

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 187
3015400**

BETWEEN CHARANJIT SAHOTA
Applicant

AND INDEPENDENT STEVEDORING
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Mitchell, Counsel for Applicant
Shima Grice, Counsel for Respondent

Investigation Meeting: 15 May 2018 at Tauranga

Submissions received: 7 & 18 May 2018 from Applicant
7 & 23 May 2018 from Respondent

Determination: 13 June 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Charanjit Sahota, claims that he was unjustifiably dismissed by the Respondent, Independent Stevedoring Limited (ISL), on 2 June 2017.

[2] ISL denies that Mr Sahota was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct.

Issues

[3] The issues for determination is whether or not:

- Mr Sahota was unjustifiably dismissed by ISL
- Mr Sahota should be reinstated to ISL
- There has been disparity of treatment

Background Facts

[4] ISL is a stevedoring company operating in Tauranga and Whangarei. In Tauranga it operates within the Port of Tauranga site (the Port) and has approximately 150 employees, of whom 3 are Crane Drivers.

[5] ISL operates at the Port and all persons entering and leaving the Port do so via the Port's entry and exit gates and may do so only with the Port's permission. The Port is a 'customs controlled area' where the New Zealand Customs Service monitors cargo and as a result of which companies operating at the Port are subject to strict controls.

[6] Mr Sahota was initially employed by ISL as a Stevedore on or about 2013. He was subsequently selected to be trained as a Crane Driver in November 2016 when ISL started its crane operation.

[7] Mr Sahota was a member of the Surfside Employees Association Inc (the Union) which was a party to a collective agreement with ISL (the Collective Agreement). In addition he had been issued with an individual employment agreement (the Employment Agreement).

[8] Mr Sahota had subsequently also joined the Maritime Union of New Zealand

[9] The Collective Agreement stated at clause 3 headed 'Completeness & Variations':

Together with the individual agreement and rules and policies that the Company may introduce (which may not conflict with this agreement), it represents a full record of the agreement freely entered into by the Surfside Employees Assn. (on behalf of its members) and the Company.

[10] The Employment Agreement signed by Mr Sahota on 19 September 2014 stated at clause 2:

That the employee agrees to devote his or her efforts to the employment and in all respects comply with the directions, responsibilities and policies given and made by the company and serve its interests faithfully.

[11] The ISL policies were set out in the booklet: ISL Induction – Employment Work Rules Safety which included the following:

2.11 Personal Behaviour

You are expected to conduct yourself in a dignified, respectful and courteous manner and to maintain good relationships in the work environment. Fighting and use of violence will result in dismissal. Using threatening or abusive language and playing practical jokes which result in or have the potential to result in someone being injured, will also be viewed seriously.

3 Company Rules

...

The following are examples of the types of behaviour which could result in disciplinary action in the form of warnings, and ultimately dismissal.

...

3.2.9 Insubordination or use of abusive language.

3.2.10 Any breach of Company Rules or Policy.

[12] When questioned at the Investigation Meeting, Mr Sahota confirmed that he was familiar with both the rules and procedures of ISL and knew that certain types of behaviour were dismissible offences.

[13] Mr Sahota said that the Crane Driver position was a prestigious one, meriting a higher rate of pay than the Straddle Drivers, and as a result he believed that there was resentment towards the Crane Drivers from other employees, in particular the Straddle Drivers.

Incident 23 May 2017

[14] Mr Sahota said he had problems with Mr Dan Jackson, a Straddle Driver, ‘pulling a finger’ at him when their paths crossed. This had been happening over an approximately six month period prior to 23 May 2017. Although Mr Sahota felt frustrated by Mr Jackson’s actions, he had not responded or complained to management.

[15] Mr Sahota said he had been having a ‘bad day’ on 23 May 2017. Mr Jackson had pulled a finger at him and been laughing, and Mr Sahota believed he was trying to provoke him. He had called Mr Jackson over the ISL radio channel and asked him to whom he was pulling the finger and Mr Jackson had said it was to him.

[16] After a short exchange over the radio, Mr Sahota sent Mr Jackson two text messages in the first of which he stated: “*Pull that finger at me again I’ll shove it up your arse you homo*” and sent a second one some minutes later.

[17] Mr Jackson had responded by stating that Mr Sahota may have misunderstood that the fact that the fingers were facing Mr Sahota meant that they were a gesture meaning 'peace', however Mr Sahota did not accept Mr Jackson's explanation.

