym she utilised. Mr Merennage had also been the driver on this route on 16 November 2011.

Complaint 17 November 2011

[11] Ms Elaine Keohane, Operations Team Leader, said she had been on duty at the Depot on 17 November 2011 when two women had arrived asking to speak to the Depot Manager. They had been referred to her as the next person in charge. The women had been Ms Elizabeth Soper, Director of Creative Abilities, and a social worker.

[12] Ms Soper had handed to Ms Keohane a hand written complaint from the Complainant dated 16 November 2011. The Complainant alleged that Mr Merennage, the driver of the bus she had travelled on earlier that day, had previously, that is earlier in the year, sexually assaulted her when she was travelling on the bus he had been driving. No date of the alleged complaint had been stated in the written complaint.

[13] After reading the hand written complaint Ms Keohane asked if the police had been informed and Ms Soper had told her that as they had wanted Ritchies to have prior notification, they were going to the police station after they left Ritchies.

[14] Ms Keohane took a copy of the hand written complaint and assured Ms Soper and her colleague that Ritchies would identify the driver involved and take appropriate action, whereupon they had left the Depot.

[15] After Ms Soper and her colleague had left the Depot, Ms Keohane made enquires and ascertained that Mr Merennage had been the driver on the 880 bus route the previous day.

[16] Mr Harvey had arrived at the Depot shortly afterwards and Ms Keohane had informed him of the situation. Immediate steps had been taken to contact Mr Merennage and ask him to report to the Depot.

Initial interview 17 November 2011

[17] Once Mr Merennage arrived at the Depot he had met with Mr Harvey and Ms Keohane, who had taken notes during the meeting (Ritchies file note). The meeting commenced by Mr Harvey telling Mr Merennage that a serious complaint of a sexual nature

had been received He had provided no other details, and had advised Mr Merennage that Ritchies were required to suspend him from his duties.

[18] Mr Merennage had asked when the alleged incident had occurred and Mr Harvey had responded that it was: “*a while ago*” but gave no other details. Mr Merennage said he had leapt to the conclusion that it was the same person who had made a complaint about him earlier in the year; however both Mr Harvey and Ms Keohane informed him it had not been the same person and that it was not related to the earlier complaint.

[19] Mr Merennage asked if he could be provided with more details, to which Mr Harvey responded by advising that Ritchies would need to carry out an investigation and until then he would be suspended on full pay.

[20] Mr Merennage had again requested more details of the complaint, and Mr Harvey repeated that there would need to be an investigation first to be fair to both Mr Merennage and the Complainant.

[21] As the meeting ended Mr Harvey asked Mr Merennage if he had ever worked in a care facility. Mr Merennage confirmed that he had and left the meeting.

[22] Mr Merennage said that because the Complainant had been on the bus he had been driving the previous day he had spoken to her, and as a result of Mr Harvey asking about his having been previously employed in care facility, he had concluded it had been she who had made the complaint in circumstances in which he believed her to be unstable.

[23] A few minutes after the meeting ended he had returned to the meeting room and said to Mr Harvey and Ms Keohane: “*If this is the girl from the other day, I know that girl and nothing happened. I asked her where she was going and she said the gym and that was all. I know from the previous thing that happened to me to be very careful so I am always very careful now ... all the time*”

[24] Mr Harvey said that he had found it significant that Mr Merennage had made an immediate connection in the context of a complaint of a sexual nature both to the earlier complaint and to the Complainant.

[25] Mr Merennage confirmed that he had agreed with Mr Harvey in the meeting that the matter was to be kept confidential; and his understanding at that time had been that it was not to be discussed with the other drivers and Ritchies employees.

[26] Mr Merennage said that he had been very scared as a result of the complaint and the meeting with Mr Harvey and Ms Keohane, especially as he believed the Complainant to have been unstable.

[27] Accordingly following the meeting he had visited the premises of Creative Abilities to speak to his previous employer, Mr Gordon, whom he thought might be able to assist him however he had not been at the premises, and he had instead seen Ms Soper.

[28] Mr Merennage said he had not believed that he had been breaching confidentiality partly for the reason that he had not understood it to apply other than to Ritchies employees, and partly because he believed that his former employer would have already known about the complaint.

[29] Mr Harvey confirmed that Ms Soper had telephoned him after Mr Merennage had left the Creative Abilities premises and told him that she had not wanted to speak with Mr Merennage.

[30] During the early evening on 17 November 2011 Ms Keohane received a telephone call from the Complainant who had been in a distressed state and who had alleged that “*he*” had not taken her bus fare when it had been offered, and voiced her concern that the driver might be dismissed as a result of her complaint.

[31] Following the meeting with Mr Harvey and Ms Keohane, Mr Merennage, who had believed the suspension to be without pay, had also contacted Mr John Clearwater, the lawyer who had represented him in the previous sexual assault charge. Mr Clearwater emailed Mr Harvey on 18 November 2011 stating his understanding that Mr Merennage had been suspended without pay, and asking for full details of the allegations against him.

