

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 69
3014136

BETWEEN PHILLIP O'BRIEN
 Applicant

AND AUCKLAND MEAT
 PROCESSORS LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Simon Mitchell and Jeremy Lynch for Applicant
 Blair Edwards and Anna Jackman for Respondent

Investigation Meeting: 15 August 2017 at Hamilton

Submissions received: 21 and 23 August 2017 for Applicant and 17 and 23
 August and 28 November 2017 for Respondent

Determination: 28 February 2018

DETERMINATION OF THE AUTHORITY

- A. Phillip O'Brien was unjustifiably suspended and unjustifiably dismissed by Auckland Meat Processors Limited.**
- B. Mr O'Brien's application for reinstatement is declined.**
- C. Within 28 days of the date of this determination, Auckland Meat Processors Ltd is ordered to pay Mr O'Brien the following:**
- (a) \$4256.53 gross as lost wages; and**
 - (b) \$13,500.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- D. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] Phillip O'Brien is a slaughterman who worked at part of the Ruakura meat processing plant for about 12 years. Auckland Meat Processors Limited is part of the Wilson Hellaby group. Wilson Hellaby had owned another part of the Ruakura plant previously. In 2014 it took over another part of the plant which had been operated by AgResearch, where Mr O'Brien worked. Auckland Meat Processors Ltd operated under the name Ruakura Meat Processors (RMP).

[2] In 2016 the Ruakura plant underwent a major upgrade and shutdown period, and the plant then moved from its previous lamb and beef processing to pig processing.

[3] Mr O'Brien was the union delegate at RMP. An incident occurred on 1 June 2017 where he stopped the pig processing line due to a disagreement with the supervisor of the slaughter chain, Sid Murfitt, about a work task. After some discussion Mr O'Brien turned the chain on again and work recommenced.

[4] Later that day Mr O'Brien was suspended on pay. He attended an investigation meeting on 6 June 2017 and then to a disciplinary meeting on 8 June 2017, both with Mark Stirling (Regional Plant Manager) and Malcolm Hampton (General Manager). Mr O'Brien was dismissed on 8 June 2017, for the stopping of processing and refusing to restart it, which RMP characterised as serious misconduct.

[5] Mr O'Brien claims that his suspension and dismissal were unjustified. His employer (referred to as RMP or the company) says that Mr O'Brien's dismissal was justified. Mr O'Brien initially filed for interim reinstatement but the parties agreed to go promptly to a substantive hearing instead.

[6] An investigation meeting was held in Hamilton and evidence heard from Mr O'Brien, Wayne Barham (organiser for the New Zealand Meat Workers Union), Mr Murfitt, Mr Stirling and Mr Hampton.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the

parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Mr O'Brien's history at Raukura

[8] Mr O'Brien is an experienced slaughterman, having worked in the meat industry for over 45 years. Although he had worked at Raukura for about 12 years, only about three of those were for Auckland Meat Processors Ltd.

[9] Mr O'Brien had been a union delegate for about five years. Initially this was with the Public Service Association (PSA) when this part of Raukura was operated by AgResearch. When RMP bought the plant, Mr O'Brien joined the Meat Workers Union (the union) and became its delegate. The union took over responsibility for the site from the PSA in late May 2017, just days before Mr O'Brien stopped the line. He had not had any delegate training with the Meat Workers Union by 1 June 2017.

[10] There was no suggestion that the change of union had any effect on Mr O'Brien's actions on 1 June 2017 or on RMP's actions.

Removing and collecting pigs' ears and kidneys

[11] Pig processing had only been undertaken at Raukura since about November 2016. The task about which Mr O'Brien stopped the line was the removing, collecting and bagging of pig ears and kidneys, followed by labelling and putting the bag in the chiller (the collection). Earlier the collection had been done by external contractors referred to as meat inspectors, supplied by Asure Quality (Asure).

[12] Due to a reduction in the availability of meat inspectors agreed between RMP and Asure, there was not always a meat inspector in the immediate area to undertake the collection task. There were also staffing shortages around the same time, due to illness and injury. As a result RMP was often requiring its staff to perform two or three tasks on the chain each. This included the collection task which RMP slaughtermen were being required take over at points on most days.

[13] Union members were concerned about having to undertake multiple tasks on the chain. On 31 May 2017 members had mentioned to Mr O'Brien, as the union delegate, that they were having to do the collection job. Mr O'Brien told them that it

was not their job; rather it was an Asure job. The reason for his view was a job description which is referred to in more detail below.

[14] The slaughtermen's concern seems not to have been the nature of the collection job itself, rather having to do that along with various other jobs on the processing line. So, on 31 May for example, the offal person (dealing with hearts and livers) was asked to jump over and do the ears as well. Mr O'Brien considered that that was too much. That was why the slaughtermen started to complain about it.

[15] Mr O'Brien frankly acknowledged that he had not raised the concerns about this particular issue with RMP prior to 1 June 2017. Mr O'Brien was reluctant to name the other workers who had raised the issue about the ears and kidneys job the day before with him. He accepted that the union had no knowledge of those concerns. Until 1 June 2017, Mr Murfitt was not aware of any issues about what the slaughtermen did as compared with the meat inspectors

Job descriptions

[16] Mr O'Brien's view that the RMP workers should not have to undertake the collection task was based on a job description which he received around Christmas 2016 (the 2016 job description). This was the only job description he recalled seeing.

[17] The 2016 job description was provided by Mr Murfitt when an audit was being undertaken and a vet was coming for an inspection. Mr O'Brien asked Mr Murfitt about not having a job description for various different jobs on the line and Mr Murfitt gave the document to him. Mr Murfitt was pressed for time and says he threw the job description together from an old mutton floor job description which he changed to pigs.

[18] He asked Mr O'Brien if he wanted to make any changes to let Mr Murfitt know. Mr O'Brien handed it around to the workers but did not think there were any comments at that point. Mr Murfitt did not get any feedback from it from Mr O'Brien or any other slaughtermen. Mr Murfitt says that no steps had been taken to amend or finalise the job description because he had heard from the Auckland office that they had a process for job descriptions. They were still in the process of doing it.

[19] The 2016 job description had the following entry:

...ears and kidneys are collected by Asure.

[20] RMP says that the 2016 job description was only ever a draft. Its position at the investigation meeting was that the job description in operation was one from 2012 which was an AgResearch document (the 2012 job description), although pigs were not slaughtered at the plant at that time. Mr Stirling considered that Mr O'Brien was aware of the 2012 job agreement as he recalled Mr O'Brien saying to him "*I see you've slipped pigs in*".

[21] Mr Murfitt thought that the 2012 job description would have gone out with the new collective agreement to each of the slaughtermen. He was covered by the collective agreement at that point and was sent a copy of it. Mr O'Brien was unable to recall that job description.

[22] The 2012 job description includes slaughtering of animals, including that of pigs. It also included a general provision that other duties can be undertaken as required.

[23] When asked whether the 2016 agreement might seem like the more relevant document than the 2012 document, being newer and focused on pigs, Mr Hampton said that Mr O'Brien obviously held that view.

[24] After the investigation meeting, when the parties were in the process of filing submissions, RMP identified that there was a version of the 2012 job description, but with the Wilson Hellaby letterhead, dated August 2014, from when Wilson Hellaby took over the part of Ruakura where Mr O'Brien worked.

[25] There are some indications that the 2016 job description is a draft. It is headed "1.0 Slaughter man 1", rather than referring to "Job description" and/or the company's name and appears not to have been spell checked or formatted consistently. However, I note Mr O'Brien's evidence of his limited high school education and the fact that his job was not one focused on paperwork.

[26] Particularly as union members had had no comments, it was credible that Mr O'Brien assumed that the job description had been finalised. Job descriptions were generally kept in the supervisor's or compliance person's office and so Mr O'Brien

would not necessarily have expected to see a finalised version. I accept that Mr O'Brien genuinely thought that the 2016 job description was in effect.

Raising the collection issue with the supervisor

[27] On 1 June 2017 Mr O'Brien spoke to the slaughtermen during the smoko break and said that he was going to talk to the supervisor because the collection job was not in their job description.

[28] Mr O'Brien approached Mr Murfitt towards the end the break and told him that the slaughtermen would no longer be removing pigs' ears and kidneys as it was not part of their job description. He asked Mr Murfitt to tell the plant manager.

[29] There was some discussion, with Mr Murfitt expressing surprise because he had forgotten about drafting the 2016 job description and giving it to Mr O'Brien. Mr Murfitt said that they would talk about it later.

[30] Mr O'Brien went outside to his car, got the job description and took it to Mr Murfitt. The discussion was somewhat heated with, with Mr O'Brien asking whether Mr Murfitt was calling it a false document. Mr Murfitt said he needed Mr O'Brien on the line and Mr O'Brien went back to work. At that point the ears and kidneys were being done by the meat inspector.

The line

[31] There was about ten staff working on the processing line, also sometimes referred to as the chain. The line can be stopped and started by pushing a button. It is stopped quite often for breaks, if one task is getting behind the others, or a bin is full and needs to be emptied. Any staff member on the line can do it as there is a button behind them on the wall.

[32] Mr O'Brien had not previously stopped the line for industrial issues. There did not appear to be any history of stopping the line being undertaken for industrial dispute purposes.

Stopping the line

[33] About an hour after his discussion with Mr Murfitt, Mr O'Brien noticed that another slaughterman had been given the collection task. That slaughterman had recently become a union member. Mr Murfitt was standing nearby.

[34] Mr O'Brien pushed the button stopping the line. He asked Mr Murfitt what the other slaughterman was doing and for that slaughterman to be taken off the collection job. Mr Murfitt said that he would not and told Mr O'Brien to start the line up. Mr O'Brien refused because the work was not in the RMP slaughterman's job description. He asked Mr Murfitt to remove the work from the slaughterman so Mr O'Brien could restart the line. Mr Murfitt repeated his demand for the line to be started.

[35] Mr Murfitt then told Mr O'Brien to go to his office and Mr Stirling was called. Mr Murfitt said that he could put that slaughterman anywhere, he's not one of you (referring to union members). Mr Murfitt was not aware that the man in question had recently joined the union. The suggestion was that different rules applied to those who were not union members, or at least that Mr O'Brien no authority to complain about what was happening to non-members.

[36] Mr O'Brien accepts that Mr Murfitt asked him three times to start the chain again. Mr O'Brien asked him to remove the man from the collection job then he would start the chain again. Mr Murfitt refused to do that.

Re-starting the line

[37] During the discussion in the office, a reference to sacking was made by Mr Murfitt. He says that his comment was that if it was up to him he would sack Mr O'Brien. Mr O'Brien says that he was told that he was sacked and could clear out his locker and piss off, which Mr O'Brien took to mean he was summarily dismissed. Mr Murfitt says that it was Mr O'Brien who responded to Mr Murfitt's comment about his view on sacking, by saying something like "well in that case I'll go to my locker and piss off".

[38] Mr Stirling made a comment about that not being a good idea to Mr Murfitt, as Mr O'Brien was leaving the office. Mr O'Brien took this as confirmation by Mr Stirling that Mr Murfitt had sacked him. However, Mr Stirling says that Mr O'Brien

was not dismissed in the office. He accepted that he may have said something like “don’t do that it’s not a good idea” in terms Mr Murfitt dismissing Mr O'Brien.

[39] During a heated discussion there is potential for misunderstanding as to what is said or heard. In any event, the parties are in agreement that Mr O'Brien restarted the line, kept working and the backlog was cleared. Mr Murfitt confirmed during the lunch break, when asked by Mr O'Brien, that he still had his job.

Cost of the stoppage

[40] The chain was off for about 15 or 20 minutes.