30 May 2017

[18] Mr Sahota said that on 30 May 2017 in the straddle yard area at the start of his shift there had been a brief exchange between himself and Mr Jackson in which Mr Jackson had accused him of stealing the straddle drivers hours.

[19] Mr Sahota said that after he finished his shift he had arranged to collect a friend and show him around ISL. At the Investigation Meeting Mr Sahota confirmed that he had not obtained permission to do so, although he had intended to speak to his team leader.

[20] When they (Mr Sahota and his friend) reached the straddle yard area he had seen Mr Jackson and they had a heated argument, after which he had left and made two telephone calls to Mr Jackson.

[21] Mr Richard May, at that time Terminal Operations Manager at ISL, said he had received a telephone call from Mr Jackson at approximately 18.50 p.m. Mr Jackson told him that there had been an incident with Mr Sahota as a result of which he had felt afraid to go home because Mr Sahota had been making threats and might be waiting for him outside the Port entry gates.

[22] Mr May returned to the Port and had spoken to Mr Jackson whom he said had been visibly distressed. He telephoned Mr Sahota at approximately 7.00 p.m. who told him he was at home. Mr May told Mr Sahota not to contact Mr Jackson and that he would investigate the alleged incident the following day.

[23] Mr May told Mr Jackson it was safe for him to leave the Port and that he would want to meet with him the following day at 10.00 a.m. He also called Mr Sahota and told him to attend a meeting at 9.00 a.m. the following morning.

Meeting on 31 May 2017

[24] Mr May asked Ms Paula Clode, Financial Controller, to attend the meetings with Mr Sahota and Mr Jackson on 31 May 2017 in order to investigate what had occurred on 30 May 2017.

[25] During the meeting with Mr Sahota on 31 May 2017 Mr Sahota was asked for his version of events, and his response was recorded in the notes made by Ms Clode.

[26] Mr Sahota recounted the incident between himself and Mr Jackson on 23 May 2017, and stated that on 30 May 2017 he had started work and met Mr Jackson who had asked him why he was 'stealing' the straddle drivers' hours. Following that interchange, there had been no other interactions or conversation until after he had left the Port.

[27] He had been outside the Port entry gate when Mr Jackson had telephoned him, asked why he had run away, and if they could have a 'man to man' fight.

[28] He had driven back to the carpark by the straddle yard at approximately 6.20 p.m. and had seen Mr Jackson standing with another employee, Mr Sean Roberts. Mr Sahota said he was alone, but there were some maintenance men in the vicinity that he thought Mr Jackson may have mistakenly thought were with him.

[29] Mr Jackson had repeated that he wanted a fight but he (Mr Sahota) did not want to lose his job, so he had said he would have a 'man to man' chat outside work. He had returned to his car and left the Port. Mr Jackson had telephoned him again but he had not answered.

[30] Mr May said he had asked Mr Sahota to write out his version of events, which was ISL standard procedure after an incident.

[31] The version of events recorded in Mr Sahota's handwritten version of events dated 31 May 2017 stated that he had been outside the Port when Mr Jackson had telephoned him, and that he had been alone when he returned to the Port. He also stated that he would like to see the calls on Mr Jackson's mobile log because they could have been made by a person Mr Jackson had arranged to call him.

[32] A meeting was also held with Mr Jackson on 31 May 2017, and a written statement was obtained from Mr Jackson. Ms Clode recorded notes of the meeting with Mr Jackson held at 10 a.m. on 31 May 2017. The notes record Mr Jackson's version of events on 23 and 30 May 2017.

[33] Mr Jackson had stated that there had been an altercation in the smoko room on 30 May 2017 during which Mr Sahota had 'swung' at him and Mr Jackson had slapped him in response. Mr Jackson had stated that Mr Sahota had swung at him 5 times, and he had slapped him 3 times. An employee, Tawh, had initially been present, but had left the Smoko room before the altercation.

[34] Mr Jackson claimed that later that evening Mr Sahota had left the ISL premises but he had returned to the Port accompanied by a person in a black hoody, and called to Mr Jackson to meet him down by the Port entry gate.

[35] He had refused to go outside the entry gate and Mr Sahota had returned to his car.

[36] Mr Jackson stated he had received telephone calls from an unknown number which he had not answered. When he had answered a call, it had been Mr Sahota who had spoken and threatened him. A number of employees, Mr Warren Clark and an employee, Sumo, had listened with him to the calls.

Investigation

[37] Following the meetings with Mr Sahota and Mr Jackson Mr May said he had carried out an investigation. He had obtained details from Mr Jackson's phone log which showed 5 calls from an unknown number. The first was a missed call at 6.25 p.m. which was followed by 4 further calls. Two of the later calls from an unknown number were identified as being from Mr Sahota.

[38] Mr May had spoken to a number of employees, Mr Clark, Mr Matt Howland and Mr Mike McCartney, and obtained written statements from them.

[39] Mr Clark stated that he had been present when Mr Jackson received two of the calls. He stated that the calls had been aggressive and threatening, and it had sounded like Mr Sahota speaking.

[40] Mr Howland, one of the Crane operators, had stated that it was not unusual for straddle and crane drivers to gesture to each other by a wave or pulling fingers, but that it was never meant to be offensive.

[41] Ms Clode had spoken to and obtained a statement from Mr Roberts which confirmed that Mr Jackson and Mr Sahota had spoken on the evening of 30 May 2017, but he had not heard the specifics of their conversation. He had entered the straddle shed after Mr Sahota had told him to: "*Bugger off*". He stated that he had not seen anyone else next to Mr Sahota in the carpark.

[42] On 1 June 2017 Mr May obtained a video of the CCTV footage from Port Security which recorded Mr Sahota entering the Port and he also obtained the entry and exit times from the Port. The employee from whom he obtained the CCTV footage, Mr Mike McCartney, had told him that Mr Sahota had been really angry and in an aggressive mood on 30 May 2017, and had supplied a written statement to that effect

[43] Mr May said he had viewed the CCTV footage again with Ms Clode who said she had been shocked as the footage which showed Mr Sahota in the car accompanied by another person.

[44] Mr May said it was clear to him that there were different versions of what had occurred, in particular what Mr Sahota had told him at the meeting and in the written statement dated 31 May 2017, which did not accord with the events as recalled by other employees to who he had spoken.

[45] As a result Mr May telephoned Mr Sahota on 1 May 2017 to ask him to attend a meeting to be held on 2 June 2017 and advised him to obtain representation. Mr May also telephoned Ms Carol Greene, the Surfside Union delegate, to advise her that Mr Sahota might call her.

Meeting held on 2 June 2017

[46] The meeting held at 11.00 a.m. on 2 June 2017 was attended by Mr Sahota and Ms Greene, Mr May and Ms Clode. Ms Clode again took notes.

[47] Mr May said he had commenced the meeting by telling Mr Sahota that there had been a number of discrepancies between his statement and that of Mr Jackson. He put these discrepancies to Mr Sahota.

[48] He told Mr Sahota that Mr Jackson had alleged there had been a fight between him and Mr Sahota during the day on 30 May 2017. Mr Sahota denied that a fight had taken place and mentioned that he left the smoko room with another employee, Tawh.

[49] Mr May said that Mr Sahota had stated he had returned to the Port as a result of Mr Jackson having telephoned him, but that the phone log Mr Jackson had provided had shown that no call had been made at the relevant time to him.

[50] Mr Jackson had stated that there had been someone with Mr Sahota when he (Mr Sahota) had returned to the Port. Mr Sahota had denied this and stated that he was alone when he returned however there had been maintenance staff present that Mr Jackson may have thought were with him.

[51] During the Investigation Meeting Mr Sahota said he had become confused by the question. He said his friend had stood by the side of the car where he would not have been visible to Mr Jackson.

[52] During cross-examination Mr Sahota accepted that he had anticipated Mr Jackson would say someone had been with him and therefore provided an explanation that maintenance men had been present in the vicinity at the time he spoke with Mr Jackson.

[53] Mr May had told Mr Sahota that he had obtained Mr Jackson's phone records that showed a number of calls from an unknown number and that 2 or 3 of the calls had been heard by 2 witnesses who said it had sounded like Mr Sahota and that the calls were threatening in nature. Mr Sahota denied he had made the calls and produced his telephone call log.

[54] At the Investigation Meeting Mr Sahota confirmed that he had deleted the telephone log on his phone before providing it to ISL because he was scared and wanted to retain his job with ISL.

[55] Mr May said at that point he and Ms Clode had talked to Mr Sahota about the ISL work rules as they had wanted him (Mr Sahota) to know how serious the situation had been.

[56] Mr May told Mr Sahota that ISL had the CCTV footage which showed someone in the car with him, and Mr Sahota then admitted that he had brought someone to the Port with him.

[57] At that point Ms Clode said she had suggested a break as Mr Sahota appeared to be confused and was insisting Mr Jackson had telephoned him even though the times did not correlate to the telephone records provided by Mr Jackson.

[58] After the meeting reconvened Mr Sahota told Mr May and Ms Clode that he worked twelve days without a break.

[59] Ms Greene asked to view the CCTV footage and Mr May and Ms Clode said they had all viewed it together. At the Investigation Meeting Mr Sahota said he had not viewed the CCTV footage but had left the meeting and had lunch.

[60] After the CCTV viewing there was another adjournment.

[61] When the meeting resumed at 3 p.m. Mr Sahota had said that he was telling 100% truth and that:

- (i) he had not made the 'stealing hours' remark to Mr Jackson;
- (ii) there had been no physical altercation between him and Mr Jackson;

- (iii) he had pre-arranged to collect a friend and show him around the Port;
- (iv) he had not known Mr Jackson was still at the Port; and
- (v) he had made the calls to Mr Jackson then left for home when Mr Jackson had said he would report him to ISL.

[62] Mr Sahota had said he would apologise to Mr Jackson and he would accept a final warning. He also provided a written statement.

[63] Mr May and Ms Clode had discussed the appropriate outcome.

[64] Mr May said that Mr Sahota had not told the truth, changing his version of events between 31 May meeting and during the 2 June meeting, so that by the end of the meeting on 2 June 2017 he no longer had any confidence that he could believe anything Mr Sahota told him. As a result his view had been that Mr Sahota's employment with ISL could not continue due to a lack of trust and confidence in him.

[65] Ms Clode said her view had agreed with that of Mr May, setting out in her written evidence that Mr Sahota had changed his view on 5 main issues which were that he:

- a. had returned to the Port because Mr Jackson had telephoned him after he had left the Port;
- b. was alone when he had returned to the Port;
- c. did not know Mr Jackson was still at work when he returned;
- d. had not made threatening calls to Mr Jackson; and
- e. had worked twelve days without a break.

[66] Ms Clode confirmed that she and Mr May had discussed the outcome following the meeting on 2 June 2017. Their joint view was that Mr Sahota had continually changed his evidence, and that he could not be trusted to tell them the truth concerning the incident on 30 May 2017.

[67] Whilst a lesser penalty had been considered, it was deemed to be not appropriate since they had lost all trust and confidence in him.

[68] ISL wrote to Mr Sahota on 7 June 2017 confirming that he had been dismissed with effective from 2 June 2017 on the grounds of serious misconduct due to fact that he and Ms Clode had lost all trust and confidence in him (Mr Sahota).

[69] The letter stated: “*While we carefully considered your explanations, we considered that your behaviour fell well short of the standards we expect from our employees.*”

Determination

Was Mr Sahota unjustifiably dismissed?

[70] Mr Sahota claims that he was unjustifiably dismissed by ISL. The test of justification in s 103A of the Act states:

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.

[71] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. ISL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[72] Mr Sahota was dismissed as a result of ISL having lost trust and confidence in him.

[73] Whilst ISL was investigating the incident between Mr Sahota and Mr Jackson, it became aware of a number of discrepancies between Mr Sahota’s account of events, and that of Mr Jackson and other employees.

[74] These discrepancies were put to Mr Sahota during the meeting held on 2 June 2017. During that meeting Mr Sahota had changed his version of events on more than one issue and as a result of these discrepancies, ISL considered that Mr Sahota had tried to mislead and deceive it.

[75] An employment relationship is founded on the fundamental basis that an employer and employee have trust and confidence in each other to behave in good faith towards the other.¹

[76] As a result of the repeated alteration of his evidence I find that ISL considered it could no longer have trust and confidence in Mr Sahota, and this was a decision that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[77] I find that ISL had substantive justification for reaching its decision to dismiss Mr Sahota.

Procedural Justification

[78] In accordance with s 103A (3) of the Act, ISL was required to carry out a fair investigation and follow a fair procedure. When examining the procedure adopted the Authority must consider whether:

- (a) ... *the employer sufficiently investigated the allegations against the employee ...*
- (b) ... *the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee ...*
- (c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee ...*
- (d) ... *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 .*

(i) *Sufficient investigation*

[79] As part of their investigation, Mr May and Ms Clode had obtained statements not only from Mr Sahota and Mr Jackson, but also from a number of other employees, namely Mr Clark, Mr Howland, Mr McCartney and Mr Roberts. They had also obtained and viewed the CCTV footage of the events on 30 May 2017, and obtained a copy of Mr Jackson's phone log for the relevant date and time. They had also been given a copy of Mr Sahota's telephone log which Mr Sahota confirmed that he had deleted the relevant information.

[80] I find that ISL had carried out sufficient investigation into the incident on 31 May 2017.

¹ Section 4 of the Act

(ii) *Raised concerns with the employee*

[81] Prior to the meeting held on 2 June 2017 which Mr Sahota attended accompanied by Ms Greene, he had not been informed in writing that the meeting was disciplinary in nature, nor that he could have a representative at the meeting.

[82] There is no statutory requirement that an employee should be advised in writing that he or she is entitled to representation, and Mr May's evidence was that he had told Mr Sahota verbally about his right to representation at the meeting, and he also telephoned Ms Greene. Whilst it is not advisable that the employer choose the representation for the employee, there is no evidence that Mr Sahota had objected to Ms Greene representing him.

[83] However it was not until after the meeting on 2 June 2017 had commenced, and the discrepancies had been put to Mr Sahota for comment that he had been informed about the consequences of breaching ISL work rules and that the matter was serious.

[84] An employee is entitled to know the concerns held by the Employer in order that he or she may be prepared at the meeting to discuss those concerns, and the potential outcomes should the concerns be found to be substantiated.

[85] Whilst Mr Sahota confirmed at the Investigation meeting that he was aware of the ISL work rules, I find that a fair and reasonable employer would have reminded Mr Sahota of them and the fact that ISL during the meeting would be querying his actions prior to commencing what was essentially a disciplinary meeting on 2 June 2017.

[86] I find the fact of Mr Sahota being advised only partway through a meeting on 2 June 2017 that ISL viewed the discrepancies in his evidence as a serious disciplinary matter to be a failing of natural justice.

(iii) *Reasonable opportunity to respond*

[87] The written statements obtained by Mr May from Mr Clark, Mr Howland, Mr McCartney and Mr Roberts were not provided to Mr Sahota or his representative, either prior to the meeting held on 2 June 2017, nor during it.

[88] I accept that the contradictions as contained in Mr Jackson's evidence were notified to Mr Sahota and he was told that Mr May had a witness statement about the nature of the calls made to Mr Jackson which the witness had believed was from Mr Sahota. However Mr McCartney's allegation that Mr Sahota had appeared to be in an angry and aggressive mood on 30 May 2017 was not put to Mr Sahota for comment, although it may have influenced ISL adversely against Mr Sahota.

[89] Further, Mr Sahota was not shown or informed about the statement from Mr Roberts in which he (Mr Roberts) stated that he had not seen anyone with Mr Sahota when he returned to the Port.

[90] The employee Tawh was not interviewed, and therefore did not provide a written statement although his evidence as to the alleged altercation in the smoko room on 30 May 2017 may have informed the credibility of Mr Sahota's evidence as a whole.

[91] Moreover although Mr Sahota had been informed about the existence of the CCTV footage, neither he nor Ms Greene had been given the opportunity to view it prior to the commencement of the meeting on 2 June 2017.

[92] I find these to be procedural failings in the process adopted by ISL.

[93] I note that following the second adjournment on 2 June 2017, and after Mr Sahota and Ms Greene had been provided with the opportunity to view the CCTV footage, Mr Sahota was informed of the discrepancies between his evidence and the evidence obtained by ISL, and given an opportunity for him to make further explanation. Mr Sahota also provided a further written statement.

[94] There is no evidence that either Mr Sahota, or Ms Greene on his behalf, requested a further adjournment or a rescheduling of the meeting.

[95] I find that Mr Sahota prior to the third resumption of the meeting on 2 June 2017, been informed of ISL's concerns and provided with the CCTV footage evidence.

[96] However I find that Mr Sahota's opportunity to respond had been hampered from the outset by ISL's failure to provide him with all relevant information prior to the commencement of the what was a disciplinary meeting on 2 June 2017 and is clearly a breach of the duty of good faith by ISL.²

(iv) *Employer genuinely considered employee's explanation*

[97] Mr May and Ms Clode considered the evidence provided by Mr Sahota following the third resumption of the meeting. Their evidence was that they had considered a lesser penalty than dismissal but given the loss of trust and confidence, it had been decided that dismissal was the appropriate decision in all the circumstances.

² S 4 (1A) (c) (i) of the Act.

[98] Having considered all the circumstances, I find that there were failings in ISL's process, specifically the failure to advise Mr Sahota of the seriousness in which ISL viewed the concerns and the potential outcome of its process; the failure to advise or provide copies to Mr Sahota of all the evidence obtained; and of initially questioning him on 2 June 2017 prior to his and his union representative viewing the CCTV footage.

[99] In light of Ms Clode's evidence that Mr Sahota was becoming confused during the meeting on 2 June 2017, I find that a fair and reasonable employer would have considered adjourning and rescheduling the meeting .

[100] I find the process failings to be more than minor and in all the circumstances a fair and reasonable employer could not have reached the decision to dismiss Mr Sahota in all the circumstances at the relevant time.

[101] I determine that Mr Sahota was unjustifiably dismissed by ISL.

Should Mr Sahota be reinstated to ISL?

[102] Mr Sahota is seeking reinstatement. Whilst reinstatement is no longer the primary remedy, it is a remedy available to the Authority provided that it is determined as "*reasonable and practical*" pursuant to s 125(2) of the Act.

[103] ISL opposes reinstatement on the basis of practicability citing three specific grounds, these being that (i) it no longer has any trust and confidence in Mr Sahota; (ii) there is no Crane Driver role currently available; and (iii) the Port may not issue Mr Sahota with permission to enter the Port..

[104] In *Angus v Ports of Auckland (No 2)*³ the Employment Court noted the observation of the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of New Zealand Normal Intermediate School* that practicability of reinstatement involved a balancing act between the interests of the parties and the justice of their cases not only regarding the past, but also the future, noting:

... It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."

³ [2011] NZEmpC 160 at [63]

[105] Mr May and Ms Clode stated that they had lost all trust and confidence in Mr Sahota as a result of his persistent inability to tell the truth during the investigation. Whilst Mr May is no longer employed at ISL his evidence was that his replacement as Terminal Operations Manager would also need to have the requisite trust and confidence in Mr Sahota.

[106] The evidence of Mr May and Ms Clode was that ISL relied on the Crane Drivers to provide evidence of any incidents or hazards which occurred on the ground below them to ensure health and safety in a hazardous working environment. They no longer had any trust and confidence in Mr Sahota to fulfil that requirement.

[107] Mr Sahota, by his action in bringing an unauthorised person into the Port without the necessary authorisation, had also affected their ability to have trust and confidence in him. The Port is a high hazard environment and the person Mr Sahota brought onto the Port had not received a health and safety briefing and was not wearing an obligatory Hi-Viz vest. In addition, the Port was a customs controlled area and Mr Sahota had not sought permission to bring an unauthorised person into that area.

[108] In light of these considerations the Port might refuse Mr Sahota an entry permit without which he could not enter the Port and carry out his duties at ISL.

[109] The third reason, being the non-availability of a Crane Driver position is of less weight, albeit I accept that Crane Drivers have to undergo a training programme and ISL has a very limited number of Crane Driver positions available.

[110] Following due consideration, I am not persuaded that reinstatement would be practicable or reasonable, and accordingly I do not award it.

Has there been disparity of Treatment?

[111] Mr Mitchell submitted that there had been disparity of treatment between Mr Sahota and Mr Jackson who was not dismissed as a result of his involvement in the matter with Mr Sahota.

[112] In *Chief Executive of the Dept of Inland Revenue v Buchanan*⁴ it was noted that there were three separate issues to be considered in relation to the question of disparity of treatment:

- 1) Is there disparity of treatment?
- 2) If so, is there an adequate explanation for the disparity?

⁴ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

- 3) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?⁵

[113] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[114] In *Samu v Air New Zealand*⁶ the Court of Appeal stated:

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 for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[115] The basis of Mr Sahota's dismissal was that the employer had lost trust and confidence in him to be truthful, and not because he had been involved in a fight with Mr Jackson.

[116] Clause 2.11 of the Work Rules states that that: "*fighting and use of violence will result in dismissal*". Mr Jackson's evidence in his written statement was that Mr Sahota had been the provoker in the physical altercation. Mr Sahota had denied that an altercation had taken place.