[32] Mr Harvey had responded by email dated 21 November 2011 providing all the same information he had provided to the police, and asking for Mr Merennage’s response to the allegations within the following 5 days. The information provided consisted of:

- i. A copy of the Complainant’s written complaint dated 16 November 2011;
- ii. A copy of Ritchie’s file note dated 17 November 2011; and
- iii. A copy of the file note taken by Ms Keohane of her telephone conversation with the Complainant on 17 November 2011

[33] Mr Clearwater responded on 30 November 2011 confirming that Ritchies request for confidentiality would be complied with and stating that it would be inappropriate for Mr Merennage to comment on the allegations while the matter was under police investigation.

Meeting with Complainant 29 November 2011

[34] On 29 November 2011 Mr Harvey met with the Complainant and Ms Soper at the Creative Abilities premises. The complainant had pre-prepared a typed statement which she had presented to him at the meeting and confirmed that everything in her statement and complaint were true.

[35] Mr Harvey said he had spent approximately one hour with the Complainant discussing her complaint and he had been impressed by her honesty and: *“left in no doubt about her credibility”*.

[36] On 30 November 2011 Mr Harvey replied to Mr Clearwater’s letter of the same day, confirmed that Mr Merennage’s suspension would be on full pay, and stated:

The Company is particularly concerned as the allegation is of a similar nature to an earlier complaint concerning Rohan (Mr Merennage) to the Police made on 23rd January this year by another passenger.... That complaint ... was not pursued or able to be fully investigated by us at the relevant time because the complainant moved overseas ...

The Company considers that in the absence of satisfactory explanations being provided by Rohan, the allegations in the complaint would clearly amount to serious misconduct, with the potential to irrevocably destroy our trust and confidence in him as an employee and for which he would be liable to summary dismissal.

[37] The letter proceeded to invite Mr Merennage to a disciplinary meeting to be held on 5 December 2011, and to advise that Mr Merennage would also be asked at that meeting to comment on his visit to Creative Abilities which was viewed by Ritchies as: *“an attempt by him to obstruct our investigation into this matter, which would of itself amount to further serious misconduct on his part and render him liable to summary dismissal”*.

[38] In addition Mr Merennage was to provide an explanation to the Complainant’s allegations that on multiple occasions Mr Merennage failed to collect and/or record fares for her upon her boarding the bus. The letter advised that in the absence of a satisfactory

allegation, this would also amount to serious misconduct and be grounds for summary dismissal.

Disciplinary Meeting 5 December 2011

[39] The disciplinary meeting between Mr Harvey and Mr Merennage, who was accompanied by Mr Clearwater, took place on 5 December 2011. During the meeting Mr Clearwater advised that the allegations were denied and due to the possibility of self-incrimination, he could not advise Mr Merennage to answer any questions.

[40] Mr Clearwater also requested that Ritchies maintain Mr Merennage on paid leave during the period of his suspension.

[41] Mr Harvey said he had agreed that Mr Merennage would be allowed 7 days in which to consult the National Distribution Union (NDU) of which he was a member.

[42] On 7 December 2011 Mr Clearwater forwarded a written statement from Mr Merennage. In the statement:

- he denied any improper conduct towards the Complainant;
- confirmed that he always checked that Passengers' bus passes were valid;
- confirmed that he had stated his view to Mr Harvey that the Complainant was unstable and not reliable as regards the complaint; and
- accepted that he had assured Mr Harvey and Ms Keohane that he would keep matters confidential on 17 November 2011, but explained his understanding of that undertaking as being restricted to other employees at Ritchies.

Unpaid suspension decision 16 December 2011

[43] Mr Merennage was subsequently charged with two charges of indecent assault on the Complainant arising out of the same incident, and as a consequence his driver's 'P' licence had been automatically suspended by the New Zealand Transport Agency which meant that he could not drive buses.

[44] On 16 December 2011 Mr Harvey emailed Mr Clearwater stating that as Mr Merennage could not drive due to the suspension of his 'P' Licence: "*We consider that your client's current suspension (pending completion of our investigation) should be without pay, from this date*".

[45] This information was confirmed in a letter dated 21 December 2011 in which Mr Harvey explained that the decision to suspend Mr Merennage without pay with effect from 16 December 2011 was because Mr Merennage's 'P' licence had been suspended which meant he could not drive buses as he had been employed to do, and the fact that there were no other non-driving duties available for him within Ritchies.

[46] Mr Harvey concluded the letter of 21 December 2011 by stating: "*We will keep you informed of our on-going investigation into the substantive allegations of serious misconduct ...*".

[47] Mr Clearwater replied to Mr Harvey on 22 December 2011 advising that: "*Our client intends liaising with the NDU Union to comment on his suspension without pay*".

