IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 185
5455921

BETWEEN	NIGEL RIMMER Applicant	
A N D	CARTER HOLT HARVEY LIMITED Respondent	

Member of Authority:	David Appleton
Representatives:	Luke Acland, Counsel for Applicant Daniel Erickson, Counsel for Respondent
Investigation Meeting:	6 and 7 November 2014 at Nelson
Submissions Received:	7 November 2014 from Applicant and Respondent
Date of Determination:	20 November 2014

DETERMINATION OF THE AUTHORITY

A. The applicant was not unjustifiably dismissed and his personal grievance is dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Mr Rimmer has raised a personal grievance of unjustifiable dismissal by the respondent on 10 February 2014. He states that his dismissal was both procedurally and substantively unjustified and he seeks reinstatement to his former position. He also seeks reimbursement of lost wages and compensation for humiliation, loss or dignity and injury to his feelings.

[2] The respondent denies that Mr Rimmer was unjustifiably dismissed, submitting that he was dismissed justifiably for having committed serious misconduct.

Brief account of events leading to dismissal

[3] The respondent operates a wood products plant at Eve's Valley near Nelson. Mr Rimmer commenced employment with the respondent in October 2011 and was promoted to Level 3 Grader on 8 August 2013, where he worked at what is called the coastal grading station. The respondent arranged a site visit during the Authority's investigation meeting so that the Authority could see the setup and operation of the grading station in question.

[4] Mr Rimmer's job was to look out for defects in boards that would pass from the planer room in front of him and his colleagues on grader chains and mark the wood so that the following trim saws would cut the lengths appropriately. Mr Rimmer's evidence is that he worked 10 hour shifts and would examine 4,500 lengths of wood, on average, per shift.

[5] It is common ground between the parties that boards would commonly get piled up as they came out of the planer out-feed so that they ended up being skewed at the landing table, just before the grader chains. In that event, one of the graders would have to stop the chains and climb on to the landing table and separate the boards.

[6] Mr Rimmer's evidence is that, when boards became skewed at the grading table, the procedure he was trained to carry out was to stop the action of the grading chain at one of the nearby consoles, and then go to a bank of isolation switches nearby. There were five isolation switches in the particular bank in question, next to each other in a row. These switches were used to isolate zones 4, 5, 6, 8 and 9 respectively. The grading station in question was designated as zone 6.

[7] The isolation process involved turning the relevant isolation switch and locking it into position using a padlock to which Mr Rimmer and other graders each had a key. An isolation card would also be fixed to the isolation switch which stated *DANGER LOCKED OUT DO NOT OPERATE*, amongst other words. Above each isolation switch is a button marked *RESET*.

[8] Mr Rimmer's evidence is that he had been trained to press the reset button after having locked the isolation switch in question in order to check that the isolation switch had been effectively engaged. If the button lit up, that would indicate that the isolation switch had been engaged and the zone in question had been safely isolated. If it did not light up then the isolation switch had not engaged. This methodology of testing that the isolation switch had been correctly engaged was known *no light no entry*, indicating that if the button did not light up, then it was not safe to enter the zone in question.

[9] It is the respondent's evidence that all graders had been trained in 2013 to no longer rely on the *no light no entry* methodology by pressing the reset button, but instead to walk back to the console and to attempt to start the machinery in the relevant zone. If the relevant zone had been correctly isolated, then the machinery would not operate and the grader could then safely enter the relevant zone.

[10] On 30 January 2014 one of the frequent skewing of boards occurred and it fell to Mr Rimmer on that occasion to get onto the landing table and clear the jam. His evidence is that he stopped the belt by using the console, went over to the isolation switches, engaged the isolation switch, put on his padlock and the isolation card, and pressed the *no light no entry* reset button, which lit.

[11] He then went on to the landing table to start to clear the boards when he saw a roller on the grading chain turn around 600mm away. Mr Rimmer initially believed that there had been an isolation failure and climbed off the landing table and approached the isolation switches, where he ascertained that he had mistakenly engaged isolation switch for zone 5 instead of zone 6. The isolation switch for zone 5 is approximately 10cm to the left of the isolation switch for zone 6.

[12] Mr Rimmer then spoke to the deputy supervisor and pointed out what had happened and then changed the padlock and lock out card to the correct isolation switch, carried out a safety check (known as a START procedure) which was signed off by the deputy supervisor. He then cleared the boards, turned off the isolator and went to the office at the request of the deputy supervisor.

[13] Mr Rimmer says that, as requested, he then wrote down what had happened and then gave it to the deputy supervisor. He was then told to *carry on* and that his colleague, Shannon, would be interviewed. Mr Rimmer says that he does not know

what happened at the interview with Shannon, only that he was interviewed. Mr Rimmer says he continued working to the end of his shift.

[14] When Mr Rimmer was next on duty he was handed a letter signed by Nigel Cuthill, the site manager for the plant. The letter was dated 31 January 2014 and advised that Mr Cuthill was conducting an incident investigation into the event that had occurred the previous day. The letter went on to say the following:

> *The investigation pertains to an allegation that you failed to follow the standard process for safely locking out a piece of equipment you were working on.*
>
> *A formal investigation meeting has been scheduled for 5/2/14 at 3.30pm, it will be held in my office.*
>
> *At this meeting we will discuss the results/findings from the investigation and you will be given the opportunity to assess and comments on those findings. The Company representatives at this meeting will be Matthew Walker and myself. You are entitled and encouraged to have a representative at this meeting.*
>
> *The Company has formed a preliminary view that the events described are serious breaches of Nelson Sawmill procedures.*
>
> > *The Employee Handbook provides examples of serious misconduct, which include "Acts of disobedience or negligence which affects safety, quality, security, company property or the good conduct of the business".*
>
> *The Company may conclude that there is a disciplinary case to answer as a result of the responses you make during this formal investigation meeting. If this occurs, you need to be aware that a disciplinary meeting will be held where you may be issued with a disciplinary sanction up to and including dismissal.*
>
> *Should you have any further queries please conduct me.*
>
> *Yours sincerely*
>
> *Nigel Cuthill*
> *Site Manager*
> *CHH Woodproducts*
> *Nelson*

[15] Mr Rimmer's evidence is that having been given this letter, he continued working his shift as normal, including doing further isolation lock outs.

[16] Mr Rimmer attended the meeting on 5 February 2014 and chose not to have a support person with him. The Authority saw a diary note made by Mr Cuthill of the

meeting which Mr Rimmer accepted during the Authority's investigation meeting as an accurate record of the meeting. The meeting notes contain the following passage:

> *Matt read out the Energy isolation and emergency stop devices on Coastal Grade Stations. Nigel agreed that was correct, Matt asked had he been trained against that SOP* [Standard Operating Procedure] *in November when he had signed off? Nigel said yes I was. Nigel C asked so you did use (test) console after you turned off isolator and put your padlock through hole with your lock out card attached? Nigel R said yes I did. Nigel C asked did you follow this procedure after you were signed off against the SOP. Nigel R said yes but after a while reverted back to just isolating the electrical isolators as were trained no light no entry. Nigel C asked so you knew you should have tested the console. Nigel R yes but culture of history I reverted back to old way of no light no entry.*

[17] After a short adjournment, Mr Rimmer was advised that the company had decided that a formal disciplinary meeting should take place, on 10 February 2014. The note referred to above concluded with the statement that Mr Walker (the company accountant) explained how *the company still viewed this as serious misconduct and that it would result in his dismissal*.

[18] Mr Rimmer was given a letter signed by Mr Cuthill dated 5 February 2014. This letter erroneously referred to a clause in the Eve's Valley Nelson Collective Agreement, by which Mr Rimmer was not bound, as he was not a member of the Union, but was employed pursuant to an individual employment agreement. The letter stated that the company had formed the preliminary view that Mr Rimmer had breached the isolation policies and procedures of the plant and also stated that the company had formed a preliminary view that the breach of the isolation policies and procedures may be a matter of serious misconduct which may result in his dismissal.

[19] In explaining its view that Mr Rimmer had breached the isolation policies and procedures the letter stated that the company had considered the following:

- *That you are aware of the Company health and safety policies, these are inclusive of and not limited to, Nelson Dry Mill safe operating procedures.*
- *That you entered an isolation area without following the relevant SOP fully.*
- *That you understand that entering an isolation area without locking out correctly is a serious breach of company policy and procedure.*

[20] The letter concluded by advising Mr Rimmer that he was entitled and encouraged to bring a representative to the meeting on 10 February, that the purpose of the meeting was to seek his response to the preliminary view that the isolation breach was a matter of serious misconduct and that he could be dismissed and to give him the opportunity to provide any further information that he thought was necessary for Mr Cuthill to consider prior to making a final decision.

[21] Mr Rimmer attended the meeting on 10 February without a representative but chose, instead, to record the meeting with Mr Cuthill's agreement. The audio recording of the meeting was made available to the Authority together with a transcript which both parties accepted was accurate. These notes record that Mr Cuthill told Mr Rimmer that the purpose of the meeting to investigate why Mr Rimmer reverted back to the practice that he was trained not to follow with regards to the Standard Operating Procedures (SOPs) and how to effect isolations. Mr Rimmer stated that he did not think there was anything fresh that needed to be discussed or anything new that was relevant.

[22] The notes also record that Mr Rimmer was asked whether he accepted that the *no light no entry* methodology was in place before the SOP training that Mr Rimmer had received, requiring him to carry out isolation processes in a different way. The notes record that Mr Rimmer replied *hmm, I accept that.* In his evidence to the Authority Mr Rimmer indicated that this was not a definitive statement and that he had given his answers feeling stressed because he had been told that he faced losing his job.

[23] The meeting then adjourned for 25 minutes during which Mr Cuthill and Mr Walker considered what they had heard. Mr Rimmer was then told that, because he had not followed the isolation procedure and had made the conscious decision not to follow the SOP, which could have resulted in him badly injuring himself, the company had decided to terminate Mr Rimmer's employment with immediate effect.

The issues

[24] In considering whether Mr Rimmer's dismissal was unjustified, it is necessary to consider the following issues which have been raised by Mr Rimmer's counsel:

(i) Was Mr Rimmer aware of the need to carry out a test at the console after having engaged the isolation switch?