[41] Mr O'Brien accepts that there was a cost in stopping production in terms of a loss of time but says that no animals were lost. When it was suggested to him that some offal had to be destroyed, Mr O'Brien said that they only collect so much offal depending on what the orders are for the day and the rest gets dumped anyway.

[42] Mr Murfitt says that some product got wasted as a result of Mr O'Brien being suspended. RMP did not quantify the extent of its losses nor attempt to counterclaim for them in this proceeding. It did reserve its position regarding pursuing Mr O'Brien at a later date.

Suspension

[43] Following the initial meeting which resulted in Mr O'Brien re-starting the line, Mr Stirling spoke on the phone to Mr Hampton, who was based elsewhere. During the discussion it was agreed that they would suspend Mr O'Brien on pay to begin an investigation. Mr Hampton accepted that at the time he decided to suspend he had not spoken to Mr O'Brien.

[44] After lunch Mr O'Brien was called to a meeting with Mr Stirling who told him that he had been stood down on full pay pending an inquiry being held. Mr Murfitt was not at the suspension meeting. He was supposed to be but he was called away to the slaughter floor.

[45] The decision to suspend was notified to Mr O'Brien as a fait accompli, which he did not have a chance to comment on before it was made. I find that the failure to

give him an opportunity to be heard was an unjustified action by RMP to Mr O'Brien's disadvantage.¹

The investigation meeting

[46] The following day, 2 June 2017, RMP wrote to Mr O'Brien inviting him to an investigation meeting on 6 June 2017. He was invited to bring a representative with him. The possibility of the investigation meeting leading to disciplinary action, including dismissal, was referred to.

[47] Mr O'Brien and Mr Barham attended the 6 June meeting with Mr Hampton and Mr Stirling. The meeting lasted over two hours, including breaks.

[48] During one of the breaks, Mr Murfitt was approached and his statement was taken by Mr Hampton and Mr Stirling. Notes were taken by Mr Hampton.

[49] Mr Barham emphasised that Mr O'Brien had a clean record in the time he had worked in the plant and had understood that the 2016 job description was in operation. RMP were provided with three names of people who may have heard what occurred by the line or in the office.

The disciplinary meeting

[50] Mr O'Brien and Mr Barham were then called to a disciplinary meeting with Mr Hampton and Mr Stirling on 8 June 2017.

[51] Mr Barham objected that the process was rushed and suggested that the company may already have made up its mind. Further, Mr O'Brien was relying on the 2016 job description which clearly showed the Asure meat inspectors doing the collection job.

[52] Mr O'Brien was told at the end of the meeting that he was dismissed.

The dismissal letter

[53] The dismissal letter of 8 June 2017 states that RMP concluded that Mr O'Brien had stopped the chain and refused requests on several occasions from the

¹ *B & D Doors Ltd v Hamilton* [2007] 5 NZELR 69 at [80]

supervisor and the manager to restart because of his views on a staffing position, and that this was serious misconduct.

[54] There is no reference to a disciplinary policy, code of conduct or the like and no mention of a particular type of serious misconduct which RMP categorises Mr O'Brien's actions as being.

Justification for Mr O'Brien's dismissal

[55] Under a 103A of the Act I must assess whether the employer's actions and how it acted were what a reasonable employer could have done in all the circumstances.

Reasons for dismissal

[56] The dismissal letter identifies Mr O'Brien's stopping the line and with failure to restart it upon requests, as being the reason for the dismissal. Focusing on the requests to re-start part, failure to follow a lawful and reasonable instruction may be a ground for dismissal.

[57] There is no dispute that Mr O'Brien stopped the line or that he refused, for a period of around 15 minutes, to agree to requests to restart it. In this time Mr Stirling was called and attended a meeting with Mr O'Brien and Mr Murfitt. Either Mr Stirling or Mr Murfitt could have pushed the button to restart the line but did not. Mr O'Brien did comply with the request after a time.

[58] On the face of the dismissal letter RMP dealt with the matter on the basis of the stopping and refusal to re-start, being serious misconduct and that justifying dismissal. The letter does not deal at all with the issue of Mr O'Brien's belief that work was being undertaken outside what he thought was the current job description.

[59] There were clearly other ways which Mr O'Brien could have attempted to deal with this issue and he accepted that. Other than the brief discussion with Mr Murfitt a few hours before, there had been no raising of this issue with RMP previously, whether by Mr O'Brien as the delegate or by union officials. Mr Murfitt said they would discuss the issue later but in the meantime Mr O'Brien took action.

[60] There was acceptance by some company witnesses that there were legitimate reasons to turn the line off, such as health and safety. However, that was not the situation here.

[61] I turn now to look at the role of the 2016 job description in the company's decision making. The view of RMP's representatives was that once it was established that the 2016 job description was only a draft, and thus not the correct or operational job description, that Mr O'Brien was wrong and therefore his decision to rely on what he thought was the job description was misconduct.

[62] On Mr O'Brien's behalf it was spelt out at the two meetings that Mr O'Brien believed that he was working from the actual job description. Both Mr Stirling and Mr Hampton accepted that it was Mr O'Brien's opinion that the document was in operation. Mr Hampton said at the investigation meeting that he and Mr O'Brien had different opinions and "we weren't saying it was right or wrong".

[63] However, the acceptance of Mr O'Brien's genuinely held belief seemed to have no effect on the decision-making. RMP failed to consider Mr O'Brien's explanation.

[64] Under Part 4 of the Act the role of unions in promoting their members' collective interests is recognised. During the investigation meeting Mr Stirling accepted that possibly union delegates had to make decisions on the hoof. He accepted that undertaking joint roles of employee and delegate could be difficult at times and that the delegate role could bring the delegate into conflict with the employer. He had no reason to dispute that Mr O'Brien was acting on behalf of union members.

[65] I accept that RMP was concerned about the possibility of repetition of this behaviour by Mr O'Brien. However, there was a failure to take into account his history at the plant. Some of that was before the current owners took over but both Mr Stirling and Mr Murfitt had knowledge of Mr O'Brien's history. Mr O'Brien had never before stopped the line for any reason which his employer saw as inappropriate. There was no evidence of other difficulties with Mr O'Brien in his union role.

Who was the decision-maker?

[66] A concern was raised about Mr Stirling and/or Mr Murfitt being involved in the decision to dismiss when they had had involvement in what had occurred.

[67] Having heard the evidence, I am satisfied that Mr Murfitt was not involved in the decision to dismiss.

[68] However, there is more question about Mr Stirling's role. Mr O'Brien and his representative were raising the issue of whether he had been dismissed by Mr Murfitt at the 1 June 2016 meeting, but Mr Stirling had been at that meeting.

[69] It appears that the decision to dismiss would usually have been Mr Stirling's, as the plant manager. However, Mr Hampton became involved. Mr Hampton at one point said that he considered that he was the decision-maker, however he also said that he and Mr Stirling were jointly responsible. Mr Stirling was involved in the various meetings and considered himself to be part of the decision-making team.

[70] I find that the decision to dismiss was jointly made by Mr Hampton and Mr Stirling. Given that evidence regarding what happened at the 1 June meeting between Mr O'Brien, Mr Murfitt and Mr Stirling was a part of Mr O'Brien's response to the disciplinary action, I do not consider it fair for Mr Stirling to have been involved in the decision to dismiss. Mr O'Brien was questioning Mr Stirling's credibility about what Mr Murfitt and he had said, and should not have been involved in making the dismissal decision.

Procedural issues

[71] On Mr O'Brien's behalf a number of procedural issues were raised. These included predetermination, failure to provide copies of witness statements and the speed of the process.

[72] Both Mr O'Brien and Mr Barham felt that the RMP representatives had already determined the outcome of the process. However, I was not able to establish this on the evidence before me.

[73] Mr O'Brien did not get the opportunity to see or receive copies of statements, even though these had been typed up as part of Mr Hampton's notes by the time of the 8 June 2017 meeting. They were read to him verbatim at the 8 June meeting. He and

his representative were asked if they had any comments. However, there was nothing in the statements that Mr O'Brien really objected to or disagreed with. He considers that they support his position, in so far as they say anything relevant. Copies were not requested by Mr Barham or Mr O'Brien at this stage.

[74] In other circumstances, particularly if there were significant factual disputes about what had occurred or more lengthy statements, this could well be regarded as unsatisfactory. However, here the statements were short and there was no real objection or contradiction offered by Mr O'Brien. In the circumstances of this case I regard this defect as being a minor matter which did not result in Mr O'Brien being treated unfairly².

[75] I accept that the process was prompt. The investigation meeting occurred on 6 June 2016 and the dismissal on 8 June 2016. However, it is not clear that there were steps that were missed or that Mr O'Brien was unable to present his response to the allegations adequately because of time pressures.

Conclusion on dismissal

[76] Mr O'Brien was dismissed for stopping a work process and failure to re-start it on instructions. This was a one-off situation with Mr O'Brien, acting as a union delegate, having no history of such stoppage action and, I accept, not having planned it. After some discussion he did re-start the line.

[77] I consider that Mr O'Brien's explanation for his actions is crucial to a consideration of whether the outcome of RMP's process was something which a fair and reasonable employer could have done. Mr O'Brien's explanation for his action was rejected on the basis that the 2016 job description which he relied on was not the one which RMP believed was in place. However, even the company acknowledged that Mr O'Brien genuinely considered that the 2016 job description was in place. There was a failure by RMP to consider that as a relevant factor or give it any weight. My impression in that regard from the witnesses, fits with the statement in reply which says that the (2016) job description is irrelevant.

² S 103(5) of the Act

[78] In the circumstances RMP should have considered the possibility of a lesser form of disciplinary action, recognising that dismissal was not something which a reasonable employer could do in the circumstances.

[79] Further, Mr Stirling should not have been involved in the decision-making due to his role on 1 June 2016 and Mr O'Brien's challenging of Mr Stirling's honesty in relation to events on that day.

[80] Mr O'Brien was unjustifiably dismissed by Auckland Meat Processors.

Reinstatement

[81] Mr O'Brien seeks reinstatement to his former position, which is opposed by RMP.

[82] Section 125(2) of the Act requires the Authority to be satisfied that reinstatement is practicable and reasonable. The Full Court considered the test of reasonableness in *Angus v Ports of Auckland Ltd*³ and stated:

... the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

... an employer opposing reinstatement will need to substantiate that opposition by evidence ... evidence considered when determining justification may also be relevant to the question of reinstatement.

[83] An assessment is required of the effect of any order for reinstatement on not only the individual employee and employer but also on any other persons⁴.

[84] I accept that reinstatement is important to Mr O'Brien. Mr O'Brien has had long experience in the meat industry and there was no evidence of him having skills useful outside that industry. He had been unable to find other non-seasonal work, which the work at RMP was. His earnings through the work he had been able to find were less in total than he would have made had he stayed at RMP. He said that if he was reinstated he would not reapply for the delegate role, although that appeared to be related to the union's requirements for the role, rather to the situation which led to his dismissal.

³ *Angus v Ports of Auckland Ltd* [2011] ERNZ 466 at [65]-[66]

⁴ *Angus v Ports of Auckland Ltd* [2011] ERNZ 466 at [68]

[85] RMP's position was that Mr O'Brien's job was unavailable as it had hired a labourer and trained another employee into Mr O'Brien's position. However, there was no evidence that that change, which seems relatively minor, made it impossible to reinstate Mr O'Brien.

[86] RMP also raised Mr O'Brien's lack of remorse and the prospect that he might repeat his conduct. When asked whether he had any remorse he said that if you genuinely believe what you did then you don't believe you've done anything wrong.

[87] The issue of difficulties between Mr O'Brien, Mr Murfitt and Mr Stirling was also relied on by RMP. During the investigation and disciplinary process Mr O'Brien called Mr Murfitt and Mr Stirling liars and dishonest, and through the Authority process Mr O'Brien maintained his position on that.