Events following the start of the period of unpaid suspension on 16 December 2011

[48] Mr Merennage's period of unpaid suspension lasted from 16 December 2011 until payment resumed with effect from 10 June 2013, a period of approximately a year and a half.

[49] Mr Merennage, who did not hear from Ritchies throughout the period of unpaid suspension, said that he had not contacted Ritchies during the lengthy period of his unpaid suspension as he had understood from Mr Harvey's letter dated 21 December 2011 that Ritchies would be contacting him. Moreover he had been concerned that if he made a request or complaint, it might result in his dismissal.

[50] Mr Merennage said he had made attempts to contact the NDU during the suspension period, however he had been unsuccessful in doing so, and messages he had left at the NDU office had not been returned.

[51] His financial situation became very precarious as a result of the long period of unpaid suspension, and he had tried to obtain other employment. He had registered at WINZ and was in receipt of social welfare from the period 22 December 2011 until 14 February 2013. WINZ had also arranged that he applied regularly for a range of jobs in an attempt to mitigate his loss.

[52] Mr Merennage had been made bankrupt on 11 February 2013 due his inability to make debt repayments as a result of having no income.

Employment at Pak'n'Save

[53] Through a personal contact Mr Merennage had managed to obtain employment at Pak'n'Save. He commenced employment on 12 February 2013; this was at a much lower rate of pay than he had received during his employment at Ritchies.

[54] He confirmed that he had not advised Pak'n'Save that he was suspended but still employed by Ritchies, nor that he was facing criminal charges, and he had completed the Pak'n'Save application forms accordingly.

Resumption of paid suspension

[55] The criminal trial involving Mr Merennage commenced on 13 May 2013, Mr Merennage had not been required to give evidence at the trial, and the outcome had been a not guilty verdict and his acquittal and the restoration of his 'P' Licence.

[56] Ms White, Counsel to Mr Merennage, had written to Mr Harvey on 5 June 2013 advising him of the not guilty finding and requesting on Mr Merennage's behalf that Ritchies allow him to return to work.

[57] Ms White also raised a wage claim in respect of the period of unpaid suspension.

[58] In respect of the wage claim Mr Amodeo on behalf of Ritchies noted:

The company is unwilling to engage in the matters raised in your letter concerning the basis for Mr Merennage's original suspension, given that the 90 day time limitation for the raising of a personal grievance has now expired. The company does not consent to any personal grievance being raised out of time.

[59] Ritchies also advised that although the criminal process had been completed and Mr Merennage acquitted, Ritchies would recommence the investigation process which had been placed in abeyance pending the outcome of the criminal charge process.

[60] Ms White responded by letter dated 17 June 2013, stating that Mr Merennage: "*would like to return to work. He does not consent to further absence without pay. Indeed he has never agreed to that.*", and noting that whilst Mr Merennage would participate in Ritchies's investigation: "*he expects this to occur during his employment not before you recommence paying him*".

[61] By email dated 19 June 2013 Ms White stated: "*For the sake of clarity your client needs to understand that the issue over wages is not a personal grievance but a matter of wage payment and therefore subject to a 6 year window for making a claim.*"

[62] By letter dated 20 June 2013 Ritchies agreed to return Mr Merennage to the payroll with effect from 10 June 2013, but not to his duties as a bus driver until such time as its investigation had been completed.

[63] Ritchies also noted in the letter dated 20 June 2013 that it had no knowledge of the basis on which Mr Merennage had been found not guilty at the criminal trial, and invited him to provide further or additional explanations or material on the specific allegations.

[64] Mr Merennage thereafter provided a copy of the trial transcript, but no further comments.

[65] Mr Merennage said he had continued in his employment with Pak'n'Save after this date due to his concern about the future continuity of his employment at Ritchies.

Meeting 6 August 2013

[66] Ms White had advised Ritchies that she would be overseas from 22 June until 16 July 2013, and Ritchies therefore advised that there would be a meeting following her return on 6 August 2013, which Mr Clearwater and Mr Merennage were expected to also attend.

[67] Prior to the meeting taking place Ritchies advised that:

The allegations of serious misconduct being investigated by the company are as set out in its initial meeting letter of 30 November 2011. In particular, they comprise the allegations set out in the passenger's written complaint received by the company on 17 November 2011, the alleged attempt by Mr Merennage to obstruct the Company's investigation by contacting Elizabeth Soper, (the director of Creative Abilities) and the complainant's allegation that Mr Merennage on multiple occasions failed to collect/and or record fares from her when boarding his bus.

[68] Mr Clearwater and Mr Merennage did not attend the meeting on 6 August 2013, although Ms White had earlier confirmed Mr Clearwater's attendance by email. Whilst Mr Clearwater had confirmed when contacted during the meeting that he had forgotten it was taking place, Mr Merennage said he had not attended the meeting as he had not been advised that it was taking place.

