

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 190
5545060

BETWEEN MATTHEW RIORDAN
 Applicant

A N D SRS NEW ZEALAND LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Rachele Boulton, Counsel for the Applicant
 Paul Rogers, Counsel for the Respondent

Investigation Meeting: 5 and 6 November 2015 at Christchurch

Submissions Received: 16 and 25 November 2015 on behalf of the Applicant
 23 November 2015 on behalf of the Respondent

Date of Determination: 4 December 2015

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Although Mr Riordan’s dismissal was procedurally unjustified, it was substantively justified.**
- B. Mr Riordan suffered an unjustified disadvantage in his employment in relation to the respondent’s failure to accurately advise him of his right to be paid during his suspension.**
- C. Costs are reserved.**

Prohibition from Publication Order

[1] During the investigation meeting evidence was given by Mr Riordan of the effects upon him of receiving a telephone call on 30 September 2014 at around 10am. The information received by Mr Riordan was of a personal nature affecting both him and third parties who were not involved in the Authority’s investigation in any way.

It was not appropriate for the nature of that information or the identities of those third parties to be published.

[2] Accordingly, at the investigation meeting I granted a permanent prohibition of publication order in relation to all information which disclosed the contents of the telephone call that Mr Riordan received on the morning of 30 September 2014 at 10am, which I hereafter refer to as the personal telephone call, and the identities of the third parties, save to the extent disclosed in this determination.

Employment relationship problem

[3] Mr Riordan claims that he was unjustifiably dismissed from his employment as a forklift truck driver on 1 October 2014. He also claims that he was unjustifiably disadvantaged in his employment, by being suspended. Mr Riordan seeks reinstatement, as well as other remedies.

[4] The respondent denies that Mr Riordan was unjustifiably dismissed or unjustifiably disadvantaged in his employment, asserting that he was dismissed for a serious breach of health and safety, as well as failing to obey the reasonable instructions of his supervisor, swearing at his supervisor, using an unacceptable racial epithet and harassing and intimidating the supervisor. It also claims that the relationship between Mr Riordan and the supervisor, and management, had broken down and was unrepairable.

Brief account of the events leading to the dismissal

[5] The respondent operates a saw mill and wood production plant producing a number of wooden products for sale in New Zealand and overseas. Mr Riordan's job involved, in essence, shifting pallets of wood around the plant to assist in different parts of the process.

[6] Unsurprisingly, the plant produces a significant amount of waste wood, some of which is made available to employees and contract workers free of charge to take away for their personal use. This perk is subject to a firewood policy, the details of which will be explained below.

[7] Mr Riordan was employed pursuant to the terms of an individual employment agreement, the material terms of which were as follows:

9.2 **Serious Misconduct**

Serious misconduct by an Employee may give rise to summary dismissal without notice or payment in lieu of notice. Serious misconduct means conduct of such a grave and serious nature which in the opinion of the Employer is prejudicial or likely to be prejudicial to its interests or reputation and is incompatible with the Employee's ability to faithfully carry out their duties with their Employer. Offences regarded as serious misconduct and which may result in summary dismissal shall include, but not be confined to the actions listed below:

....

- c) *wilful and/or reckless conduct causing injury or resulting in the loss or damage to the Employer's property or that adversely affects safety or quality.*
- d) *assault, intimidation or sexual harassment of another employee or any person dealing with the Employer as a customer or business contact. ...*
- f) *Refusal to obey reasonable and lawful written or verbal instructions except where there is a real and immediate danger of injury to an employee and others.*

9.3 **Suspension**

Where circumstance warrants it, the Employer has the discretion to temporarily suspend the Employee from their duties prior to a full investigation of the allegations surrounding the circumstances involving the Employee. The Employee shall be paid their normal wages/salary while they are suspended (provided the period does not become [sic] protracted as a result of undue delay caused by the Employee), unless the investigation finds the allegation of serious misconduct to be correct.

9.4 **Disciplinary Procedures**

Before entering into a formal disciplinary process, the Employee will be given a reasonable opportunity to improve. This may be in the form of an informal verbal reprimand. The intent is to encourage the Employee to behave in a manner that is appropriate to their employment. In some cases it may be more appropriate to move directly to the formal procedures.

Before considering any form of disciplinary action an investigation into the alleged misconduct must be carried out promptly.

Prior to any disciplinary meeting, the Employee will be advised of the specific allegation and the likely consequences should the allegation found [sic] to be true. The Employee will also be advised that they are entitled to have a support person at the formal disciplinary meeting. During the meeting the Employee will be given an opportunity to explain

or deny the allegation. The Employee's explanation and any mitigating circumstances will be considered before a decision is made on the appropriate course of action.

If the Employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing. The Employee will be advised of any corrective action that is required and the consequences of continued or further instances of misconduct or substandard job performance.

There are 3 steps in the formal disciplinary procedure that will generally be followed.

- 1. Written warning;*
- 2. Final written warning;*
- 3. Dismissal.*

Note: Warnings are not limited to repetitions of the same or a similar offence but may be applied to offences of a different nature.

Where misconduct or substandard work performance is considered serious enough, a written warning, final written warning, or dismissal may be issued.

...

15 Health and Safety

The Company Health & Safety manual forms part of this agreement and all rights and obligations contained in the agreement apply to the Health & Safety Manual.

[8] The Authority also saw a copy of the Company's induction handbook dated 27 April 2010 which set out a number of requirements in relation to a range of matters. Included were two sections headed up *Site Hazards* and *Fire Wood*. These read as follows:

Site Hazards

There are many hazards on site, most are particular to specific equipment and processes, however the main hazards that affect all persons on site are noise and forklifts.

Fire Wood

SRS employees, and temp agency staff are permitted to take waste wood home. The wood can only be collected from the designated areas at the end of your shift. This privilege is for your personal use, please do not abuse it. Visitors and friends are not permitted to collect wood at any time. If you have any questions regarding wood collection please discuss this with your department manager.

Failure to follow the rules described in this handbook may lead to disciplinary action being taken.

[9] At the end of the induction handbook was a page headed up *Health and Safety Statement*, signed by Mr Riordan. This document read as follows:

HEALTH & SAFETY STATEMENT

Name: Matthew Riordan

1. *The Health and Safety in Employment Act makes it an offence to endanger the safety and health of another person on the job or to work in a fashion that could cause injury to yourself.*
2. *You are required to work in a safe manner at all times and to avoid situations likely to cause harm to yourself or another.*
3. *You are required to seek advice when any situation is dangerous, or if you are uncertain about the safety of any machine, or practice.*
4. *Breaches of the Health and Safety in Employment Act and, or the health and safety rules of SRS NZ Ltd may lead to termination of your employment.*

I confirm that I have had the above four points explained to me in full.

