

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 387
5334192**

BETWEEN SIALE TALAKAI
 Applicant

AND ALBANY FOOD WAREHOUSE
 LIMITED T/A ALBANY
 PAK'n'SAVE
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Bridget Smith, Counsel for Respondent

Investigation Meeting: 27 July 2011 at Auckland

Submissions received: 27 July 2011 from Applicant and Respondent

Determination: 8 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Siale Talakai, claims that he was unjustifiably dismissed by the Respondent, Albany Food Warehouse Limited ("AFW").

[2] Mr Talakai claims that he was unjustifiably disadvantaged by AFW in that his dismissal was pre-determined by AFW as a result of his having raised a complaint regarding his having been threatened by another employee and having raised his claims through the Employment Relations Authority.

[3] Mr Talakai further claims that he was subjected to disparity of treatment by AFW in that other employees in similar circumstances to his own were treated differently and given a further chance.

[4] AFW denies that Mr Talakai was unjustifiably dismissed, and claims that Mr Talakai's dismissal was substantively and procedurally justifiable, and that the dismissal

decision was a decision which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

[5] AFW deny that Mr Talakai was unjustifiably disadvantaged in that his dismissal was pre-determined as a result of his complaint or his claims, or that Mr Talakai was subjected to disparity of treatment.

Issues

[6] The issues for determination are:

- a. Was the decision to dismiss Mr Talakai a justifiable decision in accordance with the test as set out in s103A of the Employment Relations Act 2000 (“the Act”)?
- b. Was Mr Talakai unjustifiably disadvantaged by his dismissal being pre-determined by AFW as a result of his complaint of having been threatened by another employee and by bringing his claims in the Employment Relations Authority?
- c. Was there disparity in the treatment of Mr Talakai such as to render the decision to dismiss Mr Talakai one which was not available to AFW as a fair and reasonable employer?

Background Facts

[7] Mr Talakai commenced employment with AFW as a part-time night-shift grocery assistant on 15 April 2009, and was appointed to a full-time position as from 21 September 2009. AFW employs approximately 400 employees consisting of full-time and part-time employees.

[8] Mr Talakai was employed pursuant to an individual employment agreement (“IEA”) and was provided with a copy of the AFW Business Rules and Procedures (“Business Rules”), both of which he duly signed on 15 April 2009.. Ms Mary-Kate Paterson, General Manager of AFW, said that the night-shift workers were not included in the day-shift employees induction process, but that a trainer would meet with all new night-shift employees and explain the Business Rules to them

[9] During the period 15 April 2009 until 20 September 2009, Ms Paterson stated that Mr Talakai took 7 days leave without approval or explanation. Despite this absenteeism record, Ms Paterson stated that Mr Ian Judson, at that time Grocery Manager and Mr Talakai's line manager, had been persuaded by Mr Talakai's constant requests for full-time employment and his assurances that he would fulfil his obligations under his IEA and the Business Rules, to appoint Mr Talakai as a full-time employee with effect from 21 September 2009.

[10] Mr Talakai's employment agreement ("IEA"), which he signed and is dated 15 April 2009, stated at clause 25:

25. RULES AND POLICIES

The employer shall be entitled to institute policies and rules in relation to its activities and the conduct expected of its employees from time to time and such policies and rules shall be observed in good faith by the employee. The employee should note, in particular, the employer's Business Rules, a copy of which is provided with this agreement.

[11] The Business Rules stated at clause 1 "Time Keeping": "*You are expected to be punctual. Persistent late arrival is unacceptable to your employer and an inconvenience to others*"; and at clause 4:

Absence

Staff who are unable to attend work are required to notify their Departmental Manager as soon as possible. In the case of sickness absence staff are required to notify their Departmental Manager no later than one hour before the employee's normal starting time for each day of absence so that arrangements can be made for your replacement. Absence for reasons other than sickness, especially if it can be foreseen, must be arranged with your Departmental Manager to cause the least inconvenience as possible.