[69] On 15 August 2013 Mr Merennage, who was still employed at Pak'n'Save, suffered an injury during the course of his employment, and ACC had been notified.

[70] As a result of the ACC involvement. Mr Harvey became aware of Mr Merennage's employment at Pak'n'Save when he had been contacted by ACC on 28 August 2013 in the capacity of Mr Merennage's employer.

Preliminary Decision

[71] On 29 August 2013 Mr Harvey advised Mr Merennage of the outcome of the disciplinary process, being: “*the Company’s final conclusions and proposed disciplinary action*”. In the letter Mr Harvey set out his reasoning and the conclusion reached on each of the allegations against Mr Merennage.

(i) First Allegation

[72] In regard to the first allegation of whether or not the Complainant had been sexually assaulted by Mr Merennage, Mr Harvey concluded that he accepted the Complainant’s recollection of events rather than Mr Merennage’s: “*bare denials of the events occurring at all on the part of Mr Merennage*”, having placed reliance on the following factors:

- i. *I have personally interviewed the Complainant and formed my own positive view as to her credibility.*
- ii. *I do not place any significance on the delays occurring between the alleged assault and the time it was reported by her. I accept that she was “upset and ashamed that at first I did not tell anybody”. I also accept that she did not tell anyone else ...*
- iii. *I have considered the transcript evidence of Ms Soper relating to the complainant’s medical condition and whether this could impact of her credibility of recollection of the alleged events. ... This evidence does not suggest that the Complainant would “make things up” or that she “could not be believed”. ... On the balance of probabilities I consider that the complainant was not lying ...*
- iv. *I have also considered the possibility that the Complainant may have been mistaken as to the identity of Mr Merennage. However, I would discount this possibility ...*
- v. *I have also taken into account that when I first advised Mr Merennage of a complaint of a sexual nature having been made against him ... he referred to “the girl of the other day ..” ... This followed an earlier statement he made during our initial discussions about the complaint referring to the*

previous incident when the charges were dropped ... It is significant that Mr Merennage made a connection between these two incidents or episodes in the context of a complaint about "of a sexual nature"

- vi. In considering these matters I have also brought into balance the previous similar complaint ... as supporting that the behaviour subject to the present allegations did occur.*
- vii. Neither do I consider it relevant that the present allegations have been made some time after the alleged events, given the general (on-going) denial by the Employee that the events ever occurred.*

(ii) Second Allegation

[73] In regard to the second allegation that Mr Merennage had tried to obstruct Ritchies's investigation by contacting Creative Abilities and making the statements he had (namely that the Complainant was unstable and could not be believed), Mr Harvey stated that he did not accept Mr Merennage's explanation that he had contacted Creative Abilities to obtain more information about the Complainant's allegations.

[74] Rather he considered that by doing so and making the statements he had about the Complainant, Mr Merennage had done so with the intention of deflecting or obstructing Ritchies investigation. Accordingly he concluded: "*I therefore consider that his admitted conduct in contacting the care centre and making such statements amounts to serious misconduct.*"

(iii) Third Allegation

[75] As regards the third allegation that Mr Merennage failed or omitted to collect and/or record fares from the Complainant, Mr Harvey concluded that although: "*it has not been possible to verify this allegation by reference to bus module data*" he had: "*no reason to doubt the Complainant's allegations.*"

[76] Mr Harvey concluded the letter by stating his conclusion that:

The above findings are both individually and cumulatively, of such seriousness in my opinion as to fundamentally undermine the necessary relationship of trust and confidence in Mr Merennage as a bus driver dealing the members of the public.

I have fully considered Mr Merennage's prior service but given the multiple allegations I do not consider that his prior service record in

any way detracts from my serious findings and their impact upon our trust and confidence in him as an employee. ...

In the circumstances I consider that summary dismissal is the only fair and reasonable outcome open to the Company.

[77] Mr Harvey invited Mr Merennage to make any representations by 5 September 2013 in relation to the proposed outcome, and offered to either accept written submissions, or to have a meeting.

[78] On 31 August 2013 Mr Merennage resigned from his employment at Pak'n'Save, claiming that the work was too physically demanding, and his employment at Pak'n'Save terminated on 10 September 2013.

Response to preliminary decision

[79] On 5 September 2013 both Ms White and Mr Clearwater responded separately to the preliminary decision on behalf of Mr Merennage, challenging the basis for the decision made by Ritchies.

[80] Ms White suggested that the parties attend mediation. Ritchies agreed to attend mediation, but prior to mediation taking place, Ritchies contacted Mr Peter Francis, at that time Human Resources Manager for Pak'n'Save, who informed him that Mr Merennage, who had given his reason for resigning as due to 'personal reasons' had told him and others that he was moving to Australia.