(ii) Was there a culture of skipping the test at the console which was not investigated?

(iii) Was there a failure to provide relevant information to Mr Rimmer?

(iv) Was there disparity of treatment between Mr Rimmer on the one hand and three other staff who had allegedly breached isolation procedures?

(v) Was the process conducted with undue haste?

(vi) Was dismissal substantially justified?

Was Mr Rimmer aware of the need to carry out a console test after having operated the isolation switch?

[25] Although Mr Rimmer appears to have accepted in the respondent's investigatory meetings that he had known about the need to try to restart equipment to test the efficacy of an isolation, and that he had, nonetheless, reverted to the older methodology of *no light no entry*, this question arises for two reasons. First, Mr Rimmer denied during his evidence to the Authority that he had been effectively trained to carry out a test at the console, after having engaged the isolation switch and having carried out a *no light no entry* protocol, and that his answers in the respondent's investigatory meetings should not be relied upon, as he had been stressed.

[26] The second reason is that the respondent produced in evidence documents, some of which raised questions as to how clear it was to graders that they had to carry out a test at the console, prior to entering an area that they had previously isolated using the isolation switch.

[27] It appears that the respondent has in place a suite of policies and procedures relating to health and safety. The Authority saw, in particular, six SOPs which appeared to be relevant. The first, dated September 2012, was headed up *Hazardous Energy Isolation Procedure.* This document stated that it applied to all personnel on the Nelson site and that it consisted of *Site Wide Isolation Procedures, including competency and SBO assessments.* SBO stands for *Safe Behaviour Observation.* It was the evidence of Mr Cuthill that this document was a general or generic document that coexisted with other, more specific SOPs. I accept that evidence.

[28] The Authority also saw five versions of a specific SOP which related to the coastal grade station, where Mr Rimmer worked. The first version had been issued on 15 June 2011, and the second to fifth versions had been issued in March 2013, April 2013, May 2013 and on 20 November 2013 respectively. This latter version was the one in place when the incident on 30 January 2014 had occurred. The second and subsequent versions were reasonably different from the first version in content. It is likely that there were other versions that had been issued between the first and second versions, but the respondent could not find these.

[29] The Authority also saw a document entitled *Coastal Grade Station Job Safety Analysis* (JSA) dated 5 March 2013, which was apparently in force when the incident on 30 January 2014 occurred. Mr Acland also referred to an SOP for the *Bins Sorter* section which permitted testing of the isolation switch by either the *no light, no entry* protocol or by the restart at the console test. However, Mr Rimmer did not work in the Bin Sorter section of the plant, and so I decline to consider this evidence.

[30] The evidence of Mr Rimmer was that console start up tests had been carried out prior to the installation of the isolation switches but that, when the isolation switches were installed, he had been told by the plant's electrician that the *no light no entry* methodology was to be used thereafter. It was not clear when the isolation switches had been introduced, but Mr Rimmer said it had been in 2012. In the absence of any contrary evidence from the respondent, I accept that this is likely to be true.

[31] The Hazardous Energy Isolation Procedure (HEIP) document refers to two methods of lock out. The document states as follows:

> *Methods of Lock Out:*
>
> - ***Local Point Lock Out**: Lock out is required on individual devices for each energy source in an area where risk is present and work is to take place.*
> - ***Single Point Zone Lock Out:** A single switch that isolates multiple energy sources for a zoned area. **"No light No entry"** –displayed at the isolation switch.*

[32] It was Mr Rimmer's evidence that the task of isolating zone 6 fell into the category of *Single Point Zone Lock Out*. This is relevant because the Hazardous

Energy Isolation Procedure goes on to describe the process when a *Single Point Zone Lock Out* occurs. This was stated to be as follows:

> ***Single Point Zone Lock Out***
>
> - *Stop/turn the machine off.*
> - *Turn "Zone" Isolator(s) to the OFF position and lock with a padlock and your lockout card(s).*
>
> ***NO LIGHT – NO ENTRY.*** *(If light does not come on call Electrician). If separate holes for each person working on the plant are not available, use lock-out jaws.*
>
> *When the light comes on this is confirmation that full isolation has been met, therefore test by pressing button on isolator if light stays on the plant is isolated.*

[33] Mr Rimmer's evidence is that this is exactly the process he followed on 30 January 2014. Mr Cuthill disagreed that the exercise carried out by Mr Rimmer on 30 January 2014 had been a *single point zone lock out*, arguing that it had been a *local point lock out,* which the HEIP states requires the *start button to be pressed to ensure lockout is effective.*

[34] However, evidence was also heard from Morgan Thorn, who is a union delegate and who also works in the respondent's Eve's Valley plant (albeit in a different section to Mr Rimmer), that Mr Rimmer's assessment was correct. It must be said that there appeared to be a genuine difference of opinion on this point, and that Mr Rimmer's interpretation of the HEIP is more intuitive than that of Mr Cuthill, and so is likely to be correct. However, having seen other evidence about how Mr Rimmer had been trained, I doubt that much turns on the HEIP SOP, which I believe was not in Mr Rimmer's mind when he failed to test his isolation at the console on 30 January 2014.

[35] The SOP for the coastal grade station dated 15 June 2011 contained a section dealing with how to fix skewed boards when it was necessary to get on the landing table. This contained a process which Mr Rimmer said was quite different to the one he was familiar with. It is not necessary to repeat it here, although it entails locking out different parts of equipment at a *MCC Wall* and testing each isolation at the console after each lock out. It appears that this was the protocol that was in place prior to the isolation switches being installed.

[36] The second to fifth versions of the SOP for the coastal grade station each have a section entitled *Electrical Isolators* and sets out the process to be followed when an isolator switch is engaged. This includes the words:

> *Test isolation by attempting to start – most of the equipment is tested at either consoles 1 and 2.*

[37] These SOPs also contain a section on how to deal with skewed boards at the landing table. This states the following in each version:

> *If you have to get on the landing table:*
>
> *LOCK OUT zone 6, test isolation by attempting to start.*

[38] This process is completely different from that set out in the coastal grading station SOP dated 15 June 2011.

[39] The JSA stated that the required controls for fixing skewed boards at the landing table was to:

> *Turn off the planer infeed and LOCK OUT zone 6, test isolation.*

[40] This is ambiguous as the test could comprise either the *no light no entry protocol* or the restart at the console test.

[41] The respondent had also put into evidence copies of competency assessments, induction sheets, and skills training confirmation forms, all signed by Mr Rimmer on different dates. Two skills confirmation sheets completed in January 2012 and August 2013 respectively had been signed off by Mr Rimmer's supervisors and each confirmed that Mr Rimmer had, amongst other things, an understanding of *Lock-out/safe isolating proceedings.* Two competency assessment sheets dated March and April 2013 respectively had assessed Mr Rimmer as competent in, amongst other things, *isolating procedures for this equipment.* The April 2013 competency assessment sheet specifically related to Mr Rimmer's work at the coastal grading station. This indicated that the assessment was for a new employee. Presumably, this is because Mr Rimmer had recently moved to working onto grading work in April 2013.

[42] A further competency assessment form was disclosed which showed that Mr Rimmer had been assessed two weeks later, and this time by a different assessor,

and who had also assessed Mr Rimmer as competent in *isolating procedures for this equipment*. This form indicated that the assessment was for a refresher and because an SOP amendment or release had occurred.

[43] The respondent produced another competency assessment form dated 25 November 2013 which indicated that the assessment was for an *Amendment.* This corresponded with the release of the SOP issued on 20 November 2013. This form indicated eleven aspects that were being assessed but did not have the assessor's initial against *isolating procedures for this equipment.* It did, however, have his initials against another section called *amendments (highlighted text only) page numbers 1/15.* The 20 November 2013 SOP did consist of 15 pages and so this might indicate that Mr Rimmer had been assessed as competent with respect to all the amendments in that SOP. Unfortunately, Mr Rimmer could not remember the details of this assessment and the assessor, a Mr Pritchard, no longer worked for the respondent and could not be traced. However, the November 2013 SOP had not changed from the preceding three versions in relation to the isolation procedure to be followed when fixing skewed boards at the landing table.

[44] Whilst the competency assessment form dated 25 November 2013 is unclear about whether there was training in respect of isolation procedures on that particular occasion, other documentary evidence shows that Mr Rimmer had received an induction into the April 2013 SOP in that month and then also had three separate competency assessments in April 2013, and on each occasion the relevant section designated as *isolating procedures for this equipment* had been initialled by the inductor/assessor. Furthermore, the skills training confirmation form dated August 2013 also showed that Mr Rimmer had been assessed as having an understanding of *Lock out/safe isolating procedures*.

[45] The respondent produced another document which appeared to be an Isolation and De-energisation Competency Assessment for the HEIP. This contained assessments against various competency requirements including verifying the effectiveness of energy controls. Mr Rimmer had been assessed as competent against this requirement. The requirement states:

> *STEP 6: <u>Verify the effectiveness of energy controls</u>*
>
> *The isolation was verified for effectiveness (e.g. Start procedure attempted or check carried out to check for any residual stored energy).*

[46] Mr Rimmer in his evidence pointed out that this presented an option between doing a test at the console or carrying out the *No light no entry* procedure. This evidence appears to be correct as it directly relates to the different steps identified in the HEIP SOP as between the process to be followed in a Local Point Lock Out on the one hand and a Single Point Zone Lock Out on the other.

[47] The Authority must determine whether Mr Rimmer had been properly trained on the new isolation procedures as set out in four versions of the SOP issued from April 2013, as asserted by the respondent, or whether he had only understood that he had to carry out the *No light No entry* process, as asserted by Mr Rimmer.

[48] Evidence supporting Mr Rimmer's position is the existence of the HEIP SOP, which seems to indicate clearly that the task that Mr Rimmer carried out on 30 January 2014 was a *Single Point Zone Lock Out*, requiring the *No light No Entry* test procedure. Arguably, his position is also supported by the ambiguous instruction in the JSA and by the fact that the competency assessment relating to the introduction of the November 2013 SOP does not have the trainer's initials against the part referred to *Isolating Procedures for this equipment.*

[49] Supporting the respondent's position are clear references in the four versions of the SOP issued between April and November 2013 to the need to carry out a test by attempting to start the equipment.

[50] Clause 12.1 of Mr Rimmer's employment agreement states as follows:

> *The Company has policies, guidelines and procedures which form part of your terms of employment and you must comply with them at all times. The policies, guidelines and procedures are readily available and you should familiarise yourself with them.*

[51] The respondent's employee handbook, which Mr Rimmer acknowledged having seen during his employment, set out examples of serious misconduct which included the following:

> *Acts of disobedience or negligence which affects safety, quality, security, Company property or the good conduct of the business.*

[52] The Handbook also states the following:

> *You are required to contribute to achieve our health and safety standards and to take all practicable steps to ensure a safe place of work. You should ensure you are familiar with your site Health and Safety policies, practices and procedures.*

[53] These requirements, when taken together, put a contractual onus on Mr Rimmer to ensure that he was familiar with the requirements of the SOPs relevant to his area of work. Mr Rimmer accepted that the SOPs were regularly reviewed and updated and were readily available for viewing.

[54] The Competency Assessment carried out with respect to the November 2013 SOP indicates that Mr Rimmer was trained in amendments (highlighted text only), pages No.s 1-15. Whilst the copy of the SOP that the Authority saw did not contain any highlighted text, this competency assessment suggests that the entire SOP was discussed with Mr Rimmer.

[55] More relevant, there is ample evidence that Mr Rimmer was inducted, and assessed as competent in isolation procedures from April 2013 onwards, after the amended coastal grading station SOP with the new isolation requirement had been introduced.

[56] The final element I take into account in assessing this issue is the words stated by Mr Rimmer in the meeting of 5 February 2014, as recorded by Mr Cuthill. This records that Mr Rimmer stated that, in answer to a question from Mr Cuthill, that he knew he should have tested at the console but that there was *a culture of history, I reverted back to old way of no light no entry.*

[57] The use of the words *reverted back* suggested strongly that Mr Rimmer knew that the *No light No entry* methodology had been replaced. In his evidence to the Authority, Mr Rimmer said that he had been referring to the position prior to the installation of the isolation switches. However, this makes no sense as, according to his separate evidence on this, and the evidence of the September 2012 SOP, prior to the isolation switches being installed, it had been necessary to go backwards and forwards to the console testing that different parts of the equipment had been properly isolated.

[58] During the site visit Mr Rimmer told me on oath that he had accidentally isolated zone 5 instead of zone 6 because he had been aware of the need not to interrupt production and he had been working in a hurry. This suggests that he was in such a hurry that he was prepared to skip what had become an essential part of the required process in isolating zone 6, namely, testing isolation by attempting to restart the equipment at the console.

[59] It is my conclusion, having assessed all of this evidence, that Mr Rimmer was fully aware on 30 January 2014 (or ought reasonably to have been fully aware) of the need to carry out a test of his isolation by attempting to start the equipment in zone 6 prior to entering it, rather than using the old no light no entry protocol.

Was there a culture of skipping the test at the console which was not investigated?

[60] If Mr Rimmer had suggested to Mr Cuthill that there was a widespread culture amongst the graders of failing to carry out a restart test at the console, this would have warranted a thorough investigation as, for example, it might have indicated that Mr Rimmer's supervisors knew of such a culture but somehow condoned it. However, first, Mr Rimmer said in evidence that supervisors were not present most of the time when the isolation process took place as it was so frequent and, second, the words recorded by Mr Cuthill from the 5 February 2014 meeting indicate that Mr Rimmer had been talking about the culture that had previously been in place; hence his use of the phrase *culture of history.*

[61] I also take into account the evidence of Mr Cuthill, who explained that he had spent a lot of time in the grading station when he first started working for the respondent (as he had never worked in the timber industry before) and had seen zone 6 be isolated many times before, and he had never seen anyone fail to test their isolation by attempting to restart.

[62] Taking all this evidence into account, I am satisfied that Mr Cuthill was not obliged to carry out a further inquiry in respect of an allegation of a widespread culture of failing to test at the console, because such an allegation was not made in those terms and because Mr Cuthill had no other indication that there might be such a culture.

The failure to provide information to Mr Rimmer

[63] It was Mr Rimmer's evidence that several documents of relevance to the investigation were not given to him. These included a copy of the employee handbook, the HEIP SOP, the coastal grading station SOP and training and assessment documentation, including the competency assessment forms.

[64] It is Mr Cuthill's evidence that he sent a copy of the employee handbook to Mr Rimmer when he sent out his initial letter, and that the latest version of the coastal grading SOP had been available at the investigation meeting. He conceded, however, that the HEIP SOP and the training documentation had neither been present at the investigation meeting, nor had they been otherwise provided to Mr Rimmer. On balance, I believe that Mr Cuthill is correct in saying that he sent a copy of the employee handbook to Mr Rimmer and made available a copy of the latest version of the coastal grading SOP at the meetings.

[65] Mr Rimmer also says that his supervisor said that he would get Mr Rimmer's colleague to write a statement, and that he himself made a written statement for the supervisor, but that these documents were not provided to him during the investigatory and disciplinary process. Mr Cuthill says that he was not aware that such documents had existed and did not take them into account. I accept this evidence.

Failing to provide a copy of the HEIP SOP

[66] I believe that Mr Cuthill is unlikely to have relied on the HEIP SOP in his investigation and in reaching his decision to dismiss Mr Rimmer. Whilst there are often occasions when a document or information is not relied upon by an employer, but should have been, I do not believe that the HEIP SOP was in the contemplation of Mr Rimmer when he made his error and then failed to carry out the correct restart test procedure. The failure to provide a copy of this document to Mr Rimmer was not prejudicial to him in light of these factors.

Failing to provide the training and assessment documentation

[67] However, it is without question that the respondent relied on the training records of Mr Rimmer in reaching the conclusion that Mr Rimmer had known about a requirement to test at the consoles but had consciously failed to do so. There is also

no doubt that failing to provide information to an affected employee which is relied on by his or her employer in reaching a conclusion that an employee should be dismissed constitutes a direct breach of s.4(1A)(c) of the Employment Relations Act 2000 (the Act). Section 4(1A) provides as follows:

> *4(1A) The duty of good faith in subsection (1)—*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
>
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
>
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[68] During cross examination Mr Erikson, on behalf of the respondent, suggested to Mr Rimmer that Mr Rimmer had not asked for these documents. Whilst I find this to be true, it is not for an employee to have to positively ask for information that is being relied upon by the employer, for the obvious reason that an employee cannot know what is in the mind of the decision maker and what he or she is relying upon.

[69] The respondent is a large employer with excellent resources, including a dedicated human resource department. If the respondent chooses to delegate to managerial staff the important task of carrying out disciplinary investigation meetings that could lead to the dismissal of employees, it must ensure that those managers are aware of the fundamental need to make available to the affected employee all relevant information that he or she is taking into account.

[70] Section 103A of the Act provides as follows:

> ***Section 103A Test of justification***
>
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *(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 thinks 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*

[71] The defect in the process that I have identified was not minor, as the provision of relevant information is a fundamental requirement of good faith, by virtue of s4(1A) of the Act. Even if the failure did not ultimately result in Mr Rimmer being treated unfairly, the provision at s.103A(5) requires both limbs of the test to be satisfied for the Authority to be required not to determine the dismissal unjustifiable on the basis of the defect.

[72] However, it does not follow that a defect in procedure that was not minor must always result in a finding of unjustified dismissal. In another case involving the respondent, *Kaipara v Carter Holt Harvey Limited* [2012] NZEmpC 40, His Honour Chief Judge Colgan addressed a breach of s.4(1A)(c) of the Act and the effect on the fairness of the dismissal. At [21] et seq, he stated:

> *[21] Compliance with fair and reasonable procedures is not, and never has been, a requirement simply for its own sake. For it to constitute a personal grievance of unjustified dismissal, it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable. Put another way, if the procedural failing nevertheless led to the same substantive outcome as would have occurred if the process had been correct, then, whilst in some cases it may amount to an*

> *unjustifiable disadvantage in employment, it should not usually cause an otherwise justified dismissal to be declared unjustified.*
> *[22] It is correct that CHH did not furnish Mr Kaipara with copies of several documents prepared by it after the incident and in the course of its investigation of his misconduct. It follows, therefore, that Mr Kaipara did not have an opportunity to try to contradict any of these documents. CHH was obliged, pursuant to s 4(1A)(c) of the Act to do that which it did not, and that its failure was a breach of its statutory obligation of good faith in this respect. But it is another matter whether this breach should cause Mr Kaipara's suspension and/or dismissal to be found to have been unjustified.*

[73] Although this case dealt with a matter that had occurred prior to the April 2011 amendments to s.103A, those amendments do not change the principle enunciated in these passages. In the present case, it is not clear that it would have made any difference if the training and assessment documents had been made available to Mr Rimmer prior to his dismissal, given that he had received training on the new version of the coastal grading station SOP and had expressly accepted that the *no light no entry* methodology had preceded that training. The documents merely would have confirmed that this was, indeed, the case.

[74] It is my finding that, although the respondent breached s.4(1A)(c) of the Act, and that this breach was not minor, the breach did not result in unfairness to Mr Rimmer as his concession that he had been trained in the relevant SOP after the *no light no entry* methodology had been applied would not have been changed by the provision of all the training documentation. Whilst the competency assessment form signed by Mr Pritchard cast doubt on whether Mr Rimmer had been assessed as competent in the relevant SOP's isolation procedures, the other preceding assessment forms showed that he had been trained in them previously.

[75] Accordingly, this breach by the respondent does not, alone, render the dismissal unjustified. I also do not believe that the failure caused any unjustified disadvantage to Mr Rimmer.

Was there disparity of treatment?

[76] Mr Rimmer also maintains that three employees committed isolation breaches after his dismissal, but none of them was dismissed. First, I accept the submission of Mr Erickson in this respect, that s.103A (2) precludes the Authority from considering a disparity argument in relation to events that post-dated Mr Rimmer's dismissal, in light of the requirement in s.103A that the test is to examine *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. Clearly, at the time the dismissal occurred, the respondent could not have been aware of the circumstances of putative breaches that had not yet occurred.

[77] Even if that were wrong, I would accept the argument of the respondent that the circumstances of the three employees cited by Mr Rimmer were materially different from those of Mr Rimmer. One employee's alleged breach was investigated by Mr Cuthill, and third parties denied that the employee had breached isolation procedures. This information satisfied Mr Cuthill. A second employee's breach occurred because of a flaw in the relevant SOP which did not refer to isolating a particular switch and so his breach could not have been his fault. The third isolation breach occurred because an employee entered part of the plant to which access was prohibited but the sign prohibiting entry was temporarily obscured.

[78] In none of these cases was there a deliberate failure to follow the latest correct isolation process, and so they can be materially distinguished from Mr Rimmer's action.

Was there undue haste in the process?

[79] Mr Acland has suggested that Mr Cuthill was unduly hasty when he followed the process, and that this is shown by his error in referring to the collective agreement in the letter of 5 February 2014, rather than to Mr Rimmer's individual employment agreement.

[80] Whilst it is true that greater care could have been taken by Mr Cuthill in preparing the 5 February letter, and in ensuring that all relevant documents were put before Mr Rimmer, I do not believe that Mr Rimmer was prejudiced by either of these issues. I have already addressed the incomplete provision of documentation above. With respect to the incorrect reference to the collective agreement, Mr Rimmer would have been fully aware that he was not a member of the union, and not subject to the collective agreement, and so was not prejudiced by this error. I believe that this was a minor error that did not result in unfairness, and so falls with s.103A(5).

[81] Mr Acland also submits that Mr Rimmer was not given much time before receiving each of the letters dated 31 January and 5 February, because of his shift patterns and Nelson Anniversary Day intervening. However, Mr Rimmer appears

from the transcripts to be satisfied, and content to continue with each meeting on 5 and 10 February.

[82] Standing back, I do not believe that Mr Cuthill acted with undue haste. Mr Rimmer made unequivocal admissions during the 5 and 10 February meetings which vitiated the need for Mr Cuthill to take any further steps than those which he took.

[83] In the Employment court case of *Murphy and Routhan t/a as Enzo's Pizza v. Van* Beek, His Honour Chief Judge Goddard stated the following at page 620:

> *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.*

[84] The admission must occur within a fair procedure, or else any admission may be unsafe. However, I do not accept that there has been any procedural flaw by the respondent that rendered the process so unfair as to render Mr Rimmer's admissions unreliable.

Was the dismissal substantially justified?

[85] There are a number of issues that could render the decision to dismiss substantially unfair.

Was Mr Rimmer's action misconduct rather than serious misconduct?

[86] Mr Acland argues on behalf of Mr Rimmer that the employee handbook differentiates between misconduct and serious misconduct and that what Mr Rimmer did was an example of the former, rather than the latter. In particular, he says that Mr Rimmer's action was a:

> *Failure to observe safety rules/procedures or working or acting in an unsafe manner.*

[87] The letter to Mr Rimmer confirming his dismissal relied on two examples of serious misconduct referred to in the employee handbook. These were:

> *Acts of disobedience or negligence which affects safety, quality, security, Company property or the good conduct of the business;*

and

> *Behaving in such a manner as to injure or cause extreme risk to other persons on Company premises.*

[88] I accept Mr Acland's submission that the facts do not support a finding that Mr Rimmer acted in breach of the second example of serious misconduct, as no injury was caused to other persons, nor were they caused extreme risk.

[89] In respect of the first example of serious misconduct relied upon by Mr Cuthill, he stated in evidence that he believed that Mr Rimmer had committed both an act of disobedience and an act of negligence in failing to follow the coastal grading station SOP's procedure on isolation.

[90] Taken together, Mr Rimmer's admissions on 5 and 10 February 2014 amounted to an unequivocal admission of knowingly not following the correct isolation procedure. In light of this, I accept that Mr Cuthill was entitled to reach the conclusion that Mr Rimmer had committed an act of *disobedience or negligence which affects safety*.

No serious risk of harm?

[91] Mr Acland also submitted that the risk of harm that Mr Rimmer was in when he isolated the wrong zone, and did not carry out a restart test, was much less than the risk that has been painted by the respondent. He referred to the respondent's JSA for the coastal grading station which assessed the risk of getting struck by a board and moving machinery when fixing skewed boards at the landing table as low, and the risk of slips, trips and falls as medium.

[92] However, Mr Cuthill's evidence was that the JSA was not comprehensive, and that there was also a risk of entrapment or entanglement, by getting one's foot caught in the chains along which the planks moved. He said that if this happened, one could

break or even lose a leg. Mr Rimmer's evidence as that this could not happen because he would stand on the metal deck in front of the chains when cleaning a jam. However, I accept Mr Cuthill's evidence that one could lose concentration while working to clear skewed boards and could step on the chains, with the consequence he referred to.

[93] In addition, I take into account the assessment that Mr Rimmer carried out himself when he did a START procedure after having locked out the wrong zone on 30 January 2014. In this, he identified the *current risk level* (that risk level prior to carrying out the START process) as high. He also identified entrapment or entanglement as one of the risks that were present.

[94] Mr Rimmer also says that he was not stood down or made to carry out a drug test after his isolation error, which indicates that the matter was not viewed as serious at that point. However, Mr Cuthill says that he asked the supervisor not to allow Mr Rimmer to carry out any isolation procedures until the investigation had been finished but did not tell Mr Rimmer this. Whilst he should clearly have told Mr Rimmer of this qualification, that did not impinge on the fairness of the dismissal, and I accept that the matter was viewed as potentially serious from the start by Mr Cuthill.

[95] All in all, I am content that Mr Cuthill's assessment of the risk that Mr Rimmer was under was accurate, and that he was entitled to take that risk into account in reaching his decision.

Is self-reporting jeopardised by Mr Rimmer's dismissal?

[96] It is also part of Mr Rimmer's case is that, by dismissing him after he had self-reported the incident, the respondent sent a strong signal to other staff not to self-report near misses, which would undermine the safety regime of the respondent. I have some considerable sympathy with this point of view. I am aware that some organisations operate a *no blame* approach to health and safety issues, in order to encourage self-reporting and learning.

[97] However, first, the Authority must not step into the shoes of the respondent but must assess the fairness of the dismissal against the statutory tests. Second, whilst Mr Cuthill's decision may have had the effect that Mr Rimmer has suggested it would (although Mr Cuthill's evidence is that reports of incidents actually increased after

Mr Rimmer's dismissal) that does not mean that, in terms of the Act, the decision to dismiss Mr Rimmer did not fall within the range of responses open to a fair and reasonable employer.

Was the respondent responsible for the error giving rise to the dismissal?

[98] Mr Acland also submits that the respondent effectively caused the error in the first place, by having redundant isolation switches in close proximity to the correct isolation switch. There is no doubt that there is truth in this submission. However, the new methodology of testing isolation by trying to restart the equipment was, according to Mr Cuthill, introduced to avoid the consequences of accidentally isolating the wrong zone. It would have been better to have removed or permanently locked off the redundant switches (which is now the case) but employees adopting the new testing methodology would, if implemented, have completely solved the consequences of incorrect isolation. The respondent can reasonably expect its staff to follow correct procedures once they have been trained.

Is staff training inadequate in general?

[99] Mr Thorn said in evidence that staff training is often inadequate as, essentially, it is done in a group in a noisy environment, and that staff just sign to say they understand the training when they may not have done. He himself often refuses to sign to say he has understood the training.

[100] I am unable to gauge the accuracy of this proposition as to the adequacy of training in general at the Eve's Valley plant because of insufficient evidence. In any event, this was not what Mr Rimmer said in evidence. He told the Authority that he could not remember the detail of the training and assessments referred to in the training and assessments documents. More significantly, he also did not raise this as an issue during the investigatory meetings with the respondent on 5 and 10 February. Mr Rimmer is articulate and the notes and transcript (which have been accepted as accurate) show that he did not appear to have been stuck for words during these meetings.

[101] All in all, I cannot accept this evidence of Mr Thorn as cogent evidence of unfairness towards Mr Rimmer.

Conclusion

[102] In conclusion, notwithstanding the failure to provide Mr Rimmer with relevant documentation prior to the decision to dismiss, I am satisfied that the decision to dismiss him was substantially justified. Mr Rimmer knew what was required of him and knew, or ought reasonably to have known, that a deliberate failure to carry out those requirements could result in a finding of serious misconduct and his subsequent summary dismissal.

[103] I am also satisfied that Mr Rimmer's statements to Mr Cuthill about reverting to an old testing methodology were unequivocal, and that a fair and reasonable employer could have relied upon those statements, in all the circumstances, as an admission of a conscious decision to no longer follow a better methodology that Mr Rimmer had been trained to do.

[104] The operating environment of the Eve's Valley Mill is replete with inherent hazards, including at the grading station. Although Mr Rimmer tried to downplay the hazards involved in clearing skewed boards at the landing table, a deliberate failure to follow a key part of the isolation procedures was a matter which Mr Cuthill was entitled to take seriously. There was nothing in the transcript of the disciplinary meeting, nor in the notes of the proceeding investigation meeting to indicate that Mr Rimmer, having accepted that he had reverted to an old practice, acknowledged his wrongdoing or was keen to change his behaviour in this respect.

Determination

[105] In conclusion, I am satisfied that dismissal of Mr Rimmer was an action that a fair and reasonable employer could have taken in all the circumstances at the time the dismissal occurred.

Costs

[106] Costs are reserved. If the respondent wishes to make any representations regarding their costs, they should serve and lodge a memorandum of counsel within 14 days of the date of this determination. I understand that Mr Rimmer is in receipt of

legal aid and, accordingly, the respondent is to be mindful of s.45 of the Legal Aid Act 2011 if it seeks a contribution for him for its costs. Mr Acland will have a further 14 days within which to respond on behalf of Mr Rimmer.

David Appleton
Member of the Employment Relations Authority