[12] The Business Rules includes "*Poor time keeping*" under the examples of behaviour which constituted less serious misconduct. Included in examples of behaviour which constitute serious misconduct and which it is stated "*shall result in instant dismissal*" is: "*Absence from work without good cause, during a period for which a request for leave of absence has been denied.*"

[13] At the conclusion of the example list is the statement that: "*Instances may also occur where conduct of the type set out in part A (less serious misconduct) is, in the circumstances,*

considered serious enough to constitute serious misconduct.” Under the section headed “Warning Procedure’ is stated:

3. *If necessary, a second and final warning will be given if the conduct is repeated or the areas of performance remain unsatisfactory. This will again specify the conduct or areas of performance which are of concern, the improvement needed and the consequences of repetition or a failure to improve.*
4. *If the conduct is again repeated, or the areas of performance remain unsatisfactory, employment will then be terminated. Termination will usually be on notice.*
5. *However, termination for serious misconduct will occur without prior warnings and without notice.*

[14] Mr Talakai signed a declaration dated 15 April 2009 to confirm he had received a copy of the Business rules, and had read and understood them. Mr Talakai also confirmed at the Investigation Meeting that he had read and understood the Business Rules, and that he was aware that poor timekeeping was considered misconduct and could result in disciplinary action being taken.

[15] Ms Paterson stated that issues with Mr Talakai’s attendance continued after September 2009. The issues were not only concerning Mr Talakai’s failure to attend work, but his failure to contact work to report his absence in accordance with the Business Rules, referred to as a ‘no phone no show (“NPNS”).

[16] On 10 June 2010 Mr Judson conducted an informal meeting with Mr Talakai to discuss his failure to attend work or to make contact with AFW to explain his NPNS on 2 June 2010. Mr Judson stated in the note which he had made recording the meeting:

...Charlie made no attempt to phone in even knowing what may happen and did not even make contact the next day. On previous occasions Charlie had not phoned in and only after us making contact with him has given as the reason that he was a NPNS. I have explained to Charlie that he must let a Supervisor or Manager know if he cannot make it to work and that this behaviour cannot continue and will not be tolerated and the next time that Charlie does this by not informing us with the reason he will have a meeting with Mary-Kate. Charlie fully understands the consequences of this meeting.

[17] The note is signed by Mr Talakai to indicate that he agreed that this was what had been discussed at the meeting. Ms Paterson was provided with a copy of this note.

[18] Mr Talakai said that he had only signed the note as Mr Judson had begged him to do so, and that he had not read the note before signing it. I do not find Mr Talakai's statements to be credible and accept that the discussion took place as noted by Mr Judson, and that Mr Talakai was aware of what the note stated when he signed it in confirmation that that what had been discussed at the meeting.

[19] Ms Paterson said that on 29 June 2010 Mr Talakai did not attend work and did not telephone in advance in accordance with clause 4 of the Business Rules as he had been instructed to do. Ms Paterson said she had contacted Mr Talakai and requested that he meet with her the following day to provide his explanation for his non-attendance and non-contact. Mr Talakai was invited to bring a representative to the meeting.

[20] On 30 June 2010 Ms Paterson and Mr Judson met with Mr Talakai. Mr Talakai had not brought a representative to the meeting and confirmed that he was happy to continue without one.

[21] Mr Talakai explained that his absence was occasioned by his father's illness and that he had not telephoned as he had no credit on his mobile telephone. The meeting was adjourned for Ms Paterson to give Mr Talakai's explanation consideration.

[22] Ms Paterson explained that she had considered Mr Talakai's explanation, but she had not accepted the fact that Mr Talakai had no credit on his mobile telephone to have been a reasonable excuse for failing to telephone and notify of his absence on the basis that he could have used a landline or borrowed a telephone.

[23] Mr Talakai was issued with a formal warning dated 30 June 2010 in connection with his "*continued failure to attend work shifts without contacting the store*". The warning advised that further involvement in incidents of misconduct could result in further disciplinary action being taken.

[24] Mr Talakai challenged the formal warning and mediation took place on 15 October 2010. The warning was not rescinded following mediation and both parties stated at the Investigation Meeting that it had been agreed that Mr Talakai would in future contact AFW by 9 p.m. (i.e. one hour prior to his shift which started at 10 p.m.) if he was not able to attend for his shift.

[25] On 23 October 2010 Mr Talakai failed to attend work or to contact AFW to advise of his absence as agreed following the mediation on 15 October 2010. Ms Paterson contacted

Mr Talakai to ask him to attend a meeting on 2 November 2010 and provide an explanation for his non-attendance and failure to make contact as had been agreed.

[26] On 2 November 2010 Ms Paterson and Mr Field, Fresh Foods Manager, met with Mr Talakai. Mr Talakai had not brought a representative to the meeting and confirmed that he was happy to continue without one.

[27] Mr Talakai's explanation at the meeting for his absence on 23 October 2010 was that he telephoned AFW on 3 occasions. On the third occasion he had been answered by 'a lady' who had said that she would 'pass the message on'.

[28] Ms Paterson said Mr Talakai had provided no details of the identity of the lady to whom he had spoken, or of when exactly he had called. Ms Paterson said that the meeting had been adjourned while she gave consideration to Mr Talakai's explanation.

[29] Ms Paterson said she had made enquiries of the Managers to ask if they had spoken to Mr Talakai and they had confirmed that they had not done so. Ms Paterson also explained that it would be a member of the checkout staff who would have answered the telephone during the night shift, and that on the night in question they had all been male.

[30] Ms Paterson said that she had reached the conclusion that Mr Talakai's explanation was neither plausible nor reasonable. Ms Paterson further considered that Mr Talakai's conduct amounted to misconduct.

[31] When the meeting resumed, Ms Paterson informed Mr Talakai that he would receive a Final Written Warning and that any further incidents might result in his dismissal. Mr Talakai was also advised that if he was absent due to sickness in the future, and if it was either longer than 3 days or he had no sick leave entitlement remaining, a doctor's certificate would be required. This advice was confirmed in a Final Written Warning letter on 5 November 2010.

[32] Ms Paterson said that following this meeting, Mr Talakai's absenteeism continued. Ms Paterson explained that was not just the matter of NPNSs that was a concern, but also the excessive number of absentee days Mr Talakai was taking. Ms Paterson said that this made it difficult for AFW to be able to rely on Mr Talakai to attend work for his shift.

[33] On 23 November 2010 Ms Paterson was handed a handwritten letter by Mr Talakai raising a personal grievance and asking to have an urgent meeting. In the letter Mr Talakai

raised the following issues: the unfairness of the Final Written Warning, the changing of his conditions of employment, disclosure of confidential information, and issues with the afternoon supervisor.

[34] Ms Paterson said that as soon as she had become aware of this latter issue, she had investigated it. As a result of her investigations, Ms Paterson said she had been satisfied that that manager involved had addressed the issue and dealt with it appropriately. Mr Talakai had been informed by the manager of the action which had been taken, the matter appeared to have been resolved, and Ms Paterson had concluded that there had been no disadvantage to Mr Talakai as a result.

[35] Ms Paterson replied by letter dated 24 November 2010 confirming her willingness to meet and discuss his concerns, with the meeting taking place on 26 November 2010. Mr Field again attended the meeting with Ms Paterson.

[36] During the meeting Ms Paterson said she had informed Mr Talakai that:

- he needed to attend work more regularly;
- as he was still taking leave on the basis of sickness although he had no sick leave entitlement outstanding, he should provide a doctor's certificate,
- she had not discussed Mr Talakai's meeting with another employee and that all meetings were confidential; and
- she had had a meeting with the Grocery Manager and that while she believed the incident to have been resolved, she would meet with the Grocery Manager to confirm that was the case.

[37] On 7 December 2010 Mr Talakai telephoned his supervisor, Mr Field, and advised him that he could not attend work that evening due to his car not being available, someone having borrowed it. Mr Talakai had telephoned only 20 minutes prior to his shift starting, in breach of the agreement that he would telephone at least one hour in advance of the shift commencement.

[38] Mr Field informed Mr Talakai that his explanation was not satisfactory, and that even if his car was not available, it was nonetheless his responsibility to get himself to work.

[39] Mr Talakai explained that he had no alternative transport available to him, that he had considered asking Mr Field to pick him up, but that he had not done so.

[40] On 10 December 2010 Ms Paterson wrote to Mr Talakai requesting that he attend a disciplinary meeting on 16 December 2010. In the letter Ms Paterson had detailed fully the allegations to be discussed with Mr Talakai concerning his on-going level of absenteeism and the reason given for Mr Talakai's absence on 7 December 2010. Ms Paterson reminded Mr Talakai that he was on a Final Written Warning for failure to attend work shifts without making contact with AFW as instructed, and that the outcome of the meeting might involve a further Final Written Warning or dismissal. Mr Talakai was invited to bring a representative or support person with him to the meeting.

[41] In the letter dated 10 December 2010 Ms Paterson had outlined Mr Talakai's absenteeism since he had been appointed to a full-time position:

... in the period since you became a full-time employee of Albany Pak'n'Save on 21 September 2009 (ie a period of some 65 weeks) you have had 52 days off work and have only worked a full week of 13 occasions out of those 65 weeks. Put another way. Siale, you are currently not coming to work, on average, 1.6 days out of every 10 (or nearly one day a week).

[42] The disciplinary meeting on 16 December 2010 was attended by Ms Paterson and Mr Field. Mr Talakai had initially confirmed that he was happy to proceed without a support person but after the meeting commenced, Mr Talakai changed his mind and stated that he did want a support person to be present. The meeting was adjourned and it was decided to reconvene on 20 December 2010.

[43] Prior to the meeting being adjourned, Mr Talakai had told Ms Paterson that he found working 5 days a week was unsuitable for him and that he had requested of Mr Judson that he be allowed to reduce to 4 days, but that Mr Judson would not agree to this.

[44] Ms Paterson said that she had asked Mr Talakai if he was indicating that he could not work the 5 days for which he was employed, and that it was at this point that Mr Talakai indicated that he wanted a support person.

[45] Mr Talakai failed to attend his rostered shift on 19 December 2010, however Ms Paterson said she decided not to raise this as a new or separate allegation at the meeting the following day.

[46] At the meeting on 20 December 2010 Mr Talakai attended without a representative, explaining that he had been concerned that the person chosen would not maintain confidentiality, and confirming that he was happy to proceed without a support person.

[47] During the meeting on 20 December 2010 Mr Talakai stated that he wanted a chance to prove himself and that he had a medical condition that meant it was unsafe for him to attend work.

[48] The meeting was adjourned while Mr Talakai's explanation and comments were considered. Ms Paterson said she had considered Mr Talakai's alleged medical condition but in light of the fact that this medical condition had not previously been raised with AFW, despite Mr Talakai having been provided on several occasions with the opportunity to do so, Mr Talakai needed to have provided some details to support his statement, however he had not done so.

[49] Ms Paterson having noted that Mr Talakai had offered no other reason or excuse for his failure to attend work, decided that Mr Talakai's actions in failing to inform AFW in advance of his intended absence on 7 December 2010 and to have a reasonable excuse for not coming to work, when considered in conjunction with the previous first and final written warnings, constituted serious misconduct.

[50] Following this conclusion, Ms Paterson said she had considered an appropriate outcome. The conclusion which she reached was that the appropriate outcome was dismissal, on the basis that Mr Talakai had continued to fail to attend work or make contact as instructed despite having been issued with a Final Written Warning. Consequently Ms Paterson did not believe that a further Final Written Warning would result in a change in Mr Talakai's behaviour. As a result, Ms Paterson decided that she could have no trust or confidence in Mr Talakai to report for work and there was no reasonable alternative to the termination of his employment.

[51] When the meeting was reconvened, Mr Talakai was informed of the decision to terminate his employment summarily and this was confirmed by letter dated 10 January 2010 enclosing a copy of his final pay slip.

Determination

Was the decision to dismiss Mr Talakai a justifiable decision?

[52] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

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 considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”

[53] The decisions must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

Substantive Justification

[54] Mr Talakai had signed an IEA with AFW, which stated at clause 25 that AFW’s policies and rules were to be observed in good faith by the employee. The AFW rules regarding punctuality and absenteeism reporting were contained in the AFW Business Rules, a copy of which Mr Talakai had received and had signed a declaration to the effect that he had read and understood them. Mr Talakai confirmed in his evidence at the Investigation Meeting that he was aware of the rules regarding absenteeism reporting.

[55] The Business Rules also advised of the consequences of such behaviour as poor timekeeping constituting less serious misconduct, that persistent misconduct could result in dismissal, and outlined the stages in a disciplinary procedure.

[56] In addition to the Business Rules, the importance of obeying the Rules was communicated to Mr Talakai in the informal meeting on 10 June 2010 at which Mr Judson warned Mr Talakai that his behaviour of NPNS could not continue and would not be tolerated.

[57] Following his absence on 29 June 2010 when Mr Talakai had not, in accordance with the Business Rules, telephoned in advance to advise of his impending absenteeism, he was

issued with a formal warning dated 30 June 2010, which advised that further incidents could lead to further disciplinary action being taken.

[58] At the meeting on 2 November 2010, following Mr Talakai's failure to notify AFW of his absenteeism on 23 October 2010, Mr Talakai was issued with a Final Written Warning dated 5 November 2010 which clearly advised that any repetition might result in further disciplinary action being taken and in the termination of his employment.

[59] At the meeting on 2 November 2010 Ms Paterson had also made it clear to Mr Talakai that the number of absentee days he was taking made it difficult for AFW to rely on him to attend work

[60] Following Mr Talakai's complaint about having been issued with a Final Written Warning and the meeting on 24 November 2010 in response to this, Ms Paterson clarified AFW's expectations of Mr Talakai regarding his work attendance.

[61] I find that when Mr Talakai telephoned to advise of his inability to attend his rostered shift on 7 December 2010, which notification was not in accordance with the Rule and the agreement between the parties that this should be at least 1 hour prior to the commencement of the shift, Mr Talakai was fully aware of both the Rules regarding attendance and notification of absenteeism, and the consequences of not obeying these.

[62] I find that AFW had made Mr Talakai fully aware of its expectations in regards to notification of absenteeism and of the expectation that employees should be reliable in attendance. Mr Talakai had also been made aware by AFW through the Business Rules, and additionally through the meetings with Mr Judson, Mr Field and Ms Paterson, and as a result of the warning letters dated 30 June 2010 and 5 November 2010, that his failure to notify AFW was unacceptable and could result in the termination of his employment.

[63] Despite being subject to a Final Written Warning letter, and having been advised that further failures to adhere to the Business Rules could result in the termination of his employment, Mr Talakai had again failed to adhere to the Business Rules and the agreement reached at mediation on 15 October 2010 on 7 December 2010 by not telephoning at least 1 hour in advance of the rostered shift commencement time.

[64] I find that it was open to Ms Paterson as a fair and reasonable employer to have not accepted Mr Talakai's explanation of a medical condition as being credible in circumstances in which Mr Talakai had never previously alluded to a medical condition, and had failed to

produce medical evidence in support, despite having been provided with the additional opportunity to do so given the adjournment between the meetings on 16 December and 20 December 2010.

[65] Mr Talakai was subject to a Final Written Warning on 7 December 2010 when there was a further failure on his part to follow the Business Rules and the agreement regarding notification of absence. Ms Paterson had, following an investigation into the matter, found Mr Talakai did not have a reasonable explanation for his failure to adhere to the AFW Business Rules by non-notification and non-attendance at work on 7 December 2010.

[66] I find that in all the circumstances at the time the dismissal occurred, there was substantive justification for Mr Talakai's dismissal.

Procedural Justification

[67] The decision to dismiss must also be justifiable on a procedural basis. The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*¹ are notice informing the employee of the allegations, a real opportunity for the employee to respond to the allegations, and a decision not tainted by bias or pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

[68] I find that Mr Talakai was notified in advance of each allegation, fully informed of the consequences of non-compliance with the AFW Business Rules, and that dismissal could be the outcome of failing to maintain these standards.

[69] Mr Talakai chose to have no representation at the meetings with Ms Paterson on 30 June, 2 November, 16 December and 20 December 2010, although he was provided with every opportunity to do so. In this latter context I note that the meeting on 16 December 2010 was adjourned as soon as Mr Talakai notified Ms Paterson and Mr Field that he had decided that he did want to have a representative present.

[70] I find that Mr Talakai was given an opportunity to provide an explanation at the meetings on 30 June, 2 November, 16 December and 20 December 2010, and that these explanations were given due consideration by Ms Paterson:

- At the meeting on 30 June 2010 Ms Paterson had adjourned the meeting to consider Mr Talakai's explanation;

¹ [1990] 1 NZILR 35

- At the meeting on 2 November 2010 Ms Paterson adjourned the meeting to consider Mr Talakai's explanation and to carry out investigation into the credibility of that explanation by questioning other night shift employees;
- The meeting on 16 December 2010 was adjourned to allow Mr Talakai to obtain representation; and
- At the meeting on 20 December 2010 Ms Paterson had adjourned the meeting to consider Mr Talakai's explanation.

I have found no evidence of bias or pre-determination on the part of AFW, however I have found that Mr Talakai did not, as required in accordance with clause 25 of the IEA, observe AFW's policies and rules regarding absenteeism and notification in good faith.

[71] I determine that the decision to dismiss Mr Richards was a justifiable decision in terms of s103A of the Act.

Was Mr Talakai unjustifiably disadvantaged by his dismissal having been pre-determined as a result of his complaint and claims?

[72] I have found that AFW carried out a fair and reasonable procedure in respect of Mr Talakai's dismissal. I have found no evidence to indicate pre-determination as a result of AFW taking into consideration matters extraneous to the central issues of absenteeism and non-notification of absenteeism.

[73] I further note that Ms Paterson upon receiving Mr Talakai's letter of 23 November 2010 had, prior to the meeting with Mr Talakai on 26 November 2010, investigated his complaint of the threatening behaviour with the grocery manager, and responded to Mr Talakai's concerns in a timely manner by the scheduling of the meeting on 26 November 2010.

[74] I find no evidence in support of Mr Talakai's contention that he was unjustifiably disadvantaged and his dismissal pre-determined either by his raising a complaint related to threatening behaviour by another employee, or to his having raised his claims with the Authority.

[75] I determine that Mr Talakai was not unjustifiably disadvantaged by his dismissal being pre-determined as a result of his complaint or claims.

Was there disparity of treatment such as to render the dismissal of Mr Talakai a decision which was not available to AFW as a fair and reasonable employer?

[76] The Court of Appeal decision in *Chief Executive of the Dept of Inland Revenue v Buchanan*² outlines three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*³

[77] 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.

[78] Mr Talakai stated that he was aware of at least four other employees who had been subjected to disciplinary meetings and had been issued with second and third warnings for absenteeism and non-notification of absence. Mr Talakai was not able to produce any evidence in support of this claim.

[79] In *Samu v Air New Zealand*⁴ 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.

² [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

³ *Ibid* at para [45]

⁴ [1995] 1 ERNZ 636 (CA)

[80] Ms Paterson explained that whilst five night-shift employees had received warnings for having failed to attend for rostered shifts, their circumstances were different to those of Mr Talakai, nor were they at the same stage in the disciplinary process.

[81] Ms Paterson did state that there was one other employee who had been subject to a Final Written Warning and who had resigned, but had been allowed to attend work over the Christmas period only. Ms Paterson said that there were exceptional circumstances relating to this situation.

[82] I find that AFW was not bound by what might be considered to be its generous treatment of this other employee to have acted differently in the case of Mr Talakai.

[83] Moreover, a dismissal may also be held to be justifiable in all the circumstances even where disparity of treatment is found and there is no adequate explanation for the disparity.

[84] Considering all the circumstances, I find that Mr Talakai had scant regard for AFW's rules regarding notification of absenteeism, and in light of his extremely high non-attendance record, minimal appreciation of AFW's operational requirements or of the additional burden his absenteeism placed on his colleagues on the night-shift.

[85] I determine that there was no disparity of treatment such as to render the dismissal of Mr Talakai a decision not open to a fair and reasonable employer.

[86] I am unable to assist Mr Talakai further.

Costs

[87] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant 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.

Eleanor Robinson
Member of the Employment Relations Authority