[81] In a response to Ms White's comments regarding its preliminary decision in her letter dated 5 September 2013, Ritchies raised in a letter dated 4 October 2013 the issue of Mr Merennage's employment at Pak'n'Save:

Mr Merennage was paid to be on garden leave. ... We understand he has been working for Pak'n'Save Food Warehouses on a full-time basis since February 2013 and that he did not disclose to them that he was still employed by our company. ...

We also understand that he has now resigned from this secondary employment at Pak'n'Save as from 10 September, stating his is going to live in Australia.

We do not consider that Mr Merennage has been frank and open with us, which would not only be a breach of good faith, but also goes to the whole issue of his credibility...

[82] Ms White responded to this letter by email on 9 October 2013 providing details of Mr Merennage's employment at Pak'n'Save, stating that he had no plans to go to Australia, and confirming that he wanted to return to work at Ritchies.

[83] The parties attended mediation in early October 2013; however it was not successful in resolving the issues between them.

[84] On 16 October 2013 Mr Harvey emailed Ms White confirming Ritchies preliminary decision to dismiss Mr Merennage with immediate effect for: "*the reasons set out in my previous letter to you of 29 August ...*"

[85] On 24 October 2013 Mr Merennage raised a personal grievance in regard to his dismissal from his employment at Ritchies.

Determination

Was Mr Merennage unjustifiably dismissed by Ritchies?

[86] Mr Merennage was summarily dismissed on 16 October 2013. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[87] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Ritchies must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[88] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...*

(b) ... the employer raised the concerns that the employer had with the employee ...

(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[89] There were three allegations made against Mr Merennage which Mr Harvey, in the preliminary decision letter dated 29 August 2014 described as: “*both individually and cumulatively, of such seriousness as to fundamentally undermine the necessary relationship of trust and confidence in Mr Merennage*”. I shall therefore proceed to examine the three allegations separately and cumulatively.

Did Ritchies carry out a full and fair investigation into the three allegations of misconduct?

[90] In accordance with s 103A (3) of the Act, Ritchies was required to carry out a fair investigation and follow a fair procedure.

[91] *Ministry of Maori Development v Travers-Jones*¹ the then Chief Judge Goddard stated in regards to a fair procedure:²

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

(i) *First Allegation: sexual assault of the Complainant*

[92] The allegation against Mr Merennage of sexual assault was very serious. Whilst the standard of proof by which an employer may reach a conclusion is the civil standard of ‘*on the balance of probabilities*’, the employer is nevertheless expected to act in a manner that is

¹ [2003] 1 ERNZ 174

² Ibid at para [30]

fair and reasonable when carrying out an investigation. The evidence should be as compelling as the allegation is serious. Acting in this situation a fair and reasonable manner includes the employer having a mind open to the possibility that the employee might have an innocent explanation for the suspicious circumstances.

[93] I find that at a very early stage in the employer's investigation there are two incidents of such significance as to indicate that Mr Harvey had a pre-determined view that Mr Merennage was guilty of the sexual assault allegation made by the Complainant against him. Namely:

- During the initial meeting with Mr Merennage on 17 November 2011 Mr Harvey referred to a serious allegation of a sexual nature and proceeded to ask Mr Merennage if he had previously worked in a care facility, Mr Merennage confirmed that he had worked in a care facility. Mr Harvey stated that he had found it significant that Mr Merennage made a connection between the two comments despite the question about the second being posited within the context of the first.
- I also note in addition Ms Keohane's statement in regard to Mr Merennage's confirmation that he had worked in a care facility that: *"the game was up" when John asked about working in a care facility"*
- Following his meeting with the Complainant on 29 November 2011, Mr Harvey stated that he had been: *"left in no doubt about her credibility"* despite the fact that the information the Complainant provided was in the form of a pre-prepared typed statement, and the basis for his believing in her credibility was *"...my previous experience in dealing with people in various situations whilst working for the Ministry of Transport."*
- In regard to his meeting with the Complainant Mr Harvey also stated: *"I placed reliance on the fact that I had interviewed her and believed her."* This was despite the fact that at that stage Mr Merennage had not been given the opportunity to comment on the allegations about which he had not been given any details as confirmed by Ms Keohane's statement that: *"Mr Harvey and I did not at any stage mention a day, nor a time, nor a route..."* .

[94] Further Mr Harvey noted that when he had mentioned the complaint being a serious allegation of a sexual nature during the meeting held on 17 November 2011 Mr Merennage had made a connection with an earlier incident of which he had been accused at the beginning

of that year. I note that at that time all the information with which he had been provided was that the allegation made by the Complainant was about something that had occurred: “*a while ago*”.

[95] In *Ministry of Maori Development v Travers-Jones*³ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer’s findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.

[96] I find that Mr Harvey had been influenced by the earlier unproven complaint of sexual misconduct against Mr Merennage, and that it was a factor in his preliminary decision to dismiss Mr Merennage, as exemplified by the reference to: “*multiple allegations*” in the letter dated 29 August 2013 in which he states: “*I have fully considered Mr Merennage’s prior service but given the multiple allegations ...*”.

[97] Whilst an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts, I consider that this factor influenced Mr Harvey at an early stage in the investigation process and taken within the context of the other indicators I find infers pre-determination and that Mr Harvey did not keep an open mind.

[98] Turning to the information with which Mr Merennage was provided, I note that the allegation against him lacked certainty as to the time and date when it had occurred. In that situation it was difficult for him to call witnesses or any evidence in his defence. What he did do was to deny the allegations which I consider was all he was able to do in the circumstances.

[99] Acting on the advice of his lawyer Mr Merennage did not answer any questions during the disciplinary meeting on 5 December 2013. I do not believe that Ritchies could

³ [2003] 1 ERNZ 174

fairly and reasonably take any adverse inference from this. I also note that at that meeting Mr Clearwater on behalf of Mr Merennage denied the allegations made by the Complainant.

[100] Further a written statement made by Mr Merennage was received by Ritchies a few days later. In that statement Mr Merennage denied any improper conduct towards the Complainant.

[101] Mr Harvey stated in respect to that statement that he regarded it as Mr Merennage: “*simply in denial*” and hiding: “*behind his rights against self-incrimination*”

[102] I find this comment to indicate that Mr Harvey did not have a mind open to the possibility that Mr Merennage might rightly be denying the allegations, or might have an innocent explanation for the suspicious circumstances. Mr Harvey had in effect made up his mind that Mr Merennage was guilty of the alleged sexual allegations.

[103] Following the suspension of Mr Merennage’s ‘P’ licence he was placed upon unpaid suspension. This period extended for many months.

[104] Despite having advised Mr Merennage in the letter dated 21 December 2011 that Ritchies would keep him informed of its: “*on-going investigation*”, Ritchies made no contact at all with Mr Merennage throughout the whole period of unpaid suspension either to ascertain his situation in circumstances in which he had been deprived of any income, or to advise him that the investigation was not in fact “*on-going*”, but had been placed on hold pending the outcome of the criminal process.

[105] The statutory good faith duty owed by an employer to a an employee continues to apply to an employee placed on suspension and I do not find that Ritchies’s lack of contact with Mr Merennage during this lengthy period of unpaid suspension to be the action of a fair and reasonable employer.

[106] The criminal trial concluded on 13 May 2013 with Mr Merennage being acquitted and his ‘P’ licence restored. Ritchies had been advised of this on 5 June 2013 by Ms White, but it had made no contact with Mr Merennage, and did not restore him to paid suspension until after Ms White had specifically requested this, despite there no longer being any justification after the restoration of his ‘P’ licence for leaving him on unpaid suspension.

[107] I find this course of conduct towards Mr Merennage to support the view that Mr Harvey did not have a mind open to the possibility that Mr Merennage might have an innocent explanation for the suspicious circumstances.

[108] Mr Merennage did not attend the meeting held on 6 August 2013 because he had not been advised it was taking place. Ms White at the Investigation Meeting confirmed that there had been a problem with the email notification to Mr Merennage and that he would not have received it.

[109] I find that the pre-determined views of Mr Harvey are reflected in the preliminary decision of summary dismissal. In the letter dated 29 August 2013 Mr Harvey confirmed that the factors he had relied upon in reaching the decision that Ritchies could no longer have trust and confidence in Mr Merennage included:

- The connection Mr Merennage had made at the meeting held on 17 November 2011 between the alleged complaint and the Complainant which he had found significant following the meeting held on 17 November 2011; and
- The connection Mr Merennage had made on 17 November 2011 to the first incident at the beginning of 2011 when Mr Harvey had referred to the alleged assault being ‘*a while ago*’.
- His “*own positive view as to her credibility*” formed at the time of his interview with the Complainant at the very beginning of the investigation process on 29 November 2011 which had not altered despite his having read the trial transcript which had been provided to him and the vagueness in the Complaint’s evidence in the criminal trial as to time and date of the alleged incident;

[110] In relation to the first allegation, I find that Mr Harvey had a closed mind to the possibility that the allegation made against Mr Merennage might be unfounded or have an innocent explanation. His investigation had been influenced throughout by the view he formed at the outset of the credibility of the Complainant, the inferences he drew from the meeting held with Mr Merennage on 17 November 2011, and the assumptions Mr Merennage had drawn from the remarks made by Mr Harvey during that meeting.

[111] It was difficult in the circumstances for Mr Merennage to provide an informed explanation given the limited detail he had during the investigation process, and his denials were regarded by Mr Harvey with suspicion as indicated by his remarks that Mr Merennage was “*simply in denial*” and hiding: “*behind his rights against self-incrimination*”.

[112] This view was underlined in Ritchies’s Statement in Reply in which the comment is made that: “*For reasons best known to the Applicant he was not prepared to give evidence in his own trial, He remains in a state of self-denial*”, and: “*Whilst Ritchies is aware that he*

was acquitted of the criminal charges that does not mean he was in fact not guilty of committing them”.

[113] I find that the level of pre-determination significantly influenced the preliminary decision made by Ritchies.

[114] Between the notification of the preliminary decision and the final decision of the investigation process, Ritchies discovered that Mr Merennage had been working during his period of suspension at Pak’n’Save.

[115] Whilst Mr Harvey in a letter to Ms White stated that in light of this information, Ritchies considered that Mr Merennage had not been frank and open towards it which: *“goes to the whole issue of his credibility”*, the email confirmation of the final decision sent by Mr Harvey on 16 October 2013 made it clear that the decision of summary dismissal had been for: *“the reasons set out in my previous letter to you of 29 August”*

[116] On this basis I find that the knowledge of Mr Merennage’s secondary employment had not had a significant impact on Ritchies decision-making process in regard to the first allegation.

(ii) Second Allegation: Obstructing Ritchies Investigation

[117] During the meeting held on 17 November 2011 Ritchies said it had asked Mr Merennage to keep the allegation made by the Complainant confidential. Although there is no mention of this agreement in the file notes made by Ms Keohane following the meeting, Mr Merennage did not dispute that this part of the discussion had taken place, and that he had agreed with the request.

[118] However Mr Merennage said that he had not realised that the confidentiality undertaking was intended to extend beyond Ritchies. I consider that this explanation could be attributable to the fact that he was concerned and distressed by what had occurred and the nature of the allegation and may not have clearly understood what was being discussed. This aspect finds support in the fact that Mr Merennage had not understood at that meeting that the suspension was to be on pay, as indicated by the email from Mr Clearwater on 19 November 2011.

[119] Mr Merennage’s explanation that he had wanted to obtain more information about the allegations made by the Complainant had not been accepted by Mr Harvey, despite the fact that he had not provided Mr Merennage with details of the serious allegation which had been made about him.

[120] Mr Harvey had also been concerned by Mr Merennage's comments that the Complainant: "*was unstable and she cannot be believed*", and had regarded both the visit and the comments as intended to obstruct Ritchies's investigation.

[121] Whilst I accept that Mr Merennage breached an agreement as regards confidentiality, I do not accept that there is sufficient evidence to support it, or the comments made by Mr Merennage about the Complainant, to have been made with the intention to obstruct the employer's investigation process.

[122] Accepting that the breach of confidentiality occurred, I find that the fair and reasonable employer would not have regarded the breach of confidentiality individually as: "*of such seriousness ... to fundamentally undermine the necessary relationship of trust and confidence*" in Mr Merennage such as to support a decision of summary dismissal.

(iii) Third Allegation: failing or omitting to collect bus fares from the Complainant

[123] The Complainant alleged that Mr Merennage had not followed ordinary process and collected bus fares from her. The Complainant had been in possession of a bus pass at 16 November 2013, therefore this allegation would appear to refer to occasions arising on or about the date of the alleged sexual assault, the date and time of which are vague and at the best unknown.

[124] Given the vagueness of the allegation it was, as acknowledged by Mr Harvey in the letter dated 29 August 2013, impossible for Ritchies to verify it. In the face of Mr Merennage's denials and the lack of verification, Mr Harvey nonetheless reached the conclusion that the allegation was valid based on his view that the Complainant's version of events was to be preferred above that of Mr Merennage.

[125] I do not find that given the inability to verify the allegation, a fair and reasonable employer would have regarded the matter individually as: "*of such seriousness ... to fundamentally undermine the necessary relationship of trust and confidence*" in Mr Merennage as to support a decision of summary dismissal

[126] Taking the three allegations cumulatively, I find that in light of the high degree of pre-determination from the outset of its investigation, Ritchies did not carry out a full and fair investigation into the three allegations of misconduct such as to justify its finding of serious misconduct.

[127] I determine that Mr Merennage was unjustifiably dismissed by Ritchies.

Was Ritchies's decision to convert Mr Merennage's paid period of suspension to unpaid suspension with effect from 16 December 2011 until 10 June 2013 a breach of contract or entitlement to wages?

[128] Suspension without pay has been described by Richardson J in *Birss v Secretary of State for Justice*⁴ as a drastic measure, often carrying profound emotional and social consequences as well as the more obvious financial ones.

[129] Mr Merennage was employed subject to the terms and conditions contained within the Collective Agreement between Ritchies and First Union Inc (previously separately known as NDU and FINSEC), (the CEA)

[130] Clause 5 of the CEA provides a contractual entitlement to wages. Clause 16.1 of the CEA provides that any variations should be agreed between the employer and affected employee(s), and: "*reduced to writing and signed by the employer and the Union*". Clause 17 of the CEA makes reference to Ritchie's "*in-house rules*".

[131] Ritchies's 'House Rules' provide an ability to suspend: "*the employee on pay pending an investigation of alleged events*" in disciplinary situations involving potential serious misconduct, however this relates only to paid suspension.

[132] There is no contractual right to suspend without pay, although Mr Harvey said that there was an unwritten but acknowledged understanding by all the Ritchies bus drivers of: "*No 'P', no job*".

[133] I accept that in the circumstances in which Mr Merennage had no 'P' licence, he was unable to perform the duties for which he had been employed, and in that situation there was frustration arising from a fundamental breach of his employment agreement arising from Mr Merennage's inability to perform the duties for which he was employed.

[134] In these circumstances Ritchies could have terminated Mr Merennage's employment; however it did not do so. The employment relationship remained on-going, Ritchies offered Mr Merennage no alternative duties as it considered there were none to offer, and he was suspended without pay.

[135] In *Rack v Salters Cartage Ltd*⁵ Colgan J found that a period of suspension in the case of an employee driver who was suspended as a result of being legally unable to fulfil his duties as a driver of dangerous goods due to failing to renew the dangerous goods

⁴ [1984] 1 NZLR 513 at 521

⁵ Employment Court, AC 7/02

endorsement on his driver's licence:⁶ “ *was considerably more beneficial to [the employee] than dismissal*”

[136] In that case the period of suspension without pay was 3 weeks. In Mr Merennage's case it extended to more than a year and a half. It had a profound effect upon him both emotionally and financially.

[137] Ritchies did not receive any representations from Mr Merennage, or from the NDU, about the period of unpaid suspension. However I do not find that Ritchies could take this as implying consent in circumstances in which Mr Merennage attributed the lack of objection to the unpaid period of his suspension to the fact that he considered he was vulnerable to termination by reason of frustration.

[138] There is no evidence that in the period of Mr Merennage's unpaid suspension Ritchies reviewed the situation. It took no steps to progress its investigation despite the inference in the letter dated 21 December 2011 that it would do so, nor did it advise Mr Merennage that it had put its investigation 'on hold' pending the outcome of the criminal trial. I do not find this to have been the action of a fair and reasonable employer.

[139] In light of there being no contractual right to suspend without pay, and no express and informed consent that it could do so on Mr Merennage's part, I find that Ritchies acted in breach of contract.

[140] I determine that Ritchies suspended Mr Merennage without pay in breach of employment contract during the period 16 December 2011 until 10 June 2013.

Remedies

[141] Mr Merennage has been unjustifiably dismissed and he is entitled to remedies.

Period of unpaid suspension

[142] Ritchies is to pay Mr Merennage a sum equivalent to the amount he would have been paid during the period of his unpaid suspension from 16 December 2011 until 10 June 2013 had he remained suspended on pay.

[143] From that amount is to be deducted any payments received by Mr Merennage by way of benefits from WINZ and wages earned during the period of his employment at Pak'n'Save

⁶ Rack v Saelers Cartage Ltd at para [28]

until 10 June 2013 when he was restored to full pay. I anticipate the parties can agree the amount between them. If they are unable to do so, leave is reserved to revert to the Authority.

Lost wages

[144] Mr Merennage was unemployed from 16 October 2013 until he obtained alternative employment in Australia on 14 April 2014. He gave evidence that he had sought diligently for alternative employment in New Zealand, but had failed to obtain any and could only find such employment in Australia.

[145] I order that Ritchies pay Mr Merennage the sum of \$20,800.00 gross (calculated as 26 weeks at \$800.00 gross per week x 26 weeks) months pursuant to s 128(3) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[146] As a result of his period of suspension, a lengthy period of which was unpaid, and the termination of his employment, Mr Merennage suffered severe financial difficulties. He also suffered emotionally, both on a personal basis and as a result of the adverse impact on his family.

[147] I order that Ritchies pay Mr Merennage the sum of \$10,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[148] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[149] Mr Merennage was under a duty of good faith in relation to Ritchies. Whilst I appreciate that the period when he was suspended without pay by Ritchies was an extremely difficult time for him, Mr Merennage was still employed by Ritchies and bound by the statutory duty of good faith, yet he did not advise Ritchies that he had obtained this secondary employment. I note however that there was no prohibition upon a driver having secondary employment set out in the CEA.

[150] However once Mr Merennage's 'P' licence was restored and he was restored to full pay by Ritchies, I consider that he was obligated to inform Ritchies that he was working at Pak'n'Save pursuant to the duty of good faith as set out in s 4 of the Act.

[151] He failed to do so, and whilst I consider that it did not significantly impact on Ritchies final decision of dismissal, I consider that it had the effect of confirming Mr Harvey's view in the trust and confidence issues he had based his preliminary decision upon and thus did not avert the final decision.

[152] I find contributory fault on the part of Mr Merennage and reduce the remedies awarded by 33.3%.

Costs

[153] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority