

and picked up Mr Taylor. They were away from the site for at least 40 minutes and probably as long as 80 minutes. While they were away Mr Tamahere returned to the site and found Mr Taylor was absent. After looking elsewhere for Mr Taylor in the area under development, Mr Tamahere returned to find the two workers sitting under a tree in a park across the road and drinking coke. An argument broke out when Mr Tamahere started talking about issuing both men with a verbal warning. Mr Tamahere then called the operations manager Dave Halliday to the site. Mr Halliday says he asked Mr Taylor to stop working and talk about why he had not obeyed Mr Tamahere's instructions earlier in the day but Mr Taylor kept shovelling topsoil and throwing it at Mr Halliday's feet. Mr Halliday says he found Mr Taylor's actions "threatening" and a direct challenge to his authority. He told both workers to attend a meeting at his office the next morning.

[4] The next morning arrangements were made for a disciplinary meeting on 23 February 2009. At that disciplinary meeting three days later UNSL general manager Ian Williams decided to dismiss Mr Taylor.

[5] Mr Taylor says the dismissal was unjustified and seeks reinstatement, lost wages, compensation for hurt and humiliation, and his costs. He denies refusing any order and says he was treated differently from Mr Harrison who had also disobeyed directions given by Mr Tamahere.

[6] UNSL replies that the dismissal for serious misconduct was justified and carried out in a fair way after giving Mr Taylor an opportunity to be heard and considering his explanation. It denies unjustifiably treating Mr Taylor differently from Mr Harrison because he had apologised for his conduct while Mr Taylor remained "*confrontational*".

Investigation

[7] The Authority's investigation meeting heard evidence from Mr Taylor, Mr Halliday, Mr Williams, Mr Tamahere and Dave Thomas. Mr Thomas, an employee of UNSL and a delegate of the Labourers Union, attended the disciplinary meeting on 23 February 2009 with Mr Taylor and Mr Harrison.

[8] The first three men provided written witness statements. Other documents provided included three headed “*statement of events*”: one prepared by Mr Tamahere on 19 February 2009, one prepared by Mr Halliday on 20 February 2009 and another prepared by Mr Thomas sometime shortly after 23 February 2009. Other relevant documents considered in the investigation included copies of Mr Taylor’s employment agreement, company rules and a “*progressive warning system*” (PWS) sheet. Mr Taylor had signed the latter document – a simplified version of company rules on the penalties for different kind of misconduct – on 21 January 2009.

[9] Each witness answered questions from the Authority member and the parties’ representatives. The representatives provided oral closing arguments.

Issues

[10] The issues for determination by the Authority are:

- (i) whether UNSL’s dismissal of Mr Taylor on 23 February 2009 was what a fair and reasonable employer would have done in all the circumstances at the time, considering both the decision made and how it was made; and
- (ii) if UNSL’s actions were unjustified in some way, what remedies (if any) are required, after considering both the extent to which Mr Taylor contributed to the situation giving rise to his grievance (if one is found to exist) and has since sought to mitigate his losses; and
- (iii) whether reinstatement is a practicable remedy.

Determination

[11] Where there has been a conflict in the evidence between Mr Taylor and the other witnesses about what was said and done in the events leading to the disciplinary meeting, and in that meeting itself, I prefer the account of those other witnesses on each point in dispute. I do so because I found their evidence more consistent with documents prepared at the time and with what I consider to be more likely.

[12] Having heard the witnesses and reviewed all the oral and documentary evidence, I find that UNSL’s decision to dismiss Mr Taylor, on the grounds it gave for

doing so, were not what a fair and reasonable employer would have done in all the circumstances at the time. I do so for the reasons that follow.

[13] There is little criticism of the general process followed by Mr Halliday and Mr Williams once they began a disciplinary investigation of the actions of Mr Taylor and Mr Harrison on 19 February.

[14] A fair disciplinary process requires that the worker is given (i) notice of the specific allegation and its likely consequences; (ii) a real opportunity for explanation; and (iii) an unbiased consideration of such explanation. A dismissal decided without meeting these minimum requirements will generally be unjustified.¹

[15] I find UNSL met those requirements in the following way. On the morning of 20 February Mr Williams and Mr Halliday met briefly with the two workers. Mr Williams explained that the matter was serious and they should bring a support person with them to the disciplinary meeting to be held on 23 February. When the two workers arrived at that meeting without an advisor Mr Williams asked whether they wanted Mr Thomas to attend. They agreed and he adjourned the meeting until they had a chance to talk with Mr Thomas. Mr Harrison was a union member but Mr Taylor was not.

[16] During the meeting Mr Taylor had the opportunity to give an explanation on why he had left the site that day and did so. He said he had health and safety concerns about being left there to work on his own and without any means to contact a supervisor or manager if needed. He also said the absence was during his lunchbreak.

[17] Neither reason impressed Mr Williams. Mr Taylor had been asked to work on a manhole only 600mm deep which posed no real safety threat. His lunch break was supposed to be 30 minutes long but he was away at least 10 minutes longer and more likely 40 minutes longer.

[18] Mr Williams promptly reached a view that dismissal was an option open to him however he adjourned the meeting and spoke separately with Mr Thomas to propose an alternative. He asked Mr Thomas to inform each worker that they were

¹ *NZFood Processing IUOW v Unilever* [1990] ERNZ Sel Cas 582, 595.

facing dismissal but that only a written warning would be issued if they apologised for their conduct on 19 February. Mr Thomas conveyed that message to both workers and Mr Harrison was prepared to adopt that course. Mr Taylor however was not prepared to accept he had done anything wrong and was not interested in talking about apologising. I do not accept his evidence that he was not even aware that was an option for him because he accepts he heard Mr Thomas and Mr Harrison discussing the need to “*eat humble pie and apologise*”.

[19] When the meeting reconvened Mr Taylor was twice asked whether he wanted to say anything else and replied no. Mr Williams then advised of his decision to dismiss Mr Taylor.

[20] Mr Williams then met with Mr Harrison who did offer an apology for his actions and was issued with a written warning. Mr Harrison accepted it was wrong not to follow Mr Tamahere’s orders about what work to do and how to do it on 19 February. Mr Taylor was treated differently in the end because he chose to make a different response and, on that basis, it cannot be said the different outcome for him was, of itself, unjustified.

Were Mr Taylor’s actions serious misconduct?

[21] The Authority may not substitute its view for the decision made, within a range of permissible options, by the employer. Rather the Authority must objectively assess what a fair and reasonable employer in the circumstances of the actual employer would have decided and how such an employer would have made that decision. The Authority’s conclusion on a proper outcome may differ where the actual employer’s decision or actions were below that objective standard.²

[22] A fair and reasonable employer will follow its agreed code or procedure in making decisions on the appropriate level of disciplinary action.³

² *Air New Zealand v Hudson* [2006] ERNZ 415 at [119] & [120] and *Air New Zealand v V* (2009) 6 NZELR 582at [33].

³ *Unilever*, above, at 594.

[23] UNSL's employment agreement, company rules and PWS define what amounts to serious misconduct and misconduct with a scale of disciplinary consequences ranging from verbal warnings to "*instant dismissal*". The rules and PWS were incorporated as a term of Mr Taylor's employment through a clause for that purpose in his employment agreement.

[24] The PWS identifies the penalty as instant dismissal for eight specific actions or "*any other matter of a similar nature or degree of seriousness*". UNSL's rules similarly identify 16 actions as included but not limited to the kind of behaviour considered serious misconduct and for which the penalty is summary dismissal.

[25] In his oral and written evidence Mr Williams identified four elements of Mr Taylor's conduct which led to the decision to dismiss him:

- (i) disobeying Mr Tamahere's orders on 19 February; and
- (ii) arguing with Mr Tamahere over whether he could issue a verbal warning that day; and
- (iii) not stopping work when told to by Mr Halliday on 19 February and continue to shovel topsoil in a way that Mr Halliday regarded as threatening and a direct challenge to his authority; and
- (iv) not accepting he had done anything wrong and not apologising in the disciplinary meeting.

[26] UNSL submits that together this amounted to serious misconduct within the terms of its policy and that Mr Taylor's "*behaviour and attitude*" were part of the reason for his dismissal along with the specific reason given in his notice of termination – that is the refusal to obey a reasonable request from his supervisor or management.

[27] However I find that, while Mr Taylor failed to follow Mr Tamahere's orders that day, a fair and reasonable employer operating under UNSL's rules and PWS would not have concluded his conduct amounted to a refusal to obey a reasonable request. He did not refuse to do the work required, rather he failed to do it when expected. It is correct, as UNSL submitted, that his action in leaving the site was deliberate but it lacked the element of open defiance plainly meant by the use of the

word 'refusal' in the PWS and company rules. In that context refusal requires not only a level of deliberation but also immediacy and physical proximity.

[28] The distinction is clear when contrasted, for example, with the actions of Mr Taafua, the forklift driver in the *Unilever* case repeatedly told not to drop pallets noisily. He was dismissed after a final incident where he slammed a pallet on the floor very near his supervisor only moments after again being told not to do so.

[29] Mr Taylor's conduct in leaving the site and going on a 'joy ride' were more clearly of a similar nature and degree of seriousness as misconduct for which the PWS prescribed a warning rather than dismissal. These include "*absence*", "*skylarking or irresponsible behaviour*", and "*wasting time*".

[30] UNSL's rules allowed for a warning to be issued for "*unauthorised absence during working hours*" and "*irresponsible behaviour*". A fair and reasonable employer, operating within its own rules, would have been justified in issuing a warning on that basis, not a decision to dismiss.

[31] This view is confirmed by Mr Tamahere's own assessment at the time and on the worksite on 19 February. He began filling in a PWS form for a first offence and verbal warning with the reason given as: "*Wasting time and irresponsible behaviour*". He did not identify the offence as refusing a reasonable request made by him.

[32] None of the other three elements identified by Mr Williams as his reasons for the dismissal decision fall within the identified actions for instant dismissal in UNSL's rules and PWS – either directly or by virtue of being a similar kind. At most they amount to the following two items in the rules – "*disruptive or irresponsible behaviour at work*" and "*aggressive, argumentative or discourteous behaviour towards another worker*". A fair and reasonable employer, operating within its own rules, would have been justified in issuing a warning on that basis.

[33] I do not accept UNSL's submission that all four identified elements of Mr Taylor's conduct escalated the matter to one of serious misconduct. I do so because Mr Williams' evidence shows that it was only the allegation of refusing an order that was clearly put to Mr Taylor for comment in the disciplinary meeting. Mr Williams

showed Mr Taylor the copy of the PWS he had signed and pointed to the penalty of instant dismissal for refusing to obey an instruction. While being argumentative or challenging towards Mr Tamahere and Mr Halliday was clearly in Mr Williams' mind in deciding on whether to dismiss, it was not the reason put to Mr Taylor for comment or recorded by the company at the time.

[34] Accordingly I find that Mr Taylor has a personal grievance for which remedies must be considered.

Remedies

Reinstatement

[35] Although the primary remedy and sought by Mr Taylor, reinstatement is not practicable in the present matter.

[36] The evidence of both Mr Halliday and Mr Taylor suggested re-establishing and maintaining a productive employment relationship characterised by responsiveness and communication was highly unlikely. Mr Taylor could legitimately have been issued with written warnings over how he communicated with his managers on 19 February and another occasion two weeks earlier. Evidence about texts he sent after his dismissal, which were received on Mr Halliday's phone but were intended for one of Mr Taylor's former supervisors, also disclosed a combative approach not conducive to the prospects for practicably returning to work with other UNSL staff.

Lost wages

[37] Mr Taylor gave limited evidence on seeking alternative employment since his dismissal. He had initially applied for jobs in construction and labouring but was hampered by the fact of his dismissal, a long period of unemployment prior to starting work at UNSL, and because he – responsibly – disclosed to potential employer that he served a prison sentence some ten years ago. He had since stopped applying for jobs.

[38] On the evidence available, I am not satisfied that Mr Taylor has made reasonable endeavours to fully mitigate his losses as he could have done more to seek work for which he is qualified as he has a full range of vehicle licenses. Accordingly lost wages are awarded for the period of only eight weeks under s123(1)(b) and 128 of the Employment Relations Act 2000 (the Act).

Compensation under s123(1)(c)(i) of the Act

[39] Mr Taylor said he was humiliated and shocked by his dismissal. I accept he has suffered distress and injury to feeling arising from his dismissal. Considering the general range of awards in cases of this kind, and the particular circumstances of this case, Mr Taylor is awarded \$5000 as compensation under s123(1)(c)(i) of the Act.

Contribution

[40] Under s124 of the Act the Authority must consider the extent to which Mr Taylor's actions contributed to the situation giving rise to his personal grievance and reduce remedies that would otherwise have been awarded.

[41] Mr Taylor's actions contributed substantially to the situation giving rise to his grievance – he left his workplace after being told not to do so, he was not doing the work he was directed to do, he was argumentative with Mr Tamahere, he was uncooperative with Mr Halliday – and should otherwise have properly resulted in written warnings.

[42] To recognise his blameworthy role in bringing about the situation in which his grievance arose, remedies are reduced by half.

Summary of determination

[43] Mr Taylor was unjustifiably dismissed because the finding of serious misconduct was not one that a fair and reasonable employer operating under UNSL's rules and PWS would have made.

[44] Reinstatement is not practicable and Mr Taylor is awarded lost wages and compensation for hurt and humiliation. His remedies are reduced by one half because his actions contributed in a blameworthy way to the situation giving rise to his dismissal.

[45] After allowing for that contribution, UNSL is to pay to Mr Taylor a sum of money equivalent to four weeks' wages and \$2500 in distress compensation.

Costs

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In the event they are not able to do so, Mr Taylor may lodge a memorandum as to costs within 28 days of the date of this determination. UNSL will then have 14 days in which to lodge a reply memorandum before the Authority determines costs. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority