

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 5  
5391340

BETWEEN                      WANJA ROBERT MUTZE  
   Applicant  
  
A N D                              LINCOLN    SUPERMARKET  
   LIMITED  
   Respondent

Member of Authority:      David Appleton  
  
Representatives:              Dr Martin Round, Counsel for Applicant  
   Ms Kathryn Dalziel, Counsel for Respondent  
  
Investigation meeting:      4 December 2013 at Christchurch  
  
Submissions Received:      5 December 2013 from Applicant  
   10 December 2013 from Respondent  
  
Date of Determination:      13 January 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.      The applicant was not unjustifiably constructively dismissed but did suffer an unjustifiable disadvantage in his employment by being suspended.**
- B.      The applicant is awarded compensation in the sum of \$500 in relation to the unjustified suspension.**
- C.      Costs are reserved.**

**Employment relationship problem**

[1]      Mr Mutze claims that he was unjustifiably constructively dismissed on 14 June 2012 when he was undergoing a disciplinary investigation process. He also claims that he was unjustifiably disadvantaged when he was suspended from his employment

on 12 June 2012 and also by being made to attend three investigation meetings during the disciplinary process.

[2] The respondent denies that Mr Mutze was constructively dismissed and also denies that it caused an unjustified disadvantage in his employment by suspending him and making him attend three meetings during the disciplinary investigation process.

### **Brief account of the facts leading to the resignation**

[3] The respondent company operates the New World supermarket in Lincoln. Mr Mutze began working for the respondent in March 2011, as its produce manager. In July 2011, Mr Mutze took two weeks off work due to stress, and told the respondent the reason for his leave. On his return he requested that he become the assistant manager of produce, rather than the manager and work only four days a week. The respondent agreed with that change, which took effect from 18 July 2011.

[4] By way of background to Mr Mutze's claim, and the effect he says he suffered from the alleged actions of the respondent, he explains that his wife sustained serious injuries on 22 February 2011 when a major earthquake in Christchurch caused the building in which she was present at the time to collapse. Mr Mutze states that he was trapped in the Redcliffs New World supermarket for over 30 minutes on the same day, and that these events and circumstances have caused him to suffer post-traumatic stress disorder. This diagnosis has been confirmed by his medical practitioner.

[5] On 2 June 2012, during his morning tea break, Mr Mutze took a cake that was in sealed packaging out of a refuse bin in the respondent's yard (known as the *pig bin*), unwrapped the cake and took a bite out of it, offering it to other staff members, who laughed. Another member of staff (called Kane) who Mr Mutze says had seen the cake being taken out of the bin (but not necessarily out of its package) also took a bite. Mr Mutze's evidence is that he did this as a joke.

[6] On 6 June 2012, Mr Mutze received a letter requesting him to come to a meeting the following day. The letter stated as follows:

*06 June 2012*

*To Robert Mutze*

*This letter serves to advise you that we are have the following concerns regarding your performance/behaviour:*

- *Taking and consuming products from the blue bins in the yard without authorisation.*

*We need to meet with you to give you a full opportunity to respond to these concerns/allegations.*

*If some or all of the concerns are found to have substance disciplinary action may be taken against you which could include dismissal.*

*You are entitled to bring a support person to this meeting.*

*The Time and Date of this meeting will be Thursday 07 June at 2pm.*

*The meeting location is Kyle's office.*

*If you are unable to attend the meeting at the time and date set, or require further time to arrange support person [sic] you must advise Kyle so the meeting can be rescheduled.*

*Yours sincerely,*

*Kyle Burnett  
Owner/Operator*

*The meeting of 11 June 2012*

[7] Mr Mutze was unable to arrange a support person in time and it was agreed that the meeting would take place on 11 June 2012 instead. Mr Mutze attended this meeting with his father in law as his support person. Mr Mutze complains that neither he nor his father-in-law was told that he could have a legal representative at the meeting (and says that he was not told this at any point during any of the disciplinary process prior to his resignation).

[8] The Authority saw the notes of the disciplinary meeting that took place on 11 June which show that Mr Burnett conducted the meeting, with another manager as his witness. These notes also show that Mr Burnett had pre-prepared some questions for Mr Mutze, as follows:

1. *Can you please tell me about the events of Saturday regarding the cake.*

2. *Who was there at the time – Kane/Jake/Kevin?*
3. *What was the reaction from the other people there?*
4. *What is our policy as a business about this sort of thing.*
5. *Can you tell me about any chat you have had with me about buying marked down products?*
6. *What discussions have you had with Deli staff around marking down products?*
7. *Why do you feel that you should get a deal/or get things marked down?*
8. *Why are you not concentrating on our business and not getting deals or mark-downs?*
9. *You are the only one who comes to me asking for deals/free stuff – chair, beer, rug doctor x 2 – Why is this? Do I owe you something? We feel we have bent over backwards to help and support you. Why are you still asking for stuff?*

[9] The notes show in handwriting some of the answers that Mr Mutze gave, which, in regard to the cake incident, can be summarised as Mr Mutze admitting he took the cake out of the pig bin, admitting he took a bite out of it and that it was meant to be a joke. The notes record that Mr Mutze said that it was not the right thing to do; that it needed to be authorised and it was not. Mr Mutze's answers in relation to the other matters asked can be summarised essentially as him denying that he bought marked down produce in his own department, (which was forbidden) although this did happen in other departments. He also essentially said he had done nothing wrong by wanting to get a good deal from time to time.

[10] Mr Mutze says that he had been ambushed by being presented with prepared questions about alleged misconduct and misbehaviour other than that contained in the original letter of 6 June 2012.

[11] Mr Burnett said in his oral evidence that he had asked Mr Mutze questions about marking down products, taking home a broken office chair and asking to use the carpet cleaner for an extra day because he had wanted to see whether eating the cake from the waste bin had been evidence of a pattern of behaviour of wanting free or cheap goods. Mr Burnett says that Mr Mutze had not objected to answering questions about his own purchases and marked down products and that he had accepted Mr Mutze's responses.

[12] The meeting notes for 11 June record the following:

*I want to avoid it to go on my record. Willing to make a deal with Kyle. Deal it won't go further and I will resign.*

[13] Mr Mutze's evidence is that Mr Burnett said that the matter could result in a dismissal, and that Mr Mutze did not want that to go on his record. Under cross examination, he clarified that it was the details of the dismissal that he wanted to avoid going on his record because he wanted to carry on working in the supermarket industry. He said that he had raised the possibility of resigning first, and that Mr Burnett had said that he needed to resign before the next meeting. Mr Burnett does not deny this, although he also says that he told Mr Mutze that resigning was his (Mr Mutze's) decision.

[14] Mr Mutze did not resign before the next meeting. He said that this was because he had been confused at the time and his emotions had been everywhere. He also said that he was trying to be strong and was concerned about keeping the job. He cared about the industry too.

[15] The meeting notes also show that the meeting on 11 June was adjourned after 20 minutes, until 10:00am the following day. Mr Burnett's evidence was that the reason for the adjournment was so that he could talk to the other members of staff about the issues that had been raised in the meeting of 11 June. Apparently, though, he did not do so, although he could not remember why, although he suspected that Kane, whom he had wanted to talk to, had not been present.

[16] Mr Mutze's evidence is that Mr Burnett knew that he suffered from post-traumatic stress disorder and must have known that he would find the adjournment very stressful. Mr Burnett denies that he knew that Mr Mutze suffered from post-traumatic stress disorder. On this point, Mr Mutze stated in evidence that Mr Burnett had been present at a conversation in which he and his previous employer had discussed Mr Mutze's post-traumatic stress disorder, but that he had not told him directly. For this reason, I prefer Mr Burnett's evidence that he did not know that Mr Mutze suffered from post-traumatic stress disorder.

*The meeting of 12 June*

[17] Mr Mutze says that he went to work the following day (12 June) and found the atmosphere at work *chilly and unpleasant*, and that, when he asked Mr Burnett for some assistance because of the pressure of work no assistance was forthcoming, which Mr Mutze *thought was an ominous sign*. Mr Burnett denies that he was asked for assistance.

[18] The reconvened meeting also took place on 12 June, and the notes of the meeting of 12 June record that Mr Mutze was *happy not to have [a] support person*. Mr Mutze's evidence is that he was not happy, but that he had agreed to go ahead without a support person because he had wanted to progress the meeting without further delay.

[19] The notes of the meeting of 12 June also indicate that Mr Mutze denied ever having marked product down that was not already a mark-down, that the meeting would be adjourned until 4:30pm on Thursday, 14 June, and that Mr Burnett would be conducting a formal meeting with Kane to understand his involvement in the incident. Mr Burnett says that he had by now accepted Mr Mutze's assertions about mark downs, but he was not certain that he had articulated this acceptance to Mr Mutze.

[20] Mr Burnett's evidence is that he had asked the store manager to question the co-worker Kane about eating food from the pig bin and that, when the manager had done so on 13 June, Kane had denied that he had known the cake had come from the pig bin. Mr Burnett had accepted this denial because Kane was *a straight up butcher who had worked from him as an apprentice and who spoke his mind*. Mr Burnett said that this had therefore been a completely different situation from Mr Mutze's, and that there was no disparity of treatment between Mr Mutze and Kane.

#### *Discussion of resignation*

[21] The notes of the meeting on 12 June also indicate that Mr Mutze *indicated that resignation is an option*. The notes then go on to say *Kyle [Mr Burnett] indicated that that would be Rob's choice but it would need to happen prior to the Thursday, 4:30pm meeting*. Mr Burnett said that he had said the same thing every time that Mr Mutze had mentioned the possibility of resigning, although it is not clear that Mr Mutze mentioned resigning more than twice.

[22] Mr Mutze's evidence in his brief of evidence about why he had offered to resign was that Mr Burnett had told him that the respondent did not tolerate *such*

*misbehaviour and that, depending on the outcome of its meeting with another employee, the respondent would be dismissing me.*

### *Suspension*

[23] The notes of the meeting of the 12 June also indicate that Mr Mutze was to be suspended on pay until the meeting of the 14 June. Mr Mutze says that he was not told why he was being suspended, nor was he asked whether he wished to make any comment about whether or not he should be suspended. He says he accepted being suspended because he thought he had no choice in the matter. He said in evidence that he had been stressed at being suspended, because he had to spend time at home, and may have been better off at work. He also said that he would have struggled at work, but that he would have liked to have been given a day to see how he would have coped.

[24] Mr Burnett's evidence is that he suspended Mr Mutze because of a serious breach of health and safety by Mr Mutze. However, he was unable to say why he had not suspended Mr Mutze from 6 June or even 11 June.

### *Meeting of 14 June*

[25] Mr Mutze's written evidence is that, when he arrived at work on 14 June 2012 for the third meeting, he found that his swipe card had already been deactivated and this:

*... coupled with the respondent's statements, made me believe that I had no option but to resign. I was undoubtedly going to be dismissed and my dismissal was already pre-determined.*

[26] Mr Mutze's evidence is that, at the third meeting, on 14 June 2012, new allegations were put to him, including that his actions had brought the company into disrepute and that he was asked about eating cereal out of the rubbish bin.

[27] The notes of the meeting of the 14th June also show that Mr Burnett stated that he felt that Mr Mutze's conduct *has destroyed the relationship of trust and confidence*. The notes also record, however, that Mr Burnett next asked how Mr Mutze expected to regain the company's trust and confidence. The notes show that Mr Mutze responded to that question in some detail. Further questions were then asked about Mr Mutze's training about food safety, whether he had read the staff manual, and whether the cake had been safe to eat.

[28] At the Authority's investigation meeting Mr Mutze said that he felt that Mr Burnett had already decided to dismiss him when he had arrived to work on 14 June, for the reconvened meeting, to find that his access card had been deactivated, and later in the day when Mr Burnett had said that he felt that Mr Mutze's conduct had destroyed the relationship of trust and confidence.

*Resignation*

[29] Mr Mutze's evidence is that Mr Burnett adjourned the third meeting until the following day and told Mr Mutze that, if he wished to tender his resignation, he had to do it before that fourth meeting. Mr Burnett denies he said that on 14 June. Mr Mutze's written evidence is that he was absolutely certain that the termination of his employment was already pre-determined and that he would be dismissed at the fourth meeting and so he tendered his resignation on 15 June in order that he would not have a dismissal on his work record.

[30] The wording of his letter of resignation, which was given to Mr Burnett on the 15th June 2012, is as follows:

*Date: 15.06.12*

*Dear Kyle*

*I am writing this letter to hand in my resignation. My last working day will be the 22<sup>nd</sup> of June. I have enjoyed most of my time working in your Supermarket and I'm grateful with what I have learned since I have been with you. Thank you for giving me this opportunity and taking me on after the earthquake. I wish you and your business the best of luck for the future.*

*Yours sincerely,*

*Wanja Robert Mutze*

[31] Mr Mutze says that he did not mention the events of the disciplinary process in his resignation letter because he had wanted to be professional.

[32] Mr Burnett's evidence is that he had arranged to consult with his legal counsel at 10:00am on 15 June 2012 and was still on the phone to her at 10:40am when Mr Mutze arrived. He said that he had still not made his decision but, when he got off the phone, Mr Mutze tendered his resignation. He did not discuss with Mr Mutze why he had resigned, but took advice about whether he could accept it. A handwritten note

on the letter of resignation shown to the Authority stated that Mr Mutze would be paid until 22 June but that he would not be required to work in that time.

*Effects on Mr Mutze*

[33] Mr Mutze's written evidence is that, after he stopped working for the company, he became very anxious and had panic attacks. He says he had difficulty sleeping and would cry a lot. He says he lost his confidence and found it very difficult doing simple tasks and making decisions. His mood and motivation were very low he said.

*The respondent's evidence*

[34] Mr Burnett's evidence is that the respondent company had a policy that unauthorised possession and/or movement of company property including scrap, waste and damaged items is a cause for *instant dismissal*. Mr Burnett explained that there were important reasons for that policy, namely, that in a supermarket, proper handling of scrap and waste is very important to health and safety and it is critical that staff follow the policy.

[35] It is Mr Burnett's evidence that eating food from the *pig bin* was not a joke as policies about food consumption were an important aspect of health and safety and therefore he had needed to investigate the matter. He said that calling the matter a *prank*, as Mr Mutze's counsel had, was trivialising the matter. Selling food was their livelihood, and that if people were allowed to eat rubbish, then their business would *tank* (i.e., decline rapidly).

[36] In deciding what the outcome should be at the time Mr Mutze resigned, Mr Burnett said that he had been weighing up, on the one hand, Mr Mutze's value to the business, because of the success he had had in raising sales in the produce department, against, on the other hand, the seriousness of the conduct of taking waste product from a waste bin and consuming it.

[37] Mr Burnett says that at no time did he advise Mr Mutze that there would be a dismissal and he also denies that he told Mr Mutze that he needed to resign prior to the meeting of 15 June to prevent a dismissal.

[38] Mr Burnett's evidence is that Mr Mutze stated during the 14th June meeting that other people had eaten food out of the pig bin and that they had been told that they could eat the food. Mr Burnett said that he investigated this with the produce manager and, whilst she did not believe it was commonplace, he did take Mr Mutze's statement at face value and it was a matter he was considering as he weighed up his decision about Mr Mutze's employment.

[39] Mr Burnett denies that termination of Mr Mutze's employment was ever pre-determined; he says that Mr Mutze was the only person who had admitted taking food from the pig bin and eating it; that Mr Mutze had elected to resign during the process and that he had given Mr Mutze plenty of opportunity to carefully consider that option but, at the same time, he did need to complete the investigation as the situation was serious. Mr Mutze had not given him a chance to complete the investigation before resigning.

[40] Mr Burnett believes that he had acted at all times fairly towards Mr Mutze.

### **The issues**

[41] There are three issues to consider:

- a. Was Mr Mutze unjustifiably constructively dismissed?
- b. Did Mr Mutze suffer an unjustified disadvantage in his employment by being suspended?
- c. Did Mr Mutze suffer an unjustified disadvantage in his employment by having to attend four investigation meetings?

### **Was Mr Mutze unjustifiably constructively dismissed?**

[42] In deciding a case of alleged unjustified dismissal, it is necessary to start with Section 103A of the Employment Relations Act 2000, which provides as follows:

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

*could have done in all the circumstances at the time the dismissal or action occurred.*

- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[43] The law in relation to constructive dismissals in New Zealand is well settled. Constructive dismissal can arise in one of three ways: (*Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372).

- a. The employer gives the employee a choice between resigning or being dismissed;
- b. The employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- c. There is a breach of duty by the employer which leads the employee to resign.

[44] The essential questions to be addressed in constructive dismissal cases are:

- a. What were the terms of the contract?
- b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

*Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ SEL CAS 95 (AC).

[45] A typical constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407).

[46] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable. (*Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

[47] In order to find that Mr Mutze had been constructively dismissed, I would have to find that he both reasonably believed that Mr Burnett was about to dismiss him and also that that dismissal would have been unjustified. Mr Mutze cannot succeed in his unjustified constructive dismissal application if he had come to a conclusion that he was going to be dismissed when such a dismissal would have been justified in any event. In such a case, all that Mr Mutze would have been doing was resigning in order to avoid a fair dismissal being shown on his record, which would have been a voluntary act by Mr Mutze.

[48] In other words, Mr Mutze must show that he resigned as a response to a repudiatory action by his employer which, in this case, would be that an unlawful dismissal was about to occur.

[49] First, the allegation that Mr Mutze was facing was *taking and consuming products from the blue bins in the yard without authorisation*. There are two relevant examples of misconduct cited in the staff manual that are said to be causes for *instant*

*dismissal.* Although, legally, instant dismissal can rarely be appropriate (as a fair process must always be followed prior to dismissal save where ss. 67A and 67B apply) I interpret this phrase as indicating instances of serious misconduct. The two examples are;

*Unauthorised possession and/or movement of company, clients' or other workers' property, including scrap, waste and damaged items.*  
*Unauthorised consumption of company merchandise.*

[50] Mr Mutze admitted taking food from the pig bin and taking a bite out of it and, in my view, what Mr Mutze admits doing could fall under either category of serious misconduct. In light of this, I conclude that Mr Mutze's admitted action could substantially have justified a finding of serious misconduct, which in turn could have justified dismissal.

[51] Additionally, Mr Mutze was aware, because of the contents of the letter dated 6 June 2012, that the investigation in which he admitted the conduct in question was a disciplinary meeting, and that, *if some or all of the concerns are found to have substance, disciplinary action may be taken, ..... which could include dismissal.* His admission to the conduct was therefore given after having been told of the risk of dismissal.

[52] Mr Mutze stated in evidence that, had he known that his action had been classed as serious misconduct, he would not have done it. He also said that he had quickly read the staff manual when he had joined the respondent, but had not been given a copy. He also said that a copy had been available in the staff room. His argument is that dismissal would not have been reasonable because he had not known that eating produce from the pig bin was serious misconduct.

[53] However, the question to ask is whether he ought reasonably to have known that eating produce from the pig bin was viewed by his employer as serious misconduct. In concluding that he ought reasonably to have known this, I take into account two facts. The first is that he had read the staff manual. If he had done it so quickly that he did not take in the details, he should have asked for more time to digest it. This was not his first job in a supermarket, and he should have known that the staff manual would have contained a lot of information essential to his work.

[54] Secondly, he had been recruited as produce manager, and although he had asked to be downgraded to assistant manager, he was still of managerial status, still

supervised staff, and should have known the expectations of his employer. In conclusion, therefore, I believe that, even if he had not known expressly that eating food from the pig bin was viewed by his employer as serious misconduct, that cannot be the fault of his employer. The respondent can reasonably have expected him to have become familiar with the rules of the workplace; especially those that could lead to disciplinary action.

[55] Having admitted to conduct that he should reasonably have known was viewed as serious misconduct, arguably there is no need for the Authority to look further into the fairness of the process followed. I refer to the 1998 Employment Court case of *Murphy and Routhan t/a Enzo's Pizza v. van Beek* [1998] 2 ERNZ 607. In that case, an employee admitted taking pizzas, not paying for them and not recording them over a three week period. Goddard CJ held at p.620 that:

*An employer who has carried out no inquiry as to the possible existence of innocent explanations for apparently irregular conduct cannot claim to have reasonably reached an honest belief that the employee was guilty of serious misconduct justifying dismissal. However, that requirement does not extend to admitted conduct. ... The respondent ... admitted ... taking home five pizzas. This was enough for the appellants' purposes. The admission rendered it unnecessary for the respondent to be given any more time.*

*What then is to be said about the appellants' procedure? It was no doubt seen by the respondent as inconsiderate and uncaring. The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair inquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy. Nor does it matter that there are differences in detail between the admission and the complaint if the differences bear only on the extent or frequency of the apparent wrongdoing but do not contradict the basic premise that it had taken place. In this case, the differences between the parties prior to dismissal were that the employee admitted making up pizzas and taking them home but denied reselling them and admitted taking five in 3 weeks but denied taking 14. It cannot be said to be unfair or unreasonable for an employer to act at once on such an admission.*

[56] It is my view that the basic principle expressed in *Enzo's Pizza* is still good law despite it being decided prior to the coming into force of the Act and the test at s.103A. If an employee admits that he did the act that is being investigated, then,

depending on the act admitted, that admission could well obviate the need for further investigation, save to inquire whether there were any mitigating factors (such as previously unblemished record) which could or should persuade the employer that dismissal was not what a fair and reasonable employer could do in all the circumstances.

[57] On this analysis, therefore, it is arguable that following an admission by Mr Mutze of conduct that can amount to serious misconduct justifying dismissal, there is no need to enquire whether the process followed by Mr Burnett was what a fair and reasonable employer could have done in all the circumstances, save to consider whether he considered what mitigating factors to consider. Mr Burnett's evidence is that he did just that when doing the weighing up exercise prior to the resignation. It follows from that, that even if Mr Mutze had actually detected that Mr Burnett was going to dismiss him, such a dismissal would have been justified, and so the resignation cannot be an unjustified constructive dismissal.

[58] However, for completeness, I shall examine briefly whether there was procedural unfairness that could have resulted in an unjustified dismissal. The issues complained of by Mr Mutze are:

- a. Not being given more than 24 hours' notice of the first meeting;
- b. Not being told he could have a legal representative present;
- c. Not being warned that he was going to be questioned about matters apart from the cake;
- d. Disparity of treatment as between Mr Mutze and Kane; and
- e. Mr Burnett had predetermined the outcome.

*Not being given more than 24 hours' notice of the first meeting*

[59] Whilst this is correct, there is no hard and fast rule that an employee must be given more than 24 hours' notice of a disciplinary meeting. What is important is that the employee has time to arrange a support person and also prepare adequately for the meeting. This may well be achievable in many cases within the space of 24 hours. However, although it was not sufficient in Mr Mutze's case, he did ask for more time

and this was granted. There was no significant prejudice to Mr Mutze therefore, and I do not accept that it would have caused any dismissal to have been unjustified.

*Not being told he could have a legal representative present*

[60] The letter dated 6 June does not stipulate that Mr Mutze could bring a legal representative (or any representative) to the disciplinary meeting. Mr Mutze said that had he known he could, he would have done so. This is certainly a procedural flaw. However, given that Mr Mutze admitted the conduct, (and to have done otherwise would have caused him to lie, or otherwise not to act in good faith towards his employer) I am not convinced that the presence of a lawyer would have made any substantial difference to Mr Mutze. I believe that this flaw was minor; and did not result in Mr Mutze being treated unfairly.

*Not being warned that he was going to be questioned about matters apart from the cake*

[61] It was undoubtedly a surprise to Mr Mutze to be questioned at the first meeting about marking down products and wanting to get deals. Understandably, Mr Mutze stated that he felt ambushed by this approach. If Mr Burnett's purpose had been to see whether Mr Mutze had committed misconduct in respect of these other issues, then his failure to forewarn Mr Mutze that he was going to be investigating them would not have been what a fair and reasonable employer could have done in all the circumstances. However, Mr Burnett's oral evidence was that he had asked these questions in order to judge whether Mr Mutze eating the cake from the pig bin had been motivated by a desire to get something for free or whether it was done as a joke.

[62] Whilst Mr Burnett's questions seem to be a little odd, on balance I accept this explanation, and so believe that the failure to forewarn Mr Mutze of the questions did not prejudice him, as they were related to the core issue of eating the cake. Also, whilst Mr Mutze stated in cross examination that he was a little confused by the questions, the notes show that he was able to respond to the questions and deny any wrong doing.

[63] The other new matter that came up, during the meeting of 14 June, was that Mr Mutze had been seen to have eaten waste cereal. Mr Mutze had said that several

staff had been doing it, because the staff member responsible for clearing the bulk bins would put the broken bits and pieces in a bag, so that staff could help themselves. It is not clear from the notes whether Mr Burnett was treating this as a separate issue for disciplinary investigation, or part of the cake investigation, although Mr Burnett said during the Authority's investigation meeting that Mr Mutze had brought the matter up of staff eating products, so he had had to investigate it. I accept that. On balance, I am unable to conclude that Mr Burnett had ambushed Mr Mutze in respect of his questions about eating waste cereal for the purposes of investigating a fresh alleged incident of misconduct.

[64] In summary, I do not believe that the approach taken by Mr Burnett up to Mr Mutze's resignation was sufficient to enable me to conclude that a dismissal would have been procedurally unjustified.

*Disparity of treatment as between Mr Mutze and Kane*

[65] Mr Mutze sees the treatment meted out to him as different to that meted out to Kane as unfairly disparate, because he maintains that Kane knew all along that the cake he had offered Kane had come out of the pig bin. However, Mr Burnett had not been present at the time and so could only rely on the two contradictory statements made by the two staff members. He had no definite way of determining who was telling the truth. He chose to believe Kane, and had a reason for that which does not appear to be so unreasonable that no fair and reasonable employer could have come to that conclusion in all the circumstances.

[66] Therefore, I am unable to conclude that the difference in treatment between Mr Mutze and Kane was unjustified.

*Mr Burnett had predetermined the outcome*

[67] Mr Mutze maintains this because of two main factors:

- a. on 14 June he turned up for a meeting and found that his key card had been deactivated; and
- b. Mr Burnett had stated on 14 June that he had lost trust and confidence in Mr Mutze.

[68] Mr Burnett said that he always deactivated someone's key card when they were suspended. This appears to be credible, as the whole point behind a suspension is to remove the employee temporarily from the work place. Removing their right of access temporarily would be part of that process. I do not accept, therefore, that it is reasonable to conclude that it was evidence of predetermination.

[69] Mr Burnett's evidence was that he had stated that he felt that he had lost trust and confidence in Mr Mutze because it would help Mr Mutze to understand what Mr Burnett was feeling, and give him an opportunity to respond to that. I believe this explanation, because the next question asked of Mr Mutze was what he could do to regain their trust and confidence. Mr Burnett would not have asked that if he had already determined to dismiss Mr Mutze.

### *Conclusion*

[70] Mr Mutze's admission of conduct (eating waste food from the pig bin) that amounted to serious misconduct means that, had Mr Mutze then been dismissed, it would have been a justified dismissal because Mr Burnett did weigh up mitigating factors. Even if that is an incorrect approach, I am not of the view that the alleged procedural infelicities cited by Mr Mutze would have led to a finding of unjustified dismissal as I do not believe that they were actions that no fair and reasonable employer could have done in all the circumstances.

[71] Having found that, if there had been a dismissal it would have been justified, Mr Mutze being convinced that he was going to be dismissed and resigning as a consequence cannot lead to a finding of unjustified dismissal because his resignation would not have been in response to any repudiatory breach of contract by the respondent, which is a necessary element of a constructive dismissal.

[72] Mr Mutze's constructive dismissal claim must therefore fail.

### **Did Mr Mutze suffer an unjustified disadvantage in his employment by being suspended?**

[73] Mr Burnett's explanation for suspending Mr Mutze was because of what he called a serious breach of health and safety by Mr Mutze. However, it is not clear what potential mischief Mr Burnett was trying to protect his business from by having Mr Mutze suspended on pay. It was not because he believed that Mr Mutze would

interfere with witnesses because that was not the reason given. If it had been, that may have been justified. However, I am unconvinced that Mr Burnett genuinely believed that Mr Mutze would commit further serious breaches of health and safety if he remained in the workplace.

[74] Mr Mutze's evidence was that he felt stressed being at home instead of work, and that he would have liked to have been given the chance to try to work during the investigation. I accept that evidence. I therefore accept that Mr Mutze was disadvantaged in his employment by being suspended.

[75] I also conclude that no fair and reasonable employer could have decided to suspend Mr Mutze in all the circumstances. I therefore accept that Mr Mutze suffered an unjustified disadvantage in his employment by having been suspended.

**Did Mr Mutze suffer an unjustified disadvantage in his employment by having to attend four investigation meetings?**

[76] Mr Mutze says that Mr Burnett knew that he was suffering from post-traumatic stress disorder and that he should have known that making him attend four meetings would have caused him stress. However, I have already found, on balance, that Mr Burnett did not know about the post-traumatic stress disorder, although he knew he had suffered from stress in the past.

[77] I accept that Mr Mutze felt stressed by attending the four meetings. Having to attend any disciplinary meeting has the potential to cause a disadvantage on employment. However, I cannot conclude that no fair and reasonable employer could have required Mr Mutze to attend four meetings. Mr Burnett did not do so arbitrarily, or capriciously, and there is no evidence that Mr Mutze complained at the time of having to attend the meetings. Therefore, I do not find that Mr Mutze was caused an unjustified disadvantage in his employment by being made to attend four disciplinary investigation meetings.

**Remedies**

[78] Having found that Mr Mutze suffered an unjustified disadvantage in his employment by being suspended, he is entitled to be considered for remedies. He suffered no financial loss, as the suspension was on pay. He may, however, be entitled to compensation under s. 123(1)(c)(i) of the Act for humiliation, loss of

dignity and injury to his feelings. I accept Mr Mutze's evidence that being suspended caused him stress.

[79] However, I am mindful that the suspension lasted only two days and so that stress would have been short lived. In the circumstances, I believe that \$500 is ample compensation.

[80] I am obliged to consider under s.124 of the Act whether Mr Mutze's actions contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies accordingly. Although Mr Mutze contributed to the situation giving rise to the disciplinary investigation, he did not contribute to the situation giving rise to the suspension. I therefore decline to reduce the award.

### **Order**

[81] The respondent is ordered to pay to Mr Mutze the sum of \$500 under s.123(1)(c)(i) of the Act.

### **Costs**

[82] The parties are directed to seek to agree how costs are to be dealt with between them, but in the absence of such agreement, any party seeking costs may do so by serving a lodging a memorandum of costs within 28 days of the date of this determination, and any memorandum in opposition must be served and lodged within a further 14 days.

D Appleton  
Member of the Employment Relations Authority.