

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 495
3121553

BETWEEN	JEREMY O'NEILL Applicant
AND	PRESTIGE BUILDING REMOVALS LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Rachel Webster, counsel for the applicant Michael O'Brien, counsel for the respondent
Investigation Meeting:	23 June 2022 at Hamilton
Submissions received:	27 June 2022 from the Applicant 4 July 2022 from the Respondent
Determination:	29 September 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant, Jeremy O'Neill, worked for the respondent, Prestige Building Removals Limited (PBR) as a site manager. Mr O'Neill says he has a personal grievance for unjustified disadvantage due to being suspended from his employment, and for unjustified dismissal. Mr O'Neill claims compensation for hurt and humiliation in relation to both grievances. He also seeks reimbursement of lost wages.

[2] Mr O'Neill further says PBR breached its duty of good faith towards him and seeks a penalty for that alleged breach.

[3] PBR says Mr O'Neill's claims are without merit. It says Mr O'Neill was not suspended, rather he was given the opportunity to remain away from work during a disciplinary investigation, which he elected to do. PBR says that even if Mr O'Neill's dismissal was found to be unjustified, any remedies should be reduced to zero given his blameworthy conduct which was causative of his dismissal. PBR further says it did not breach its duty of good faith towards Mr O'Neill.

What has the Authority's process been?

[4] Mr O'Neill provided two witness statements and gave oral evidence at the investigation meeting. Unsworn affidavits were provided for three directors or shareholders of other companies operating in the house removal industry. Only one of the three, Mr Troy Martin, attended the investigation meeting.

[5] PBR provided witness statements for:

- a. Mr Jason Barnes, PBR's director and shareholder;
- b. Mr David Fulford, who contracts to PBR as a site manager;
- c. Mr Malcolm Whitehead-Clarke, PBR's Health and Safety Compliance Officer.

[6] Mr Barnes and Mr Whitehead-Clarke attended the investigation meeting for PBR. The witnesses in attendance answered questions under affirmation from the Authority and counsel. Following the investigation meeting, counsel filed helpful written closing submissions.

[7] As permitted by s 174E of the Employment Relations Act (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation 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.

What are the issues?

[8] The following are the issues for investigation and determination:

- a. Was Mr O'Neill suspended from his employment?

- b. If so, does Mr O'Neill have a personal grievance for unjustified disadvantage in relation to a suspension?
- c. Does Mr O'Neill have a personal grievance for unjustified dismissal?
- d. If PBR's actions were not justified in respect of a disadvantage and/or dismissal, should Mr O'Neill be awarded remedies, being:
 - i. Compensation for hurt and humiliation pursuant to s 123(1)(c)(i) of the Act;
 - ii. Lost wages pursuant to s 123(1)(b) of the Act?
- a. If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr O'Neill contributing to the situation giving rise to the grievance(s)?
- b. Has PBR breached its duty of good faith towards Mr O'Neill?
- c. If yes, should a penalty be ordered against it?
- d. Should either party contribute to the costs of representation of the other party?

What happened?

[9] PBR is a relatively small business that specialises in house relocations, house removals and also sells relocatable homes. It is based in Hamilton.

[10] Mr O'Neill commenced employment with PBR on 22 December 2019 as a site manager. There does not appear to have been a strict reporting line between Mr Barnes as owner and Mr O'Neill as site manager. The pair had known each other for a number of years, including on a personal level.

Employment agreement

[11] Mr O'Neill filed an unsigned employment agreement with the Authority along with his statement of problem. At the investigation meeting Mr O'Neill stated he never had an employment agreement with PBR and had not seen that agreement "before this process". He said his employment with PBR was a "continuation" of employment with another employer. Mr O'Neill did not raise the non-provision of an employment agreement during the disciplinary process or in his witness statement before the Authority. At the investigation meeting he answered questions about the content of the agreement, and I am satisfied the agreement more likely than not reflects the terms and conditions agreed between the parties.

[12] The agreement provided, among other duties, that Mr O'Neill had overall responsibility for operations and works conducted on work sites, managing employees and contractors onsite, building close working relationships with them in a senior supervisory role and ensuring respectful relationships within the team.

[13] The agreement outlined that both PBR and Mr O'Neill would meet their obligations under the Health and Safety at Work Act 2015. It stated PBR's duties included providing and maintaining a safe working environment for employees and others in the workplace. It provided Mr O'Neill would take reasonable care to look after the health and safety of others.

[14] In relation to suspension of Mr O'Neill's employment, the agreement stated:

The employer might decide to suspend the employee on pay while investigating allegations against the employee, e.g. for serious misconduct, or if a condition, illness or injury means the employee poses an immediate risk to themselves and/or others.

If an investigation is delayed because the employee refuses to take part, or because of other reasons beyond the employer's control, e.g. waiting for a criminal trial to end, the employer may decide any further time on suspension will be unpaid.

[15] In relation to serious misconduct, it stated:

Ending Employment: Serious Misconduct

If, after following a fair process, the employer concludes that the employee has engaged in serious misconduct, the employee may be dismissed without notice.

Serious misconduct is behaviour that fundamentally compromises the employer's trust and confidence in the employee.

[16] Examples of serious misconduct are provided, including harassment of a work colleague and repeated failure to follow a reasonable instruction.

[17] The agreement further provided that Mr O'Neill must immediately return any of PBR's property and information on or before the final day of employment. It stated this included, IT devices, access cards, keys, vehicles and workplace equipment. It stated Mr O'Neill must also stop using passwords and codes for PBR's systems.

[18] The agreement also stated Mr O'Neill would be provided with a vehicle for work purposes only, and that the vehicle must be parked at PBR's business address

when not in use. The agreement said PBR could decide to stop providing the vehicle if it was no longer needed for Mr O'Neill's duties or if it had been misused.

Employment of Mr Whitehead-Clarke

[19] In around April 2020, Mr Whitehead-Clarke commenced employment with PBR. Mr Barnes says he arranged to bring Mr Whitehead-Clarke in to enable Mr O'Neill to focus on quoting for new business and driving and to spend less time managing staff.

[20] Mr O'Neill states Mr Barnes told him Mr Whitehead-Clarke was employed to free Mr O'Neill up so he could concentrate on site visits, permits, organising jobs, and going out for tow outs. However, Mr O'Neill says Mr Whitehead-Clarke had no experience in the industry. Mr O'Neill states about a month before Mr Whitehead-Clarke was employed, Mr Barnes removed the title of site manager from Mr O'Neill's business card. Mr O'Neill says Mr Barnes told him that it was because Mr O'Neill was going to become a part owner of the business and did not need a title on his business card. Mr O'Neill says he did not think anything of it at the time and believed Mr Barnes was living up to his word at the time the business was purchased that Mr O'Neill would receive shares in PBR. Mr Barnes says it was Mr O'Neill insisted his business card have no title on it.

Treatment of other employees

[21] Mr Barnes says in the first quarter of 2020 he became concerned about the way Mr O'Neill was treating other workers. He says two specific things caused him concern:

- a. Mr Fulford told him about an incident at an Awanui café where Mr O'Neill told a contracted driver, in a loud and aggressive manner, "fuck off or I'll throw something at you". Mr Fulford advised Mr Barnes it was apparent the driver was shaken up about the incident. Mr Barnes says he spoke to Mr O'Neill about the incident and told him that sort of behaviour would not be tolerated.
- b. Soon after that discussion, three other drivers came to Mr Barnes raising concerns about how Mr O'Neill had been treating them, including yelling

at them and being aggressive. One of those drivers also made a complaint about Mr O'Neill driving too fast and dangerously.

Coffee discussion on 7 May 2020

[22] Mr Barnes says on 7 May 2020 he took Mr O'Neill out for a coffee offsite. Mr Barnes says he relayed the concerns the three employees had raised with him and Mr O'Neill's initial response was to say "they just to need to harden up". Mr Barnes says he told Mr O'Neill that is not how workplaces operate in this day and age, and even if he had been treated that way by bosses in the past it was not how staff could be treated. He says he told Mr O'Neill part of his role as an employer was to protect all employees in the workplace and that he made his expectations of Mr O'Neill's behaviour very clear moving forward.

[23] Mr O'Neill says he and Mr Barnes would often go out for coffee and chat about business. He recalls one coffee catch up when he raised with Mr Barnes how Mr Barnes spoke to a female employee. Mr O'Neill states Mr Barnes retorted that Mr O'Neill should not talk to the boys the way he does. Mr O'Neill says he responded saying maybe we all need to look at the way we talk to each other. Mr O'Neill states he does not recall Mr Barnes ever saying anything to him that made him think Mr Barnes had an issue with the way he was talking to or treating staff, or that he needed to treat employees reasonably, because he was already doing so. Mr O'Neill says Mr Barnes did not tell him any further instances would be considered a serious matter. He says Mr Barnes used to say staff members were "fucking idiots" and he remembers at one point telling Mr Barnes he did not need to be so brutal.

Chain incident on 19 June 2020

[24] Mr Barnes' evidence is that soon after the coffee discussion, Mr Whitehead-Clarke reported an incident concerning Mr O'Neill. It is common ground that during a job on 19 June 2020 Mr O'Neill discovered the wrong metal tow chain had been brought onsite for a house move. Mr Whitehead-Clarke reported Mr O'Neill threw a metal chain from one end of a house to another. At the investigation meeting, Mr Whitehead-Clarke clarified that Mr O'Neill threw the chain alongside the exterior of a house. Upon discovering the absence of a chain of suitable length, Mr Whitehead-Clarke says Mr O'Neill became irate and aggressive. He reported Mr O'Neill told

workers present onsite “you are all fucken useless and might as well not be here” and “you might as well all pack up and fuck off home”.

Phone call incident on 23 June 2020

[25] On 23 June 2020 Mr O’Neill started to drive to Auckland along with the above-mentioned female PBR staff member with whom he also had a casual personal relationship. Mr O’Neill says the purpose of the trip was to look for housing stock for PBR, and that Mr Barnes was aware of the trip. The two men spoke over the phone. Mr O’Neill says he told Mr Barnes houses need to be looked at and the conversation ended as follows:

Mr Barnes: I don’t give a fuck about any houses!

Mr O’Neill: What is your problem??

Mr Barnes: Do what your [sic] fucking told to you wanker!

Mr O’Neill: Don’t fucking talk to me like that, if it [sic] that big a problem for us to do our job then well [sic] fucking just turn around and come back, but don’t you fucking dear [sic] bitch about quotes or possible stock houses.

Mr Barnes: Drop what you are doing and just fuck off. I’ll get hold of you later.

[26] Mr O’Neill says he made handwritten notes of the discussion the same day.

[27] Mr Barnes’ recollection of the conversation is different. Mr Barnes says he was in a car with Mr Fulford talking to Mr O’Neill on speaker phone about going to a job that PBR had not been given yet. Mr Barnes says he asked Mr O’Neill if he was sure he needed to do the job when they had other current jobs that needed attention. He says Mr O’Neill became very angry and told Mr Barnes to “go fuck” himself and hung up. Mr O’Neill did not go back to work on 23 June 2020, and this turned out to be his final day at work.

Period following 23 June 2020

[28] Mr Barnes says given how erratically Mr O’Neill was behaving, he had concerns about Mr O’Neill being at the workplace. Mr Barnes says after the 23 June phone call, he suggested to Mr O’Neill via text message that he take until the end of the following week off. He says he initially planned to have a meeting with Mr O’Neill earlier but postponed it to make sure he had all the relevant information. Mr Barnes says he had a close relationship with Mr O’Neill but he felt he could not let the issues lie, particularly as it was impacting other staff. He also says it was one thing for Mr

O'Neill to want to have a robust conversation with him one-to-one, but to tell Mr Barnes to "fuck off" in front of other employees was something totally different.

[29] On the afternoon of 23 June, and on a number of days after, the pair shared a large number of text messages. It is important to set out a number of those as they are relevant to the issue of whether Mr O'Neill was suspended or took leave, the motive for the dismissal and the process PBR followed in carrying it out. I set them out without attempting to address spelling or grammatical errors.

Text messages on 23 June 2020

[30] Mr Barnes and Mr O'Neill sent text messages to each other as follows on 23 June 2020:

Mr Barnes: Take till the end of next week off, I will sort it all from my end and gett subcontractors in as from tomorrow, thanks

Mr O'Neill: Wot??? wot is really going on!

Mr Barnes: Jeremy I think u better start looking at things in the business a lot closer, and look around u more, I am actually over doing shit that u should be sorting out and making sure it rite, I havent got the time anymore and nor am I going to clean up shit when u I shouldnt even be doing or seeing, if u want to succeed going forward u need to change your ways and start planning better, it doesnt take two to go and look at houses u fit thst into your timing with your jobs and with how we r place with workers, I am nearly ready to close it all as I dont need the shit

Mr O'Neill: Jason that makes little to no sense, think you maybe need to read your own text and expand on how it is written??

Mr Barnes: Ok Jeremy

Text messages on 24 June 2020

[31] A long text message exchange then occurred throughout the day of 24 June 2022 between the pair, most of which I record here:

Mr Barnes: What time is well nooked in to take pole out tonight, and did u book boof in?

Mr O'Neill: [Sends a screenshot of Mr Barnes' text message on 23 June 2020 regarding taking until the end of the next week off]

Mr Barnes: If u r going to be a wanker fuck off and find another job I really dont care to be honest , all good I will find out myself thanks

...

Mr Barnes: I will let u know soon what time on Monday to have meeting, u r more then welcome to bring a support person with u thanks

Mr Barnes: Malcolm will be over later to pick up credit card its all good to give it to him

Mr O'Neill: Right so it one of those hah....

Mr Barnes: Take it what ever way u like

...

Mr Barnes: U were asked by Malcolm what trailer to use, u r a peace of work I would never do what u have done but I guess its what everyone expects from u, u knew that was the wrong trailer and didnt say anything

Mr Barnes: I am redirecting your calls as from today I will let u know what time Monday

Mr O'Neill: Well if you hadn't gone completely overboard with your meltdown yesterday an gone overboard with how you deal with things then nothing would be outta place or a problem...you should try take alittle bit of ownership for how you talk to people, things you say...your not as clean cut as you wanna make out.but sure you say woteva it is you need to make you feel better about your decisions...if the going to Auckland is wot your big flip out was over ??? just wow. boys got same amount of work done as was expected and obviously was the the time to make most of that afternoon...but sure woteva tme Monday, all this very most seems a overraction at this stage

Mr Barnes: Its more then just going to Auckland I can assure u, the problem is u can even c when it is all goong wrong and rhe damage u cause, look at the cocklebay house its fucked as well and full of water , truck still got trees on it from over a week ago, a peace of another clients house in yard with no tarps on it and full of water , u just dont care about anything at all, u have even sabotage my load tonight, just like u did to my house u rented but its all good I will sort it out c u Monday

[32] Mr O'Neill then picked up the exchange again the same evening:

Mr O'Neill: Oh wow...so here it starts to come... this will be interesting at just how many things you can possible try and line up to consider are my direct doing ? cocklebay? just done has been tarped whole time and let me guess malcolm's damage from towing will undoubtedly be my doing somehow??and damage I done??I am actually still waiting for reason I'm told to be on leave till end of next week as I not asked for any leave and this is by a directive as to why I am, to date I have no reasoning for this?

Mr Barnes: U went home on your own doing, so I told u to have till Monday off and we will address it then, one thing with u is u r never wrong and dont take any responsibility at all , there is alot of things that r nkt right Jeremy and u seem to take a blind eye at it all, as for Malcolm its come from allt of people u shouldnt of let him tow from there u should of waited till u got out onto main road, and on top u jump into a pilot vehicle and not in the truck with him? Then damage happened and u laugh to everyone about it ,and at him what sort of person r u ? But like every house u tow there is a lot of damage and u don't care u just think toby will sort it and don't give a fuck at all about the company paying for all of this as u just don't care as long as its about u and yourself , I am over your bullshit and lazy ways and not even getting jobs done or yard sorted u drive past shit and don't even sort it but I guess everyone warned me about your shit but I actually thought u would change your

Mr O'Neill: Really so that wasn't you that said 'drop woteva you doing and fuck off, I'll get hold of you', really Jason there is diffinitly one of us that is never wrong, and makes sure everyone knows so..

Mr Barnes: Jeremy I actually don't care and I am over it all, I will be making big changes in the next couple of weeks as I will not be caring on like this anymore, I will catch up on Monday arvo with u

Text messages on 26 June 2020

[33] The exchange started again on 26 June 2020 as follows:

Mr O'Neill: Am again asking as to wot I am on directive leave for as I still do not know?meeting on Monday is not suitable as my support person is not available to be in Hamilton till weds afternoon. This should be to much of a problem due to you instructing me that I am not required and am to be on leave till end of next week...

Mr Barnes: No ones told u to be on leave u hang up phone on me and went home Jeremy , Wednesday is fine for meeting lwt me know what time works for u

Mr O'Neill: [Resends screenshot of Mr Barnes' text message on 23 June 2020 regarding taking until the end of the next week off]

Mr O'Neill: Weds 1pm, thanks

Mr Barnes: That's good I have put time aside, I need your ute for piloting so I am send Malcolm or Anton over tonight to change over they will leave u with a car thanks Jason

Mr O'Neill: Is any reason my emails now require me to sign back in??seems odd that all of a sudden...and now the ute which is part of my pay .and seriously we both know ther no piloting jobs it needed for over weekend let alone anytime next week .so again am asking the reasons I am on directive leave by you yourself????

Mr Barnes: Jeremy u will not be left with out a vehicle as they r swapping it out so it doesn't matter as long as u haveva vehicle I need that ute for jobs, emails r coming to me while u r off work as Maria has sent u quotes and I need to pass these on so I can get back to clients whie u r away , your phone still works and u will have use of a car , c u on Wednesday next week at 1pm

Mr O'Neill: Seriously Jason ther are like 4 spare pilot vehicles in the yard but you just happen to need my one....really???

Mr Barnes: No there r no spare ones as I have sold one and I hiring one out to another company , we will swap back over Tuesday or Wednesday next week thanks

Mr O'Neill: Sure Jason if you say so

[34] Although at the investigation meeting Mr Barnes suggested there were additional text messages not put before the Authority, these have not been provided by PBR. I am satisfied the above text messages provide a fulsome picture of the nature of the text exchanges.

[35] Mr Barnes also gave evidence that he attempted to call Mr O'Neill during this period, but he did not answer Mr Barnes' phone calls. PBR did not provide evidence in support of Mr Barnes' attempts. Both men state they did not have any telephone discussions after 23 June 2020. While Mr Barnes may have attempted to call Mr O'Neill as stated, it is clear both men actively communicated with each other via text message, however unwise their exchanges may have been in the circumstances.

[36] Mr O'Neill says the above text messages made it clear PBR was going to dismiss him. He says he knew something was up when Mr Barnes sent a text to him about taking time off, as Mr Barnes knew Mr O'Neill never takes time off. Mr O'Neill says he did not choose to go home and not work.

PBR letter of 3 July 2020

[37] On 3 July 2020 Mr Barnes emailed Mr O'Neill attaching a letter proposing a meeting on 6 July 2020 which stated he wanted to discuss:

...the following three allegations:

1. You told me on the phone on Tuesday, 23 June 2020, "to get fucked" and then hung up;
2. Intimidatory behaviour towards fellow employees resulting in them feeling unsafe around you; and
3. Swearing at employees.

As you are aware I have had multiple discussions with you over the last 3 month period discussing with you your treatment of other staff. Because of the issues associated with your interactions with staff Prestige Building Removals Limited employed Malcolm Whitehead to oversee the staff with you focusing on quoting and driving to relieve you from having to have overall responsibility. Despite this new structure being put in place, your intimidation of, and swearing at, employees appears to have continued...

[38] The letter went on to state the meeting was an opportunity for Mr O'Neill to respond to these allegations and advised no decision about what did or did not happen had been made yet. The letter also advised the allegations were serious and if substantiated disciplinary action up to, and including, summary termination may result. It advised Mr O'Neill was entitled to bring a legal representative or other support person to the meeting. A very brief statement from Mr Fulford was attached confirming what Mr O'Neill said to Mr Barnes during the 23 June phone call.

[39] The letter also attached a brief statement signed by Mr Whitehead-Clarke outlining his account of the incident with the tow chain on 19 June 2020. The statement stated the tow chain incident was one specific example of Mr O'Neill behaving in this manner and that he had witnessed him behave like this previously.

[40] Mr O'Neill says he was shocked about the phone call allegation given how Mr Barnes spoke to him on that day. He says it was not unusual for Mr Barnes to speak like that, including to other staff. Mr O'Neill says he was also surprised about the second allegation relating to 19 June 2020. He says he phoned two of the employees who were onsite at the time of the tow chain incident. He says he then saw them in person and explained the allegation and asked if they would write a letter setting out their recollections. They then gave Mr O'Neill a letter of support. It stated they had

never felt threatened by the way Mr O'Neill spoke to them or treated them. They also stated that it had been unsafe working without Mr O'Neill to assist them recently.

Mr O'Neill's letter of 7 July 2020

[41] On 7 July 2020 Mr O'Neill, via his legal counsel, provided a written response to the three allegations in the letter.

[42] In relation to the first allegation, counsel asked for confirmation of who the decision maker was and stated it should not be Mr Barnes as he was the one making the allegation. Mr O'Neill disputed that he told Mr Barnes to get "fucked" and hung up the phone and attached Mr O'Neill's written record of the conversation. The letter stated Mr Barnes' normal way of dealing with things was to get explosive on the phone then send text messages similar to the ones above. The letter further stated this is the culture Mr Barnes allows at PBR as he treats all employees like this.

[43] A brief statement from the female PBR employee who was in the car with Mr O'Neill was also provided to PBR. The statement said while the employee heard Mr Barnes and Mr O'Neill arguing, she could not make out what was said because she was on her own phone call.

[44] In relation to the second allegation, Mr O'Neill's response was that it was "outright lies". Mr O'Neill provided the letter of support from the two employees. Mr O'Neill said he was blunt and to the point as this is the most effective way of keeping everyone safe. He says instructions needed to be clear and given quickly. Mr O'Neill disputed the allegation in Mr Whitehead-Clarke's statement and requested other witnesses be interviewed and that he be provided with interview notes.

[45] In relation to the third allegation of swearing at employees, Mr O'Neill disputed the allegation and reiterated his response to the second allegation. The letter stated swearing is commonplace in the industry and at PBR's workplace due to the example set by Mr Barnes. He also disputed that he swore at other employees in an abusive manner or in a manner that made them feel intimidated or uncomfortable.

[46] Counsel further stated she had been advised annual leave had been deducted from Mr O'Neill's leave balance while on suspension since 23 June 2020. The letter stated it was clear Mr O'Neill had not been on leave, but rather was directed to stay

away from work by Mr Barnes. The letter indicated there were procedural and substantive issues with the suspension.

[47] Finally, counsel stated Mr O'Neill's view that the decision on the allegations had been predetermined given that:

- he has already been stripped of his work credit card, work ute and shut out of his work emails;
- the derogatory comments Jason is making about Jeremy throughout the industry;
- it appears to Jeremy that Malcolm was put into the position to attempt to build a case against Jeremy;
- Jason's text messages, including one stating "I will be making big changes in the next couple of weeks as I will not be [carrying] on this like anymore"; and
- a full investigation has not been undertaken in relation to these allegations despite it being obvious there are witnesses to be interviewed.

Meeting on 8 July 2020

[48] A meeting was then held on 8 July 2020. Mr Barnes, PBR's counsel, Mr Whitehead-Clarke and a PBR employee who took notes were present. Mr O'Neill and his counsel attended. Notes of the meeting have been provided to the Authority, the accuracy of which has not been challenged. Counsel for Mr O'Neill addressed each of the three allegations during the meeting. At the meeting Mr O'Neill denied telling Mr Barnes to "fuck off" on 23 June 2020, and accepted throwing the chain across the house. Mr Barnes says Mr O'Neill did not express any regret for any of the things that had happened, which the notes appear to reflect.

PBR's letter of 10 July 2020

[49] On 10 July 2020, Mr Barnes sent a letter to Mr O'Neill's counsel setting out its "tentative" findings on the three allegations and outlined PBR's proposed outcome, being summary termination of employment. The letter asked for a response by 14 July 2020.

[50] In relation to the first allegation, the letter stated the allegation regarding the 23 June 2020 phone call was substantiated.

[51] In relation to the second allegation, the letter stated Mr O'Neill had admitted throwing the tow chain in frustration. It outlined Mr O'Neill's suggestion that he said the "situation" was "fucken useless" and that "we may as well all fuck off home". The letter recorded Mr Whitehead-Clarke's recollection at the 8 July 2020 meeting, and that

he maintained Mr O'Neill acted and spoke in the way set out in his 3 July 2020 statement. The letter further noted an employee (not one of those who had complained) felt intimidated by Mr O'Neill. Mr Barnes stated he had spoken to that employee who confirmed Mr Whitehead-Clarke's statements including that he felt intimidated by Mr O'Neill.

[52] In relation to the third allegation, the letter stated the allegation was substantiated. The letter noted Mr O'Neill's position that swearing was common in the house removal industry, but stated Mr Whitehead-Clarke maintained Mr O'Neill spoke in an aggressive way and staff felt intimidated by it. The letter noted Mr Barnes had spoken to one of the two employees from whom the letter of support was provided to Mr O'Neill. Mr Barnes stated the employee had subsequently conveyed he did not know the basis for being asked to write the letter, and that he felt pressured by Mr O'Neill as a manager to do so.

[53] The letter also stated PBR's position on whether Mr O'Neill had been suspended. It recorded that Mr O'Neill had not been suspended and PBR "merely offered you the opportunity to not come to work if you did not want to (but I never said you would be paid for that time off)."

Mr O'Neill's letter of 13 July 2020

[54] Counsel for Mr O'Neill responded to PBR's letter on 13 July 2020 disputing PBR's findings. It stated Mr O'Neill's position that Mr Barnes made a decision to dismiss on 23 June 2020 and PBR had subsequently attempted to put sufficiently serious allegations and a process in place to justify a predetermined dismissal. It also raised a personal grievance in relation to Mr O'Neill's suspension.

PBR's letter of 14 July 2020

[55] Mr Barnes says he carefully considered everything and wrote back on 14 July 2020 giving his reflections on what Mr O'Neill had put in front of him. Of note is that the letter refers to the Awanui café incident in which it says Mr O'Neill acted in an intimidating manner towards the contracted driver. The letter stated that incident provided background and context to the current allegations, and that Mr O'Neill had been spoken to after that incident and it was made "abundantly clear such behaviour was unacceptable". Of further note is that Mr Barnes says he spoke to both employees from whom the letter of support was provided to Mr O'Neill. The letter stated both had

indicated to Mr Barnes they did not want the letter “on the record”. Mr Barnes stated Mr O’Neill did not provide the full context in which they were asked to write and constituted a further intimidatory action by Mr O’Neill.

[56] Mr O’Neill says the two employees were happy to write the letter, and that he did not intimidate them to do so in anyway. Mr O’Neill says it got back to him that one of the employees was given a hard time about the letter and that Mr Barnes had directed everyone not to talk to Mr O’Neill.

[57] Mr Barnes says that given he was putting a lot of information forward (and some of it might have been new) he wanted to give Mr O’Neill a further opportunity to respond by 4pm the following day.

Mr O’Neill’s letter of 15 July 2020

[58] Counsel for Mr O’Neill sent a letter in reply on 15 July 2020. The letter requested all information relevant to Mr O’Neill’s suspension and PBR’s investigation to date. The letter stated the Awanui café incident was irrelevant to Mr Barnes’ decision making, but went on to describe Mr O’Neill’s version of the events surrounding it as evidence Mr Barnes modelled and condoned the same behaviour as Mr O’Neill. The letter stated PBR first needed to give Mr O’Neill a warning that the behaviour would no longer be condoned before it took any formal disciplinary action against Mr O’Neill.

Termination letter and raising of dismissal grievance

[59] Mr Barnes says he considered the further letter - including the suggestion that a warning should be given - but did not consider it an appropriate outcome in the circumstances. Mr Barnes sent counsel for Mr O’Neill a letter dated 15 July 2020 confirming the decision to dismiss. The letter advised PBR had provided all relevant information it had, and there were no statements in written form from employees in addition to those already received.

[60] On 16 July 2020 counsel for Mr O’Neill raised a personal grievance of unjustified dismissal.

Was Mr O’Neill suspended from his employment?

[61] The Employment Court has succinctly noted:

A suspension occurs when an employee is prevented from working and is sent away from the workplace, but his or her employment remains on foot.¹

[62] It is clear to me from the text message exchanges between 23 and 26 June 2020 that Mr O’Neill was indeed a suspended from his employment. On 23 June 2022 Mr Barnes told Mr O’Neill to “Take till the end of next week off, I will sort it all from my end and get subcontractors in as from tomorrow, thanks”. In his oral evidence Mr Barnes stated that rather than his text constituting a directive to take leave, his text was more to allow for a “cooling down” period and that time out was good for everyone. It is not clear to me how Mr Barnes’ text messages encouraged any such cooling down. On an objective assessment, the text message was not allowing “an opportunity” to take leave as suggested. If there was any doubt as to whether Mr O’Neill was being sent away from the workplace in that text message, it is obvious from subsequent texts that he was. Mr O’Neill responded to the reference to leave with surprise, and sent a text message the next day stating he was still waiting for the reason he was told to be on leave, and that he had not asked for leave. It is clear from Mr O’Neill’s text messages that he was not requesting to take leave. If it was intended that the earlier text message was to provide Mr O’Neill only with an “opportunity” to remain away from work during the disciplinary investigation, then PBR had the opportunity to clarify that with Mr O’Neill in later text messages, but did not.

[63] I do not accept that there was an option to remain at work. Mr Barnes’ text messages constituted a directive or directives to remain away from work. Sending Mr O’Neill away from the workplace in such circumstances was, whether or not PBR understood or labelled it as such, a suspension.

Does Mr O’Neill have a personal grievance for unjustified disadvantage in relation to the suspension?

[64] In deciding whether to suspend an employee, an employer must comply with the rules of natural justice and, in order to meet the test of justification as set out in s 103A of the Act, must follow a fair and reasonable process. An employer must also comply with any applicable employment agreement. Her Honour Judge Holden has said of suspension:

The rules of natural justice also mean an employee generally ought to be told a suspension is being contemplated and the reasons why and given an opportunity to be

¹ *Hong v Auckland Transport* [2019] NZEmpC 54 at [48].

heard before a decision is made. These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer's conduct. The surrounding circumstances can include immediate safety issues as well as the length of the proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made.²

[65] The Employment Court confirmed that "(i)t is well-established that a suspension of an employee from employment is a disadvantageous action as far as the employee is concerned".³ There is a general rule that an employee must be given the opportunity to comment on a proposal to suspend them before the suspension is effected, although there is "no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so".⁴ The court further noted:

Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining to suspend; in others, it may not.

[66] It is clear that as a person conducting a business or undertaking, PBR had an obligation to protect workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work. While Mr O'Neill faced serious allegations regarding his behaviour which involved swearing at employees and throwing a metal chain in their presence, I am not satisfied the risk posed by that included imminent danger to the employees. As such, I am not satisfied PBR had good reason to suspend Mr O'Neill without giving him the opportunity to be heard and I find the suspension was unjustified.

[67] That Mr O'Neill did not work the rest of the day on 23 June 2022 by going "home of [his] own doing" did not justify the unilateral suspension or otherwise entitle PBR to require Mr O'Neill to take time off work.

[68] In terms of any disadvantage suffered, Mr O'Neill says he was conscious that everyone at PBR would have known there was a big blow up between him and Mr

² Above n1, at [50].

³ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [40].

⁴ *Graham v Airways Corporation of New Zealand* [2005] ERNZ 587 at 613-614.

Barnes, then he was not at work and did not like how that would look. Mr O’Neill says he felt stressed that he was not allowed to be at work as he never takes time off work, as he does not like doing nothing. He says he also did not know what Mr Barnes was telling the employees about why he was away. He was also stressed about what was actually going on. He says then the process kept being dragged out and he did not receive a formal letter from PBR until 3 July 2020.

[69] As he was ultimately paid for the period of suspension as “special leave” and not annual leave, Mr O’Neill suffered no financial disadvantage.

[70] I find that his unjustifiable suspension disadvantaged Mr O’Neill in his employment.

Does Mr O’Neill have a personal grievance for unjustified dismissal?

Test of justification

[71] Justification is to be assessed in accordance with the test in s 103A of the Act. In determining justification of actions, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of PBR and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions. As part of this consideration, the Authority must determine whether PBR could reasonably have concluded Mr O’Neill was guilty of serious misconduct, and whether, in all the circumstances, dismissal was within the range of reasonable outcomes on which PBR could have settled.

[72] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4 of the Act and each of the four procedural fairness tests in s 103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer’s ability to justify a dismissal.

Disciplinary process

[73] Mr Barnes says PBR is a small business with 12 employees, and that it cannot afford any dedicated resource to manage its people. Mr Barnes says he relies on Mr Fulford and Mr Whitehead-Clarke to do that. When required, Mr Barnes says he steps in and does any people management. In making my findings, I have had regard to the

resources available to PBR in assessing whether it sufficiently investigated the allegations against Mr O'Neill before taking action and dismissing him.⁵

[74] In larger businesses where a manager or owner might otherwise be both witness and decision-maker on a disputed point in a disciplinary investigation, the law generally recognises that a reasonable employer, acting fairly, is best advised to have someone else make the necessary inquiries and assessments about that contest of evidence.⁶ The degree of separation fairly required will vary in different circumstances (taking into account, for example, the resources of the employer).

[75] In relation to the first allegation regarding the 23 June 2020 phone call, Mr Barnes was the complainant, witness and decision-maker. In relation to the second and third allegations, he was also a witness in an indirect way in light of Mr O'Neill's claims during the process that Mr Barnes had acted in similar way towards other employees and condoned swearing within PBR. The other potential decision makers within the business, Mr Whitehead-Clarke and Mr Fulford, witnessed the first and second allegations respectively. While they could not be said to be entirely impartial, they likely could have been more so than Mr Barnes.

[76] PBR engaged a specialist employment lawyer to assist during the disciplinary investigation so the business clearly had resources to apply to the process. However, accepting that engaging an independent investigator and decision-maker may have been beyond PBR's reasonably available resources as a small business, Mr Barnes still could not fairly make assessments and decisions about the conflicting evidence in the same way as a fair and reasonable employer could have done. The text messages amply demonstrate the level of animosity Mr Barnes felt towards Mr O'Neill on 23 June and on days following. It would be naïve to think Mr Barnes could set that animosity aside in his role as investigator.

[77] Mr O'Neill expressed his belief Mr Barnes pulled together some allegations to support his decision to investigate and dismiss him. Having reviewed the text messages Mr Barnes sent to Mr O'Neill, I am satisfied there were more likely than not mixed motives for Mr O'Neill's dismissal which included performance concerns. These included issues around planning, damage caused to customers' houses, not getting jobs

⁵ Employment Relations Act 2000, s 103A(3)(a).

⁶ *Allen v C3 Limited* [2012] NZEmpC 124 at [25], [27] and [30].

done or the yard sorted, failing to support Mr Whitehead-Clarke onsite and laziness. A text from Mr Barnes on 24 June 2020 also stated he “will be making big changes in the next couple of weeks as I will not be caring [sic] on like this anymore”. It seems clear around the time PBR engaged counsel, Mr Barnes’ intemperate texts ended and a formal process was engaged to investigate the three allegations. It would also be naïve to think Mr Barnes could set aside performance concerns in the circumstances. I also find that elements of pre-determination of dismissal may be present in respect of certain actions PBR took during his suspension – diverting his work calls, stopping his credit card, taking away access to emails and picking up the work ute he was using.

[78] I note PBR has provided no written record of what was conveyed to Mr O’Neill about his treatment of employees and the possible disciplinary consequences of not adjusting his behaviour. Mr O’Neill disputes Mr Barnes raised issues with him regarding his behaviour towards other employees.

[79] I find that swearing was not only tolerated, but condoned within the workplace and that Mr Barnes participated in it himself. In light of that, I find it was incumbent on PBR to take more formal steps to address its concerns with Mr O’Neill about his swearing and treatment of employees at an earlier stage. Dealing with performance concerns over coffee, and not following up in a formal manner when issues continued, was not sufficient to bring the seriousness of the issue and the potential consequences to Mr O’Neill’s attention. I note Mr Barnes and Mr O’Neill also knew each other very well on a personal level prior to and outside of the employment relationship. In my view, these facts provide additional reasons why Mr Barnes was not best placed to conduct a fair and open-minded investigation and demonstrate why a clear formal and documented process was required.

[80] Taking these factors into consideration, I find Mr Barnes’ personal investigation of the allegations were not what a fair and reasonable employer could have done in all the circumstances, and I accordingly find Mr O’Neill’s dismissal was unjustified on that basis. I consider this defect in the process was not minor, and it resulted in Mr O’Neill being treated unfairly.

Grounds for dismissal

[81] In relation to the first allegation, under cross-examination at the Authority’s investigation meeting Mr O’Neill acknowledged during the phone call on 23 June 2020

that he became very angry and told Mr Barnes to go “fuck himself” and hung up on him. This acknowledgment came after having denied that during the disciplinary investigation. By way of explanation, Mr O’Neill said he swore at Mr Barnes only after Mr Barnes yelled and screamed at him. Mr O’Neill said he was sick of Mr Barnes’ “shitty moods” and “was fucken over it”. Under re-examination, Mr O’Neill was pointed to his handwritten notes of the phone call and then said he was not a “100 percent” sure that he swore at Mr Barnes using the words alleged and hung up on him. While Mr O’Neill may have used the words alleged and hung up on Mr Barnes, his dismissal in reliance on those allegations was still unjustified on procedural grounds for the above reasons and was unsafe. This is also the case in relation to the third allegation in relation to swearing.

[82] I am satisfied, however, that sufficient grounds existed to dismiss Mr O’Neill for serious misconduct in relation to the second allegation.

[83] In relation to that allegation, Mr O’Neill says there was no evidence that any other workers were intimidated by his language and behaviour in throwing the metal chain. However, an assessment of that behaviour should be objective and not whether someone who was the target of alleged intimidating behaviour considered they had been intimidated. Mr Whitehead-Clarke’s oral evidence was there were five workers present including himself. There is no compelling evidence that the chain was thrown at or towards other workers. I also note Mr Whitehead-Clarke acknowledged in his oral evidence that the chain was shorter than stated in his witness statement before the Authority. However, I consider PBR could have reasonably concluded Mr O’Neill’s throwing of a metal tow chain in anger combined with his comments on that occasion was serious misconduct. At the investigation meeting Mr O’Neill admitted he was angry, threw the chain and said the words alleged. Under cross-examination, Mr O’Neill admitted his comments were directed at the employees rather than the situation. This is despite maintaining during the disciplinary process that was not the case. I do not accept Mr O’Neill was justified in his actions because of the risk of delay to the house move that day. There is also no evidence to suggest PBR condoned physically aggressive behaviour such as that exhibited by Mr O’Neill on 19 June 2020.

[84] I accept PBR’s position that at no time during the disciplinary process did Mr O’Neill take responsibility for his alleged actions, express any remorse, or provide PBR

with any assurance that his behaviour would not be repeated. I find a fair and reasonable employer could have concluded Mr O'Neill's actions constituted serious misconduct in light of Mr O'Neill's admissions, and PBR's obligation to protect the health and safety of other workers was important. I find it was open to PBR to conclude summary dismissal was an appropriate outcome in the circumstances.