I also confirm that I have received a copy of the induction handbook and read it.

Signed

Dated

[10] The document was signed by Mr Riordan and dated 12th May 2010.

[11] On 10 September 2014 a staff notice was issued which, according to the respondent, was placed on notice boards (in the smoko room). This read as follows:

STAFF NOTICE

10th September 2014

Reminder about firewood

The SRS Induction Handbook states "SRS employees, and temp agency staff are permitted to take waste wood home. The wood can only be collected from the designated areas at the end of your shift."

So please remember do not collect waste wood during work time.

For safety reasons waste wood cannot be collect [sic] from the waste wood bunkers while the Mill is working. The bunkers are a high risk areas as logs can fall from the log deck.

*Paul Vane
HR Manager*

The events of 30 September 2014

[12] According to Mr Riordan he would often help one of his co-workers to organise loads of finished product to go on to trucks and then collect fire wood for the personal use bins. It is common ground that these personal use bins, also known as fire wood bins, or cage bins, were filled with off cuts from time to time so that employees could take them home for fire wood. Not all off cuts were deemed suitable for firewood, or at least were not so popular with the staff. Mr Riordan said that he was one of the people responsible for moving the suitable off cuts to the designated firewood collection area (which was by the smoko area) although it is denied by the respondent that this was Mr Riordan's responsibility.

[13] The exact course of the events of 30 September 2014 is in dispute, although elements are agreed between the parties. The first key event of 30 September was the personal telephone call which Mr Riordan says that he received, and which he says made him anxious and made it hard for him to concentrate.

[14] Mr Riordan says that, shortly after he had received the call, he was in the process of putting a fire wood bin at the end of the conveyor belt of what is known as the thatcher machine, which removes the knots from planks of raw timber and cuts them to size. The off cut wood travels to the end of the conveyor belt and normally falls into a large bin known as a *blue bin*. This is larger than a fire wood, or cage bin.

[15] Mr Riordan says that, as soon as wood that was suitable for fire wood was being cut, he would remove the blue bin from the end of the belt and would replace it with the fire wood bin so as to catch the off cuts. When the bin was full, he would then move it over to the designated area. I understand Mr Riordan's evidence to be that this was his invariable practice.

[16] Mr Riordan says that, as he was doing this on 30 September, his supervisor, Surendra Khichi, came up to him on his forklift and told him that he was not allowed to use the cage bins. Mr Riordan says that Mr Khichi told him that he could only use the blue bin because it had had a backstop cage recently fitted to it. Mr Riordan says that Mr Khichi explained that the thatcher machine had been playing up, and that, from now on, only the blue bin was to be used. Mr Riordan says that he immediately moved the cage bin away and put the blue bin back in place.

[17] Mr Riordan says that Mr Khichi then said to him that, if he was collecting fire wood, he had to go to the waste bunker. It is common ground that the waste bunker is an outside storage space where wood was placed and where diggers would be used to pick the wood up and load it on to the trucks. Mr Riordan says that it was dangerous to be there because logs could fall on people. Mr Riordan says that he therefore told Mr Khichi that it was too dangerous to do that, and so he proceeded to load off cuts from the blue bin into the fire wood bin by hand. He says that he had used this technique before a number of times, although he also said that no one else did it because it was too much effort. Mr Khichi then told him not to do that as well.

[18] Mr Riordan acknowledges that it was around this point that he began to get irritated or annoyed with Mr Khichi. He said that he needed fire wood to heat the house as his young son was coming to stay. He said that he was also aware that other employees would be wanting fire wood, and they would be annoyed if he had not moved it to the designated area as they were not allowed to come and get it themselves from anywhere else.

[19] Mr Riordan says, at that point, Mr Khichi became very angry and confrontational, raised his voice at him and said *no don't do that*. Mr Riordan says that he snapped and said *yes I am, it is all right for you untouchables because you get it whenever you want*. Mr Khichi then replied *you cannot speak to me like that* and then drove off on his forklift.

[20] Mr Khichi's version of events is somewhat different. He explained that the thatcher machine had been malfunctioning and that there was an unpredictable risk of planks of wood several metres long ejecting off the conveyor belt, and over-shooting the bin at the end. It was for this reason that a back stop cage had been fitted on to the blue bin. He says that he had already explained the purpose of the guard to Mr Riordan.

[21] Mr Khichi says that it was not Mr Riordan's job to bring bins over to the thatcher machine but that he would take it upon himself to move bins around the thatcher machine on some certain days, specifically when a certain sort of wood was being cut which was particularly good for fire wood. He said that Mr Riordan would hide the bins around site.

[22] Mr Khichi's evidence largely aligns with that of Mr Riordan with respect to him telling Mr Riordan not to replace the blue bin with a fire wood bin. He agrees that Mr Riordan did replace the blue bin as he had been asked to. However, he said that he had then gone away and come back a little later and saw Mr Riordan putting the fire wood bin next to the blue bin, and then leaning into the blue bin, unloading it into the fire wood bin by hand while the thatcher machine was still running. Mr Khichi's evidence is that he said *Matthew, you never know that four metre board which piece is going to go on the table and which piece is going to come into blue bin, it is not safe, stop doing it.*

[23] Mr Khichi says that Mr Riordan stopped. Mr Khichi then went into the office to do some paperwork, walked outside again and saw Mr Riordan removing wood from the bin by hand again. Mr Khichi says that he asked Mr Riordan not to do it again and that Mr Riordan responded with *who are you, you don't obviously care about other people, you are untouchable and how are other people going to take fire wood.*

[24] Mr Khichi says that he replied that other people could take fire wood from the bunker after 4.30pm. He said that he pointed out to Mr Riordan that he did not have his trailer there so he could not take wood home anyway. He then said that, after he had told Mr Riordan not to worry about other people, to do his job and not to use the bin in that part of the building, Mr Riordan told him to *f*** off.*

[25] Mr Khichi says that, at this point, the operator of the thatcher machine, Mr Graeme Eddy, came over and explained to Mr Riordan that the thatcher machine was playing up and that he could be hit on the head. He also told Mr Riordan to calm down. Mr Khichi says that Mr Riordan did not listen to them but kept swearing at him and Mr Eddy. In Mr Eddy's evidence he largely corroborates that of Mr Khichi but says somewhat laconically that *Matt just continued to act up.* Mr Eddy does, however, state that he heard Mr Riordan say to Mr Khichi *you and the rest of these Indians think you are untouchable ...*

[26] Mr Khichi's evidence is that he had previously explained to Mr Riordan about the caste system in India, and that he was from the highest caste, called *Rajput*, and that there were four other castes, the fourth and lowest caste being called *untouchables*. It is Mr Khichi's evidence that he believed that, by Mr Riordan calling

him *an untouchable*, which he regarded as an insult, Mr Riordan was trying to provoke him.

[27] Mr Khichi said that he then went to see Mr Paul Vane, the HR Manager, but when he found that Mr Vane was not around he went instead to see his Manager, Mark Morton, whose title is Sales Manager. It is Mr Khichi's view that Mr Riordan's activities presented a real health and safety risk, especially given that he was not wearing a hard hat.

[28] The Authority saw a statement which had been written by Mr Khichi after Mr Riordan's dismissal which reported that Mr Riordan had used a number of swear words at him, as follows:

*You don't f***** care about other people because you are f***** untouchable,. it's a F***** Indian takeover but they never listen to me and I have all the F***** time in the f***** world. I am going to do it, watch me. F*** you, you F***** C***.*

[29] Mr Riordan did not deny that he had sworn at Mr Khichi but did not accept he had used the words attributed to him in Mr Khichi's statement. Whilst Mr Riordan was reluctant to admit that he had used all of the swear words attributed to him, on balance, having taken into account the evidence of Mr Eddy as well, who witnessed part of the argument between Mr Khichi and Mr Riordan, I accept that Mr Riordan did use strong language to Mr Khichi in an angry way.

[30] Mr Riordan says that, around 4pm that afternoon, he was asked to come to the office but did not know what it was about or who he was meeting. Mr Morton and Mr Vane were there and they asked him about the incident with Mr Khichi. Mr Riordan says he explained that there had been an argument and says that Mr Morton and Mr Vane were laughing. They inquired about the term *untouchables* and Mr Riordan says he explained that it was to do with the caste system and that he meant that Mr Khichi was *way higher up than me and could get everything whereas he was denying me the same benefit*.

[31] Mr Riordan says that Mr Morton agreed that it was unfair on him that no one had explained the new procedure to him relating to the use of the new blue bins with the backstop on them. Mr Riordan says that, at the end of the meeting, Mr Vane said

that he *may get a written warning for this*. Mr Riordan said that he also told them about the personal telephone call he had received.

[32] Mr Riordan says that the following day, 1 October 2014, he went to work and was called into the office again at around 8.30am. He said that Mr Vane advised him that the incident the day before was more serious than he had initially thought, that he had googled the word *untouchables* and had discovered it was an offensive term that referred to Mr Khichi being *the lowest of the low*. Mr Riordan said that he was very surprised and confirmed that he thought it was the opposite. He said that he explained how Mr Khichi reserved all the best fire wood for himself and that he had a superior attitude towards others.

[33] Mr Riordan said that Mr Vane then advised him that he was suspended from work whilst the matter was being investigated and that he could lose his job. He said that he was told that there would be another meeting at 8.30am the following morning.

[34] Mr Riordan said that he got a telephone call around 2pm that afternoon from Mr Vane saying that he would have to postpone the meeting until Wednesday 8 October as he had annual leave booked from 2 to 3 October and Mr Riordan had leave booked for 6 and 7 October. Mr Riordan's evidence is that he asked what he was going to do for pay, but that Mr Vane told him that he had annual leave that he could use. Mr Riordan was reluctant to use his annual leave, he says, because he wanted to use it for when his son would be around at Christmas.

[35] Mr Riordan's evidence is that he and Mr Vane then agreed that the meeting take place that afternoon, at 3.45pm. He then asked for one of the employees called Cory Barnes as his support person but that he was told that he could not have Mr Barnes as, if he left his position, the whole saw mill would have to close down. He then asked to have another employee called Felix Ioane, and this was agreed to.

[36] At 3.45pm that afternoon Mr Riordan attended the meeting but says that he did not have a chance to speak to Mr Ioane beforehand. He says that Mr Vane said that he had investigated the incident and it was clear that Mr Riordan had put himself in a health and safety risk and had disobeyed an instruction from a supervisor. Mr Vane also said that the use of the word *untouchables* was serious.

[37] Mr Riordan says that his response was that verbal altercations were common, and that he had just received the upsetting personal telephone call. Mr Riordan says that he also referred to other employees who had been in a worse situation, specifically referring to an incident between an employee called Bruce Rauhihi and Mr Khichi when Mr Rauhihi had pushed Mr Khichi to the floor but had not been dismissed. Mr Riordan replied that Mr Morton had said that the two situations were not comparable.

[38] Mr Riordan says the meeting was adjourned and that, when he was called back into the meeting, he was told that the relationship between him and Mr Khichi had become untenable, and that there were no mitigating circumstances, so that he was dismissed.

[39] Mr Riordan says that the next day he called the CEO, Mr Paul Gillet to ask whether he could have his job back but that Mr Gillet had told him that he was sorry about everything but did not want to get involved. Mr Riordan was given permission to say goodbye to his colleagues.

[40] According to Mr Morton, during the initial meeting with Mr Riordan, when Mr Riordan was explaining about the caste system, he had also stated *this is just an Indian takeover*. Mr Morton also said that Mr Riordan was made well aware during the first meeting that the incident was being viewed as serious, and that it could *resolve in some form of disciplinary action*.

[41] According to Mr Vane, during the first meeting with Mr Riordan, Mr Riordan had stated that he did not think it was dangerous to take wood from the blue bin while the thatcher machine was running but that he said that he also had taken no wood while the thatcher machine was actually cutting.

[42] With respect to the second meeting with Mr Riordan, Mr Vane's evidence was that Mr Riordan was told he was being investigated for serious misconduct for not following his supervisor's instructions, which put his own, and other people's safety at risk. Mr Vane said that Mr Riordan asked about being paid while suspended and that he had explained to Mr Riordan that, in accordance with his individual employment agreement, whether or not he was paid would depend on the outcome of the investigation and the disciplinary meeting.

[43] Mr Vane's evidence is that all the staff members working in the area at the time of the incident were asked what they had seen and heard, and that Mr Eddy, the thatcher operator, was the only person who was prepared to say what he had seen and heard. However, Mr Vane's evidence was also that another employee was not asked about what had happened because he had been absent during the day of the investigation meeting. This was Mr Sione Tukia, who had witnessed the argument between Mr Riordan and Mr Khichi.

[44] Mr Vane's evidence was that, after discussing the incident with Mr Khichi, Mr Eddy and Mr Riordan it was *clear that there was no factual dispute*, so discussing the incident further with other staff was not required.

[45] It was the evidence of Mr Morton and Mr Vane that Mr Vane read out his notes of his interview with Mr Eddy relating to the incident, as well as his notes from the other meetings. Mr Morton says that Mr Riordan denied that he had said what Mr Eddy had reported him to say but also explained that he did not realise the seriousness of the comment about *untouchables* before now. Mr Riordan also stated that he would serve Thursday and Friday as a suspension, and return the following Wednesday *as meek as a lamb*.

[46] It was Mr Vane's evidence that Mr Riordan did not have a lot to say, other than to confirm that he had deliberately taken no notice of what Mr Khichi had told him not to do. Mr Vane says that Mr Riordan had also admitted swearing at Mr Khichi and calling him an *untouchable*.

[47] Mr Vane wrote a letter to Mr Riordan on 1 October setting out his decision. This read as follows:

ALLEGATIONS OF SERIOUS MISCONDUCT
Refusal to follow instructions

As a result of our investigation into the above allegation and consideration of your response during our meetings on the 30th September and 1st October, please be advised that we have concluded that your behaviour is deemed as serious misconduct (refusal to follow instructions).

The investigation also revealed you put yourself in danger by collecting wood from the Thatcher conveyor while it was running and that you displayed intimidating behaviour by swearing at your supervisor and making racist comments towards him. Given this conclusion your actions are considered to have seriously and significantly undermined our employment relationship with you to

the extent that it is no longer reasonably tenable. As a result we are summarily dismissing you effective immediately. We have taken all the circumstances into account and considered whether there are mitigating circumstances which might justify an alternative outcome but have not found any.

Your final pay will be made up today and deposited into bank account tonight. Your final pay is made up of 22.75 hours for this week's work and all outstanding holiday pay. Your final payslip is attached.

*Yours faithfully
Paul Vane
HR Manager*

The factual disputes between the parties

[48] There were a number of factual disputes between the parties. However, many of them are not central to the issues that the respondent says led to dismissal. For example, the time of day of the incident, whether Mr Riordan was standing or sitting in the forklift when Mr Eddy came to talk to him and the exact swear words used by Mr Riordan do not make a material difference to the issue to be determined.

[49] On the issue of whether or not Mr Riordan had known that the backstop guard had been fitted to the blue bin prior to Mr Khichi telling him on 30 September, I accept Mr Riordan's evidence. This is largely because the respondent produced evidence to show that the guard had been fitted on Friday 26 September. Therefore, Mr Riordan may well not have seen the guard between that date and 30 September, especially given the evidence of Mr Khichi that Mr Riordan only emptied the blue bins at the end of the thatcher machine when wood was being cut which produced good firewood.

[50] In any event, although Mr Khichi says that Mr Riordan argued with him about not putting the cage bin at the end of the thatcher machine instead of the blue bin with the guard, it is accepted that Mr Riordan did comply with this instruction. In addition, what Mr Khichi described as the exchange between him and Mr Riordan about this appeared more to be Mr Riordan asking why he was not to put the cage bin at the end of the thatcher machine and Mr Khichi explaining the reason. I do not believe that this is a matter of any material relevance as Mr Riordan was not dismissed for putting the cage bin in place of the blue bin.

[51] Another issue of factual dispute is whether Mr Riordan's duty involved moving firewood to the designated area or not. I am prepared to accept that this was a

job that Mr Riordan did, even if it was not part of his formal duties as stated in his position description. It is very common for an employee to regularly carry out tasks which are not part of his or her position description. However, what is important is whether he carried out that task safely, and in accordance with the respondent's accepted procedures.

[52] I set out my findings in relation to other matters of dispute below.

The issues

[53] In deciding whether the dismissal was justified or not, it is necessary to examine both the procedural and the substantive justification. This involves considering the following sub-issues:

- (a) Whether the respondent properly raised the allegations with Mr Riordan;
- (b) Whether Mr Riordan was subjected to unfairness by not being given copies of Mr Vane's handwritten notes;
- (c) Whether there was a failure to consider usual work practices;
- (d) Whether Mr Riordan was disadvantaged by not being allowed to have his support person of choice;
- (e) Whether Mr Riordan was misled into thinking his support person was not allowed to speak;
- (f) Whether Mr Riordan was disadvantaged by not being able to speak to his support person first;
- (g) Whether the respondent properly took into account the mitigating circumstances of the stress Mr Riordan says he felt relating to the personal telephone call;
- (h) Whether there was a disparity of treatment between him and the other employee who had assaulted Mr Khichi;
- (i) Whether Mr Riordan was disadvantaged by not all of the witnesses being interviewed;

- (j) Whether it had been put to Mr Riordan prior to the decision to dismiss that the relationship between him and Mr Khichi had been irreparably damaged;
- (k) Was the respondent unjustifiably mistaken in concluding that Mr Riordan had used an offensive racial epithet to Mr Khichi?
- (l) Was Mr Riordan's dismissal substantively justified?

[54] It is also necessary to determine whether Mr Riordan's suspension constituted an unjustified disadvantage in his employment.

The material legal principles governing the Authority's investigation

[55] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test of justification when determining whether a dismissal was justified. It 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.

Did the respondent properly raise the allegations with Mr Riordan?

[56] Ms Boulton submits that the details of the allegations were not properly raised with Mr Riordan until he had been required to provide his explanation, on 30 September. It is certainly the case that Mr Vane reappraised his views as to the seriousness of the incident after he had googled the term *untouchable* and spoken to Mr Khichi and Mr Eddy.

[57] I do not consider that it is inherently unfair for an employer to have an initial interview with an employee suspected of having been involved in potential misconduct before the employer advises him or her that they are facing serious misconduct allegations. Indeed, it may be that the initial interview will dispel the employer's concerns. What is important is for the employer to give the employee a full account of its current concerns once it has reached the view that there is a case of potential serious misconduct to answer.

[58] I am satisfied that this information was largely made available to Mr Riordan when he was called into the second meeting on the morning of 1 October. The fact that Mr Riordan made mention during this meeting of his personal telephone call as an explanation for him being stressed the previous day suggests that he was aware of the nature of the concerns about his conduct towards Mr Khichi.

[59] On balance, I do not accept that Mr Riordan was unjustifiably disadvantaged by the way the initial interview was conducted. I will add, however, that best practice is for the employer to write a letter to the employee spelling out the concerns prior to any disciplinary meeting taking place.

Was Mr Riordan subjected to unfairness by not being given copies of Mr Vane's handwritten notes?

[60] It is true that Mr Vane did not provide copies of his notes of the interviews he had held with Mr Eddy and Mr Khichi prior to the third disciplinary meeting in the afternoon of 1 October. Instead, Mr Vane read the notes out to Mr Riordan. A better practice would have been to have provided Mr Riordan with the notes, and given him time to digest them, prior to the meeting. Trying to process the details of statements given orally when under the stress of a disciplinary investigation meeting puts the

employee at a potentially significant disadvantage. I accept that Mr Riordan was under a disadvantage as a result of being put in that position.

[61] The reason Mr Vane did not do this, he says, was because Mr Riordan wanted to get the meeting over with. However, even if the meeting had to take place that day, a copy of the notes could have been given to Mr Riordan a short period before the meeting started. If they had been hard to read, Mr Vane could have assisted. I therefore find that the disadvantage was unjustified, as I believe that no fair and reasonable employer in all the circumstances could have failed to have provided the notes in advance of the meeting starting. I do not believe that this failure is minor.

[62] However, whilst this failure was procedurally unjustified, it is not clear that the provision of the notes would have made any difference to the outcome in the end because of the admissions made by Mr Riordan. I will examine this question further when I consider the substantive fairness of the dismissal.

Was there a failure to consider usual work practices?

[63] Ms Boulton refers here to the evidence of Mr Rauhihi that staff often collected wood during work hours, and in the same manner as Mr Riordan. I accept that the respondent did not expressly address its mind to this issue. However, the dismissal of Mr Riordan related to factors in which usual work practices played little material part. In particular, in my view, a knowledge of usual work practices is unlikely to have changed the employer's view of Mr Riordan's use of a racially charged term towards Mr Khichi, or his aggressive refusal to follow Mr Khichi's instructions in relation to avoiding a health and safety risk.

[64] I consider that, in the circumstances, this failure was a minor one which did not result in Mr Riordan being treated unfairly.

Was Mr Riordan disadvantaged by not being allowed to have his support person of choice?

[65] Mr Riordan had requested that Mr Barnes be his support person. Mr Vane said in evidence that Mr Barnes had been operating the log turner and that, because of staff shortages, the mill would have had to have stopped running if he had stopped working. He says that he had suggested to Mr Riordan that they delay the meeting, but

Mr Riordan had insisted on having the meeting that day, as he could not handle the stress of waiting until 8 October.

[66] I accept the evidence of the respondent that it was not possible for Mr Riordan to have had his first choice of support person on that day for the reasons that Mr Vane gave. As it turned out, however, Mr Riordan was able to have another member of staff present.

[67] An employee does not have an inalienable right to demand that a specified employee must attend as his or her support person whenever he or she wishes and, where there are good reasons for the employer to refuse such a request, that refusal would not be unreasonable. Given that Mr Riordan was offered the opportunity to attend the disciplinary meeting on 8 October, he did have the chance of having Mr Barnes support him. When Mr Riordan made the decision to attend the meeting in the afternoon of 1 October, he must have been aware that one of the consequences of that decision was that he would be unable to have his first choice of support person. I do not find, therefore, that the respondent's actions in this respect were unjustified.

Was Mr Riordan misled into thinking his support person was not allowed to speak?

[68] This was an allegation made by Mr Riordan in his statement of problem, and repeated in his written brief of evidence, although it was not raised as a grievance in the personal grievance letter sent on his behalf by Lane Neave Lawyers, who were representing him at that time. The allegation was denied by the respondent in the statement of reply, but not addressed by Mr Vane in his evidence.

[69] Mr Riordan said in his evidence that he did not have the opportunity to speak to Mr Ioane, his support person, prior to the disciplinary meeting. This suggests that, even if Mr Riordan had been misled into thinking his support person could not speak, then he did not pass that misinformation on to Mr Ioane, and so no mischief was done. There has also been no complaint from Mr Riordan that, in practice, his support person was not allowed to speak.

[70] On balance, I therefore reject this complaint.

Was Mr Riordan disadvantaged by not being able to speak to his support person first?

[71] I believe that this situation arose out of the pulling forward of the disciplinary meeting, at Mr Riordan's request. However, there is no evidence that Mr Riordan asked for any time to speak to Mr Ioane before the meeting started, and that the respondent refused. If Mr Riordan had wanted to speak to Mr Ioane first, then he could have asked. On balance, I do not find that any unjustified disadvantage arises out of this issue.

Did the respondent properly take into account the mitigating circumstances of the stress Mr Riordan says he felt relating to the personal telephone call?

[72] Whilst I am unable to specify the content of the personal telephone call in this determination due to its personal nature, I accept that any reasonable person would agree that it was such as to have caused Mr Riordan a reasonable degree of stress and anxiety immediately afterwards, and that it would have weighed on his mind in the ensuing hours. Whilst I accept the respondent's evidence that the incident is likely to have occurred in the afternoon rather than the morning, that passage of time does not necessarily diminish the effect upon him of the telephone call when the incident occurred.

[73] It is well established that part of the employer's inquiry into an alleged act of misconduct includes a consideration of any mitigating circumstances that may have caused or contributed to the action in question. The employee having raised a mitigating circumstance, the employer is obliged to consider it¹.

[74] In the outcome letter sent to Mr Riordan on 1 October 2014, Mr Vane stated:

We have taken all the circumstances into account and considered whether there are mitigating circumstances which might justify an alternative outcome but have not found any.

[75] The notes made by Mr Morton make clear that Mr Riordan had explained to him and Mr Vane on the first meeting on 1 October that he may have been stressed because of the personal telephone call. The notes show that the essential details of the

¹ See, for example, *Q v Commissioner of Police* [2015] NZEmpC 57 at [305]

call were made known to them by Mr Riordan. Mr Vane's notes also show that Mr Riordan referred to the call and that he had felt stress.

[76] Mr Vane's notes of his subsequent meeting with Mr Riordan on 1 October make no mention of the telephone call, and Mr Vane's notes of his discussion with Mr Morton while they were deciding the outcome also make no mention of the mitigating circumstances.

[77] In his brief of evidence Mr Vane stated that he did not believe that the personal phone call that Mr Riordan mentioned was unusual or solely responsible for his behaviour on the day of the incident.

[78] On balance, I believe that Mr Vane did consider the personal telephone call as, otherwise, he would have been unlikely to have mentioned mitigating circumstances in his outcome letter. The next question is whether the mitigating circumstance should have persuaded Mr Vane that dismissal was not appropriate.

[79] The Authority must be wary not to step into the shoes of the employer and substitute its own views for what it should have decided. The test is what a fair and reasonable employer could have done in all the circumstances. When I consider the aspects of swearing at a supervisor, making a comment that was based on the supervisor's race, refusing to comply with the supervisor's instructions and placing himself in a position of risk, I am satisfied that dismissal did fall within the range of responses open to an employer acting fairly and reasonably, notwithstanding the mitigating circumstance presented by the personal telephone call. Whilst the call was genuinely upsetting, it was open to the respondent to regard Mr Riordan's conduct as not being excused by it.

Was there a disparity of treatment between him and the other employee who had assaulted Mr Khichi?

[80] Mr Bruce Rauhihi gave evidence of an altercation he had had with Mr Khichi in which Mr Rauhihi had said to Mr Khichi *I am not one of your Indian bitches* and then pushed Mr Khichi to the ground. He said that he had received a written warning for that incident, and had had to make up and hug the following day.

[81] This altercation had arisen out of Mr Khichi shouting at Mr Rauhihi because he had believed that Mr Rauhihi had been deliberately ignoring his calls over the

radio. It had turned out that Mr Rauhihi had not been wearing his earpiece and so had not known that Mr Khichi had been calling him.

[82] The principles relating to disparity of treatment were examined by the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan*²:

[41] The test outlined by this Court in Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd was:

We accept that if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming. (Citation omitted)

[42] This was refined by this Court in the later case, Samu v Air NZ Ltd where the Court, having set out the quotation reproduced above, added:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion. (Citation omitted)

...

[45] In essence, therefore, the argument for the Department is that the Court must consider three separate issues, namely,

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[83] On the face of it, a physical assault of a supervisor may be considered to be worse, or certainly not less serious, than swearing at a supervisor, abusing him and ignoring his instructions. However, there was also the health and safety background to Mr Riordan's dismissal which was not present in Mr Rauhihi's case, and the fact that Mr Rauhihi was provoked, in the sense that Mr Khichi shouted at him and accused him of something (deliberately ignoring Mr Khichi) which was not correct. Whilst Mr Riordan may say he was provoked also, he was, in fact, doing what he was being accused of (collecting wood by hand in front of the thatcher machine) but was refusing to stop.

[84] On balance, I believe that there is an adequate explanation for the disparity of treatment, and so this does not render the dismissal unjustified.

² [2005] ERNZ 767 (CA) at [40]-[54]

Was Mr Riordan disadvantaged by not all of the witnesses being interviewed?

[85] The eye witness whose evidence was not taken was Mr Tukia. Mr Tukia's evidence was that he had been walking past the thatcher machine and had heard Mr Khichi yelling at Mr Riordan but had not heard Mr Riordan yelling back, although he knew that they were arguing about the fire wood. He had also seen Mr Riordan collecting the off cuts by the thatcher machine, which was running at the time he said. The evidence of Mr Tukia was that it was common practice for people to collect wood during the working day. He believed that it was not dangerous to collect wood by the thatcher machine if one stood in the right place, by the side.

[86] Mr Tukia was clearly a relevant witness as he had seen at least part of the argument. The requirement upon an employer to sufficiently investigate the allegations of the employee prior to dismissal includes interviewing all relevant witnesses, unless there is a reasonable and overriding reason not to. Mr Tukia not being present on the day of the investigation meeting certainly was a material reason not to interview him. However, that leads to the question of whether the investigation should have been postponed so that Mr Tukia could have been interviewed.

[87] I accept the evidence of the respondent that Mr Riordan was anxious for the disciplinary meeting to take place. However, I heard no evidence to suggest that Mr Vane told Mr Riordan that, if the meeting was to take place that day, all relevant witnesses would not have been interviewed. This was a requirement of a fair procedure so that Mr Riordan could have understood the consequences of the failure to wait a few days. Notwithstanding this, on balance, I believe that Mr Riordan would have insisted that the meeting go ahead without Mr Tukia's evidence.

[88] Alternatively, Mr Vane could have postponed his decision to dismiss until he had heard from Mr Tukia. Not having done so, his investigation was not sufficient in my view. This leads to a conclusion that the process was flawed, and the decision unjustified because the flaw cannot be said to have been minor.

[89] Whilst I find that, if Mr Vane had interviewed Mr Tukia, it would not have changed his conclusion, this does not make the defect irrelevant, as s103A(5) requires the procedural defect to be both minor and not resulting in unfairness to justify ignoring it.

[90] In conclusion, Mr Vane not waiting until he could interview Mr Tukia before he decided to dismiss was procedurally unjustified.

Had it been put to Mr Riordan prior to the decision to dismiss that the relationship between him and Mr Khichi had been irreparably damaged?

[91] I am not persuaded that Mr Vane and Mr Morton did put to Mr Riordan for comment their provisional conclusion that the relationship between him and Mr Khichi had become *unrepairable*, as Mr Morton put it.

[92] This was a significant finding by the respondent as, even though it was expressed in the outcome letter as flowing from its other findings, it was cited as one of the reasons for dismissal by Mr Morton. As such, the respondent should have put this finding to Mr Riordan for his comment. No fair and reasonable employer could have failed to have done so in all the circumstances, and it is another factor that was procedurally unjustified.

[93] However, if the respondent had put this to Mr Riordan for comment, he would no doubt have said that his relationship with Mr Khichi was not irreparable. However, this is a question that affects Mr Khichi as well as Mr Riordan, and Mr Khichi gave evidence that he would leave if Mr Riordan were to be reinstated. I do not believe that this was a statement that he made lightly.

[94] I accept that Mr Khichi was very upset by Mr Riordan's behaviour towards him. I have little doubt that he viewed the relationship as having broken down irretrievably and this would have been a major factor in the respondent's decision. I am therefore not convinced that, even if this had been put to Mr Riordan, it would have made any difference to the substantive outcome.

Was the respondent unjustifiably mistaken in concluding that Mr Riordan had used an offensive racial epithet to Mr Khichi?

[95] With respect to his use of the word *untouchable*, Mr Riordan's evidence was that he was referring to management and supervisors, who would sometimes bring in a trailer which would be filled with wood so that the non-management and non-supervisor staff would miss out. Mr Riordan said that he could not tell where he got the word *untouchable* from, although he would have used it previously. He said that,

to him, it sounded like somebody *at the top* and that he obviously got the meaning wrong.

[96] On this point, the word *untouchable* obviously has two meanings. There is the somewhat specialist meaning that is used by English speakers within the Indian caste system, but there is also another meaning which connotes, as Mr Riordan believed, someone who is in such a lofty position that they cannot be touched or impinged upon. An example comes from the title of the 1987 film *The Untouchables*, about the Chicago crime boss Al Capone who allegedly ruled Chicago with absolute power so that no one could touch him.

[97] Mr Riordan said that he admitted he had used the word *untouchable* and had admitted his fault by using it, and that he had been mistaken as to its use. He said that Mr Khichi had not said anything to him at the time about using the word, and that it was only when Mr Vane had googled the term overnight that he had decided that it was a more serious issue. Mr Riordan said that there was no mention of intimidation or harassment during the final meeting.

[98] On balance, I accept Mr Riordan's explanation that he had believed that the term *untouchables* referred to people who are, or who present themselves as superior. I do not believe that he was suggesting that Mr Khichi was *the lowest of the low*. This is supported by Mr Eddy's evidence; if Mr Riordan had meant the word to mean *the lowest of the low* he would not have said *you and the rest of these Indians think you are untouchable*. However, I do believe that Mr Riordan was referring to Mr Khichi's position in the caste system, as I believe that he had remembered that Mr Khichi had told him that he was from the highest caste.

[99] There does not appear to have been any case law within New Zealand relating to caste discrimination, although the UK Employment Appeal Tribunal has found that the concept of caste falls within the definition of *ethnic origins* as used in the UK equality legislation³. However, I do not believe that it is necessary in the current proceedings to determine whether Mr Riordan's use of the word *untouchables* to Mr Khichi fell within the technical definition of race or ethnic or national origins within the Act (or, indeed, the Human Rights Act 1993). What is relevant is whether a fair

³ *A and P Chandhok v P Tirkey* 19 December 2014 UKEAT/0190/14/KN

and reasonable employer could have come to the conclusion that Mr Riordan had used a term that could be taken as a term of racial abuse.

[100] On balance, I believe that it was fair and reasonable for the respondent to have come to that conclusion, given that Mr Riordan had made reference to an *Indian takeover* and to the caste system when explaining himself to Mr Vane and Mr Morton. I believe that Mr Riordan would not have used the word *untouchable* to another supervisor who was not of Indian descent. His use of the word was, therefore, predicated on knowledge of Mr Khichi's race and his membership of a caste and so had a racial overtone.

Was the decision to dismiss Mr Riordan substantively justified?

[101] Taking into account what Mr Riordan admits to having done on 30 September, I believe that the decision to dismiss him was substantially justified. He essentially admitted the following:

1. Swearing at Mr Khichi;
2. Picking up firewood during work hours;
3. Transferring firewood from one bin to another at the end of the thatcher machine;
4. Knowing that the thatcher machine was subject to random malfunctions;
5. Refusing to stop when Mr Khichi asked him to do so more than once; and
6. Calling Mr Khichi an *untouchable*, knowing it to be a term relevant to his race and/or ethnic origins.

Swearing

[102] On 3 February 2012, Mr Riordan had received a written warning for intimidating behaviour towards another employee. The letter set out the company's expectations of Mr Riordan, which were that he was to:

- a. Be courteous to all staff employed at SRS at all times; and

- b. Ensure he did not act in an intimidating or aggressive way to any SRS employees at any time.

[103] Whilst the respondent does not appear to have expressly taken into account this written warning, it does show that Mr Riordan was already aware that swearing at and insulting other staff was deemed to be unacceptable. This also tends to disprove the submission of Ms Boulton that *rough and ready language was part of the normal culture* at SRS. The warning dated 3 February 2012 did not have an expiry date, but even if it can be said to have expired by what one may call *effluxion of time*, it is still relevant to consider.⁴

Collecting firewood during work hours

[104] I do not believe that Mr Riordan was unaware that it was forbidden to collect firewood during working hours. There was ample evidence to suggest that this was well known, and even the evidence of one Mr Riordan's supporters, Mr Rauhihi, suggested that the rule was well known but flaunted by the staff.

Transferring firewood by hand at the end of the thatcher machine which Mr Riordan knew was malfunctioning

[105] Clause 9.2 of the individual employment agreement states that wilful and/or reckless conduct that adversely affects safety can be treated as serious misconduct by the respondent. The health and safety statement signed by Mr Riordan required him to avoid situations likely to cause harm to himself, and acknowledged that a breach of the health and safety rules of the respondent may lead to the termination of his employment.

[106] I do not accept that Mr Riordan was not putting himself at any material risk while he was bending into the blue bin retrieving wood and transferring it into the caged bin next to it. Such an action did create a risk to his health and safety and there was uncontested evidence from the respondent that Mr Riordan would often raise health and safety concerns, so he was not ignorant of such issues. Mr Eddy and Mr Morton both gave very credible evidence of the risk that Mr Riordan took in transferring the wood from one bin to the other at the end of the thatcher machine and

⁴ I refer to the Employment Court case of *Butcher v OCS Ltd* [2008] ERNZ 367 which held, at [55], that previous misconduct referred to in an expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct.

this was clearly a significant issue in the mind of the respondent in its determination that Mr Riordan had committed serious misconduct.

[107] Mr Riordan's evidence was that the machine was not cutting at the time he was collecting the wood from the bin but his evidence is contradicted by the evidence from Mr Eddy, which I accept, who said that there would have been some wood continuing to come off the end of the thatcher machine because he had just put two planks through at the time he walked over. Even if the off cuts falling into the blue bin could not have caused serious injury, the risk still existed of a plank travelling through uncut because of the malfunctioning machine. Whilst Mr Riordan said confidently in evidence that he had been standing to the side and so would have been safe, his supervisor did not believe he was safe.

Refusing to stop when asked

[108] Clause 9.2 of the employment agreement between Mr Riordan and the respondent made clear that a refusal to obey reasonable and lawful written or verbal instructions may be treated by the respondent as serious misconduct.

[109] It is not completely clear exactly what had transpired between Mr Riordan and Mr Khichi on 30 September 2014, but I do believe that Mr Khichi's evidence is preferable. He said that he had been particularly concerned about Mr Riordan's failure to do what he had been told because he had asked Mr Riordan three times to stop collecting the firewood and that Mr Riordan had refused to comply each time.

[110] Mr Khichi gave evidence that he had received supervisory training which had taught him to always ask someone to do a task three times before reporting it to a manager. It was for this reason that he had decided to report to Mr Vane Mr Riordan's failure to comply with his instructions on this occasion. He said that, whilst Mr Riordan had refused to comply with his instructions regarding the collection of firewood on previous occasions, he had never asked him to do so three times but had always walked away after the first refusal. To me this evidence is credible.

[111] It was clear from the evidence of the respondent that it took very seriously the blatant refusal of Mr Riordan to obey Mr Khichi's request for him to stop transferring the wood. On viewing the situation objectively, Mr Khichi was asking Mr Riordan to

stop transferring the wood for reasons of health and safety and the respondent was justified in taking that blatant refusal seriously, and treating it as serious misconduct.