[88] Mr O'Brien told me that it would not be difficult for him to work with them and he thought that he could still take orders from them and nothing would change in that regard. He calls lots of people liars if they do things which he deems dishonest. He is still prepared to work with them. He could not comment on whether it would have been difficult for them to work with him in those circumstances.

[89] Mr Stirling did not really think that reinstatement would work.

[90] I have carefully considered and balanced the evidence overall, and given Mr O'Brien's refusal to accept the difficulties with the approach that he had taken and continued assertions regarding the honesty of those who would be his line managers, I am not satisfied that Mr O'Brien should be reinstated.

Reimbursement of lost wages

[91] Mr O'Brien claims lost wages of \$4729.48 gross, being \$8355.00 of likely wages at RMP between the dismissal and the investigation meeting ⁵ less \$3625.52 gross for his earnings from his employment post-dismissal. This covers less than a three month period and includes full reimbursement for the period when he was without work and the difference between the two pay rates for the remainder.

[92] Having found Mr O'Brien to have been unjustifiably dismissed, I must order RMP to pay that lost remuneration under s 128(2) of the Act, subject to my

⁵ Figures provided by RMP

assessment of contribution. I am satisfied that Mr O'Brien lost \$4729.48 gross in wages as a result of his dismissal.

Compensation for non-pecuniary loss

[93] Mr O'Brien claims compensation for humiliation, upset and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

[94] Having found that he was unjustifiably suspended and unjustifiably dismissed, I consider that a global award for those two grievances is appropriate.

[95] Mr O'Brien was shocked and distressed to be suspended and then dismissed. He did not expect it, as he thought he and RMP would sort something out.

[96] Mr O'Brien lives in a small town. It has been hard for him to keep his head held high in the community. In places like the supermarket, people ask how work is and he thinks that they know about the fact that he has lost his job. He has found the situation very embarrassing for himself and for his family. He has been in the meat industry for a long time and been at Raukura for over ten years. I accept that he found his situation very humiliating and was financially pressured.

[97] I recognise that although Mr O'Brien had worked at Ruakura for over a decade, only about two and a half years of that time was for RMP.

[98] I consider \$15,000 to be the appropriate compensation sum subject to my consideration of contribution.

Contribution

[99] RMP argues that Mr O'Brien contributed to the situation giving rise to the dismissal.

[100] Under s 124 of the Act I must consider the extent to which the actions of Mr O'Brien have contributed to the situation that gave rise to the personal grievance. If his actions are to be taken into account they must be both causative of the outcome and blameworthy.⁶

⁶ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

[101] RMP disputed the status of the 2016 job description upon which Mr O'Brien relied. However, it was common ground that it was acceptable for union delegates to raise concerns which their members had and that this could sometimes place them in conflict with their employer.

[102] Mr O'Brien cannot be faulted for raising the collection issue. I accept that Mr O'Brien genuinely believed that the 2016 job description was in force and that it specified that the Asure staff did the collection task. He was acting on behalf of the members he represented and wanted to raise their concern.

[103] Where his action was contributory was his failure to raise this issue with the company in a more formal or considered way, either personally, or via the union, to allow the company the opportunity to consider it and respond, before he took direct action. RMP had no idea that slaughtermen were concerned with the collection task, which they had been doing on occasions, at least in recent times. The duty of good faith requires parties to be open and communicative, but Mr O'Brien acted hastily without due consideration. I give him credit for agreeing to re-start the line after some discussion.

[104] I consider that a 10% reduction of remedies should be made for contribution. I therefore award \$4256.53 gross as lost remuneration and \$13,500.00 as compensation for non-pecuniary loss, to be paid within 28 days of the date of this determination.

Costs

[105] Costs are reserved and the parties are invited to resolve the matter. If they cannot, Mr O'Brien shall have 28 days from the date of this determination in which to file a memorandum on costs, including a breakdown of when and how costs were incurred. Auckland Meat Processors shall have a further 14 days in which to file and serve a memorandum in reply.

Nicola Craig

Member of the Employment Relations Authority