Should remedies be awarded and are there issues of contribution?

[85] Mr O'Neill has a personal grievance for unjustified dismissal and is entitled to a consideration of remedies.

[86] I have considered counsel for PBR's submissions regarding subsequently discovered conduct involving Mr O'Neill's personal relationship with a female employee and a failure to meet clients on 23 June 2020. PBR says had it been aware of this while Mr O'Neill was employed, "it would have likely formed a separate allegation of serious misconduct and something that would go to the heart of trust and confidence". I am not satisfied the evidence or consequences of these allegations are clear enough that they ought to be taken into account in assessing the quantum of remedies.

Lost wages pursuant to section 123(1)(b) of the Act

[87] Mr O'Neill seeks reimbursement of lost wages as a result of his dismissal, pursuant to s 123(1)(b) of the Act.

[88] Mr O'Neill says Mr Barnes made derogatory comments around the industry about him. Mr Martin gave evidence that on 18 July 2020 he received a phone call from Mr Barnes and he "ran down" Mr O'Neill. Mr O'Neill says he was worried about how it would affect his ability to find a job, and ultimately it did affect him. Although he had been in the industry 30 odd years, he had only been in the Waikato about six years and Mr Barnes is more well-known there than he was.

[89] Mr O'Neill said once it became clear he needed to find another job he phoned a lot of people including the three directors or shareholders of other companies operating in the house removal industry for which unsworn affidavits were filed. He says most house movers were not taking on anyone – mainly due to COVID but some told him that they had heard how things had gone with PBR. Mr O'Neill says he is not computer

literate and had in the past obtained employment by word of mouth. There is no documentary evidence of his efforts to apply for roles. Mr O'Neill obtained a job with another house removal company. He says he was out of work from 15 July 2020 until 24 August 2020. Counsel for Mr O'Neill says he is entitled to an award of lost remuneration of either the lesser of a sum equal to his lost remuneration or to three months' ordinary time. He was earning \$2,600 gross per week with PBR plus he says he had a brand new ute for personal use which he values at \$5,000 for a three-month period. He says this despite the wording of the employment agreement that it would only be used for work purposes only. He assesses his three months total losses at \$27,022.50.

[90] I accept Mr O'Neill made attempts to mitigate his losses. He is entitled to three months lost wages. For just over five weeks he was not employed and is entitled to \$2,600 per week for that period. For just over seven weeks into his new employment, he is entitled to the difference between what he would have earned at PBR and what he earned with his new employer. I accordingly award Mr O'Neill \$20,804.50 in lost wages. I am not satisfied he is entitled to an amount relating to his personal use of the work vehicle allocated to him.

Compensation pursuant to section 123(1)(c)(i) of the Act

[91] Mr O'Neill seeks \$10,000 in compensation relating to his unjustified disadvantage grievance and \$25,000 in relation to his unjustified dismissal grievance under s 123(1)(c)(i) of the Act. He says the grievances gave rise to significant humiliation, loss of dignity and injury to feelings.

[92] He says he became quite stressed when Mr Barnes suspended him and began not sleeping properly. He says he did not know what was going and that Mr Barnes dragged out the process and he could not make plans. Sitting at home and being unable to work just made him feel worse. Mr O'Neill says he was renting a house on a fixed term basis so was concerned about being left without an income. Because of that he says he sold his motorbike which was his only form of transport but needed a buffer of money to get him through. Mr O'Neill says he had been waiting 25 years to buy the bike and it was devastating to have to sell it. He also refers Mr Barnes making derogatory comments around the industry and that he was not feeling good about it.

[93] I do not accept the disciplinary process was in the circumstances dragged out. The only evidence corroborating Mr O'Neill's claim regarding Mr Barnes making derogatory comments in the industry was Mr Martin's evidence. I note Mr Martin's evidence contained no suggestion that he was influenced by Mr Barnes' comments in any event. I see no basis for an increase in remedies as sought on that basis.

[94] Having regard to the particular circumstances of this case, including Mr O'Neill's very robust nature, I consider that an award of \$3,000 in relation to his unjustified disadvantage grievance is appropriate. In relation to his unjustified dismissal, I find an award of \$7,000 is appropriate.

[95] Section 124 of the Act states that I must consider the extent to what, if any, Mr O'Neill's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. Having considered the evidence, I have no hesitation in finding some of Mr O'Neill's actions including his actions on 19 June 2020 and text exchanges with Mr Barnes significantly contributed to the situation giving rise to both his disadvantage and dismissal grievances. It was sufficiently blameworthy such that a reduction of the remedies awarded for his grievance is appropriate.

[96] I find Mr O'Neill's remedies ought to be reduced by 30 per cent. Had PBR's culture of condoning bad language not been present, further reduction may have been warranted.

Has PBR breached its duty of good faith towards Mr O'Neill?

[97] It is not clear to the Authority how the claim for breach of s 4(1A)(c) of the Act is distinct from the personal grievance claims which are addressed above. In closing submissions, counsel for Mr O'Neill also referred to evidence he gave regarding Mr Barnes making derogatory comments about Mr O'Neill to others in the industry during his suspension period and after his dismissal. This aspect of the claimed breach of good faith was not identified in Mr O'Neill's statement of problem or at the investigation meeting and I cannot in fairness allow it to be raised at this late stage. The penalty claim is declined.

What are my orders?

[98] Prestige Building Removals Limited is ordered to pay to Jeremy O'Neill the following within 21 days of the date of this determination:

- a. Lost wages of \$14,563.15;
- b. Compensation of \$2,100.00 in relation to his unjustified disadvantage grievance;
- c. Compensation of \$4,900.00, in relation to his unjustified dismissal grievance.

Should either party contribute to the costs of representation of the other party?

[99] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[100] If they are not able to do so and an Authority determination on costs is needed a party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁷

Sarah Blick
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.