Calling Mr Khichi an untouchable

[112] Clause 9.2 (d) of the employment agreement states, inter alia, that intimidation of another employee could be treated as serious misconduct. Mr Vane was of the view that swearing, combined with racist comments, amounted to intimidation. The verb *intimidate* is defined in the New Zealand Oxford Dictionary⁵ as *frighten or overawe, esp. to subdue or influence*.

[113] It is doubtful that Mr Khichi was frightened or overawed by Mr Riordan's conduct towards him. However, clause 9.2 makes clear that the list of examples of serious misconduct is illustrative only. Sexual harassment is included in the list, and a fair and reasonable employer would be entitled to treat racial abuse as serious misconduct as well.

[114] I do not consider that Mr Riordan's use of the word *untouchable* in the way that he meant it was racial abuse as is usually meant by that term. However, as I have already found, it was an insulting term which had a racial overtone. The respondent was entitled to have taken that fact seriously and, indeed, could have been criticised for not doing so.

[115] I also find that there was a breakdown in the relationship between Mr Riordan and Mr Khichi which was unlikely to have been retrievable.

The effect of the procedural flaws on substantive fairness

[116] It is my view that none of the procedural flaws identified adversely affected the fairness of the substantive decision to dismiss. This is because of the admissions or concessions that were made by Mr Riordan, or which could reasonably be inferred from his statements during the disciplinary process. I do not accept that any of those admissions or concessions were unfairly compelled due to the flaws I have identified.

⁵ Eds Tony Deverson and Graeme Kennedy, Oxford University Press 2005

Conclusion

[117] When taking all of these factors into account, I find that the dismissal was substantively justified, as dismissal was an action that a fair and reasonable employer could have taken in all the circumstances.

Did Mr Riordan's suspension constitute an unjustified disadvantage in his employment?

[118] I accept that Mr Vane was justified in suspending Mr Riordan as he intended to question witnesses to the incident and wanted to avoid the evidence being affected by rumour. I understand that Mr Vane was perhaps fearful of Mr Riordan seeking to influence the witnesses. Given the relatively small size of the number of staff working in that particular area I accept that this was a reasonable reason, and so the circumstances warranted suspension, to use the words of clause 9.3 of the employment agreement.

[119] I do not believe that Mr Riordan was given an opportunity to comment upon his suspension. However, the suspension only lasted around six hours, and so I do not accept that the suspension, in itself, disadvantaged Mr Riordan.

[120] What does appear to have been unreasonable, however, was Mr Vane's failure to properly explain to Mr Riordan the effects of clause 9.3 of the Employment Agreement. That is to say, if it turned out that the investigation meeting found that serious misconduct had been proven then the period of suspension would be unpaid. I accept Mr Riordan's evidence that part of his concern was that he would not be paid during the suspension. It appears that Mr Vane advised him that he could take some of his annual leave in advance. This, in turn, caused Mr Riordan further concern because he wanted to use future leave to be with his son.

[121] While I do accept Mr Vane's evidence that Mr Riordan was stressed and wanted the matter resolved, I do not accept that the concern about pay and using up annual leave during the suspension played no part in Mr Riordan's decision to get the matter resolved as quickly as possible.

[122] One must speculate what would have happened had Mr Vane correctly explained the effect of clause 9.3. On balance, I believe that Mr Riordan would still have elected to have the meeting as soon as possible, rather than wait until 8 October.

However, I believe that Mr Riordan was disadvantaged by the failure of Mr Vane to explain properly the position with respect to his suspension and that that failure was not one any fair and reasonable employer could have committed in all the circumstances. Accordingly, I find that failure to have unjustifiably disadvantaged Mr Riordan.

[123] Having found that Mr Riordan would not have been prepared to have waited until 8 October for the meeting to be reconvened, I do not believe that any further disadvantage flows from Mr Vane's failure.

Conclusion

[124] I find that there were procedural failings which rendered the dismissal unjustified. However, I also find that, had these procedural failings not occurred, it is more likely than not that the dismissal would still have occurred and that it would have been substantively justified.

Remedies

[125] Section 123(1) of the Act provides:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[126] Section 128 of the Act provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[127] In *Waterford Holdings Limited v Morunga*⁶, the Employment Court reiterated the principle that, where there were procedural failings but the dismissal was nonetheless substantively justified, no award for lost remuneration is appropriate because any actual loss suffered arose from the justified decision to dismiss, not from the unjustified procedural errors⁷. Accordingly, I am unable to award any lost earnings to Mr Riordan. In any event, he gave evidence that he decided to look after his son full time shortly after his dismissal, which would have cast doubt on whether he had taken adequate steps to have mitigated his loss.

[128] For the same reason, as the dismissal was substantively justified, it is not appropriate to reinstate Mr Riordan to his former position in the respondent company. In any event, even if the dismissal had been substantively unjustified, it is unlikely that I would have found it practicable given the strength of feeling of Mr Khichi caused by Mr Riordan's conduct towards him.

[129] The next step is to consider what, if any, compensation Mr Riordan may be entitled to for humiliation, loss of dignity and injury to his feelings. These effects cannot arise from the dismissal itself, but must arise from the procedural flaws and the unjustified disadvantage.

[130] The procedural flaws in the dismissal process were:

- a. Mr Riordan not being given a copy of Mr Vane's hand written notes;
- b. Mr Vane not interviewing Mr Tukia; and
- c. Mr Vane not asking for Mr Riordan's views that the relationship between him and Mr Khichi had become irreparable.

⁶ [2015] NZEmpC 132

⁷ At paragraph 37.

[131] There was also an unjustified disadvantage in Mr Vane not making clear to Mr Riordan that he was entitled to be paid during the suspension, unless subsequently found to have committed serious misconduct.

[132] I heard no evidence that allows me to award any compensation in relation to the three procedural flaws in the dismissal process. However, I am convinced that Mr Vane's unjustified failure to explain Mr Riordan's rights during his suspension did cause Mr Riordan stress and anxiety. This did not last more than a few hours, and I fix the award of compensation at \$5,000.

[133] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[134] Whilst Mr Riordan contributed substantially to his dismissal, he did not contribute to the unjustified disadvantage I have found in respect of the failure to explain his rights during suspension. Therefore, I do not reduce the award.

Order

[135] I order the respondent to pay to Mr Riordan the sum of \$5,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[136] I reserve costs. The parties are to attempt to agree how costs are to be dealt with between them, but if they are unable to do so within 28 days of the date of this determination, any party seeking costs may serve and lodge a memorandum within a further 28 days⁸ and any reply may be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority

⁸ The periods of 28 days take into account the Christmas and New Year holiday period.