[117] ISL did not interview the employee Tawh whom Mr Sahota alleged had left the smoko room with him prior to any altercation taking place. It had accepted Mr Jackson's evidence on the matter as being truthful on the basis that Mr Jackson's evidence incriminated himself.

[118] I have noted that Tawh's evidence would have been helpful in informing credibility as regards the later incident between Mr Sahota and Mr Jackson, but I find ISL's view that an employee would not willingly incriminate himself to be reasonably based.

⁵ Ibid at para [45]

⁶ [1995] 1 ERNZ 636 (CA)

[119] At the Investigation Meeting Mr May and Ms Clode's evidence was that Mr Jackson had been truthful in regard to the telephone calls and events on the evening of 30 May 2017, and this view was supported by that of the evidence uncovered by ISL in its investigation..

[120] Even where grounds for dismissal have been established, the Employment Court⁷ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

[121] ISL had concluded that Mr Jackson had been truthful in his evidence. That explained why disciplinary action with him had resulted in disciplinary proceedings but not dismissal.

[122] I find that there was an adequate and reasonable explanation for the disparity of treatment.

[123] I determine that there was an adequate explanation for the disparity of treatment between Mr Sahota and Mr Jackson.

Remedies

[124] Mr Sahota is entitled to remedies in respect of the unjustifiable dismissal.

Lost wages

[125] Mr Sahota said he had not been able to obtain alternative permanent employment as a Crane Driver following his dismissal. He had commenced alternative employment on 2 September 2017.

[126] Employees are under a duty to mitigate their loss. In *Allen v Transpacific Industries Group Ltd* the Employment Court noted at paragraph [78]:

However, dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.⁸

⁷ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁸ (2009) 6 NZELR

[127] I had requested evidence of Mr Sahota's efforts to obtain alternative employment be provided to me following the Investigation Meeting as none were available prior to or at the Investigation Meeting. None have since been received.

[128] I accept that employees who have been dismissed in circumstances like those of Mr Sahota may suffer a disadvantage when it comes to obtaining alternative employment, but that does not negate the requirement to mitigate although it may inform the lack of success should an effort be made to mitigate.

[129] In the circumstances of the scant evidence of his attempts to find alternative employment following his dismissal, I limit Mr Sahota's remedy for lost wages to 3 months ordinary time remuneration.

[130] I order that ISL pay Mr Sahota the sum of \$13,693.68 (calculated as \$37.62 per hour x 28 guaranteed hours per week x 13 weeks) pursuant to s 128(2) of the Act.

Compensation pursuant to s 123(c)(i) of the Act

[131] Mr Sahota gave evidence that the termination of his employment resulted in him feeling extremely upset. He was unable to tell his mother and friends about his dismissal and suffered from financial anxiety in circumstances in which he was a solo parent.

[132] I find that Mr Sahota suffered hurt and anxiety as a result of his dismissal from ISL.

[133] I order that ISL pay Mr Sahota the sum of \$10,000.00 pursuant to s 123 (1) (c) (i) of the Act.

Contribution

[134] I am required under s. 124 of the Act to consider the extent to which the actions of Mr Sahota contributed towards the situation that gave rise to the personal grievance and which may influence the remedies awarded.

[135] ISL concluded that Mr Sahota had committed serious misconduct based upon his repeatedly changing his evidence to the point at which it no longer had trust and confidence in him.

[136] Trust and confidence underpins all employment relationships in which the parties are under a duty to behave towards each other in good faith. Whilst I have determined that, taking all the circumstances into consideration, a fair and reasonable employer would not have made a decision to dismiss Mr Sahota, I nonetheless find that Mr Sahota was to a large extent the

author of his own misfortune due to his prevarication and lack of consistency in his versions of events.⁹

[137] I find the actions of Mr Sahota to have been blameworthy and causative of the outcome and therefore to make a reduction for contribution to the remedies awarded to Mr Sahota appropriate¹⁰.

[138] I find contributory fault on the part of Mr Sahota and reduce the remedies awarded by 50%.

Costs

[139] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[140] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

⁹ *Finsec v Australian Mutual Provident Society* [1992] 1 ERNZ 280 (EmpC) at 291

¹⁰ *Xtreme Dining Limited Trading as Think Steel* [2016] NZEmpC 136