New Zealand Employment Relations Authority Decisions

Taylor v Whitestone Cheese Limited (Christchurch) [2017] NZERA 1195; [2017] NZERA Christchurch 195 (13 November 2017)

Last Updated: 1 December 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY

CHRISTCHURCH

[2017] NZERA Christchurch 195

3010893

BETWEEN CLIFTON TAYLOR Applicant

A N D WHITESTONE CHEESE LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Peter Cahill, advocate for the applicant

Phillip de Wattignar, advocate for the respondent

Investigation Meeting: 17 October 2017 at Oamaru

Date of Submissions: 24 October 2017 on behalf of the applicant

2 November 2017 on behalf of the respondent

Date of Determination: 13 November 2017

DETERMINATION OF THE AUTHORITY

A. Mr Taylor was unjustifiably dismissed due to procedural flaws, but the dismissal was substantively justified. Mr Taylor is entitled to reimbursement of three days' pay which he lost as a consequence of one of the procedural flaws. There was insufficient evidence to enable the Authority to make an award under s 123(1)(c)(i) of the Employment Relations Act 2000.

B. Mr Taylor suffered an unjustified disadvantage in his employment in relation to one of the procedural flaws, but is not entitled to receive any further remedy in respect of that.

C. Costs are reserved.

Employment relationship problem

[1] Mr Taylor claims that he was unjustifiably dismissed and has suffered unjustified disadvantage in his employment by being suspended, not being able to have his representative of choice attend a disciplinary meeting, and because the respondent took too long to produce wage and time records, and other information sought. Mr Cahill confirmed at the start of the investigation meeting that Mr Taylor was not pursuing personal grievances in relation to two written warnings which had been issued to Mr Taylor in February 2016 and on 11 October

2016.

[2] The respondent denies that Mr Taylor was unjustifiably dismissed and has suffered unjustified disadvantage in his employment.

Brief account of the events leading to the dismissal

[3] The respondent makes and sells various varieties of cheese in Oamaru. Mr Taylor was a cheese making assistant working in the cheese making area of the respondent's plant. Up until early 2016 Mr Taylor performed the duties of a supervisor. However, these duties were taken off him in early 2016 due, according to the respondent, to Mr Taylor's unacceptable behaviour. Mr Taylor continued to be paid at a supervisor rate. This does not feature as one of the complaints of disadvantage raised by Mr Taylor, although he relies on it, and other alleged unjustified actions, to show that there had been a campaign of bullying against him which led to his dismissal. Due to this allegation, it is necessary to look in some detail at the events preceding the dismissal.

Use of the hot hose

[4] According to the respondent, in late 2016 there were concerns about Mr Taylor's attitude, including his lack of co-operation and refusal to follow directions from the

cheesemakers who run the production process. These concerns arose out of Mr Taylor refusing to accept the instruction of a cheesemaker not to use the hot hose for hosing down the floor. The respondent said in evidence that this use of a hot hose was a cause for concern because of the cost of running hot water for cleaning, and because of the steam generated which potentially impacted on the cheese.

[5] Accordingly, the Chief Executive Officer and a Director of the respondent, Simon Berry, instructed the then head cheesemaker, Shane Emerson, to set down a meeting for Friday 7 October 2016 to discuss with Mr Taylor his work performance and relationship with the cheesemakers.

[6] According to Mr Taylor, he was told about the meeting on Tuesday 4 October. Mr Emerson told Mr Taylor that the meeting was a performance review and that he could bring a support person. Later in the week Mr Taylor was told that the meeting was with Mr Berry and Mr Emerson. He also says that Mr Emerson told him that he was not aware that Mr Taylor had done anything wrong or that there were any issues.

[7] It is common ground that, at the meeting on 7 October, Mr Berry told Mr Taylor of his dissatisfaction with Mr Taylor using the hot hose to clean the floor. According to Mr Taylor he explained why he used the hot hose but Mr Berry said that he did not accept the reason and that he was wasting company money.

Diabetes plan

[8] Mr Taylor suffers from diabetes and it is common ground that Mr Berry brought up Mr Taylor's management of his diabetes at the meeting on 7 October. According to Mr Berry he was concerned that Mr Taylor would take unscheduled, or early breaks without telling his supervisor or other staff where he was going.

[9] Mr Berry says that Mr Taylor was unwilling to engage in the issues, saying that he did not take orders from the cheesemakers. It is common ground that Mr Berry challenged this, although Mr Taylor, and a witness who was at the meeting, Sharon Solomon, both say that Mr Berry became aggressive, which Mr Berry denies.

[10] Mr Berry told Mr Taylor that they were to meet again on Tuesday 11 October 2016 to allow Mr Berry to consider Mr Taylor's responses and to provide him an opportunity to

provide a safety plan for managing his diabetes. Mr Berry says that, at the subsequent meeting on 11 October 2016, he met with Mr Taylor but Mr Taylor did not provide any safety plan for managing his diabetes, although he had agreed that he would.

[11] In his oral evidence, Mr Taylor confirmed that he did not provide a plan, and had had no intention of doing so. Mr Taylor said that this was because he has had diabetes since he was a teenager, and that the respondent knew all about it, and had never raised a concern until then. Vincent Smith, a cheesemaker, gave evidence and said that Mr Taylor taking breaks at different times than his colleagues only started to impinge upon their production in the last year of Mr Taylor's employment because not every assistant could do all the jobs Mr Taylor could, and that sometimes Mr Taylor's absences would interrupt the production run. Mr Taylor denied this, although did say that the factory was much busier in the last year of his employment.

[12] It appears that a solution was proposed by Ms Solomon which was accepted at the time; namely, to enable Mr Taylor to keep glucose tablets and jelly beans in the control room, although in his oral evidence Mr Berry did not accept that that resolved the issue, because no diabetes management plan had been produced by Mr Taylor.

Final written warning

[13] Later on 11 October 2016 Mr Berry provided Mr Taylor with a letter. The content of the letter was as follows:

Re: Outcome of Meeting regarding workplace conduct

Dear Clinton,

After hearing your explanation today of not following instructions in relation to the use of the hot-hose, is that you thought you were simply getting the job done. Despite multiple team members requesting you to stop this behavio[u]r plus you admit that you do not pay attention to requests from fellow team members. This is not acceptable as we require a cooperative and constructive working relationship between team members.

I have concluded that your behavio[u]r is contrary to behavio[u]r standards expected as a Whitestone Cheese employee.

I am concerned that your health has to be managed to an acceptable and safe standard while at work. This is a very important Health and Safety

issue in the workplace, so I need to ensure we are doing all what we can to support you with managing this, including allowing you time to take breaks to ingest sugar to assist with managing it as requested.

In review of your recent behavio[u]r being brought to my attention, I am concerned about your ability and willingness to work as required within the team. I am concerned that we have already discussed your attitude towards other staff in February where you verbally abused a fellow team member.

I have very serious concerns about your attitude at work and your recent behaviours;

1 - Failure to carry out lawful instructions.

2 - Misusing equipment.

3 - Wasting materials.

4 - Lack of application to assigned work.

Therefore I have taken into account the background and your responses and have decided to issue you with a final written warning.

Yours Truly, Simon Berry

CEO.

Split gumboots

[14] On Friday 21 October 2016 Mr Emerson reported to the then production manager, Barry McCone and to Mr Berry that Mr Taylor had been working in a sterile area wearing split gumboots so that he had exposed his socks to the factory floor and had also sustained chemical burns to his feet which had caused him to have to have a day off work.

[15] In Mr Taylor's brief of evidence he gave an account of the events relating to the split gumboots but gave the wrong dates. In this account of his evidence, I have corrected his incorrect dates. Mr Taylor said that he first noticed the splits in his gumboots on Monday 17 October at around 3 pm, after he had finished work. He said that he went to ask Mr McCone to order him a new pair, but he was in a meeting so Mr Taylor went home. He says that the following morning he forgot about the splits in the soles of the gumboots and put them on and worked an hour when he realised he had wet feet and went and changed into an old pair of spare boots. An hour later he showed Mr Emerson his split boots and went with him to the office to order a new pair.

[16] Mr Taylor said he continued to wear the spare boots for the rest of the day with wet socks until 2.30 pm when he finished work that day. However, that night he woke up with his feet very painful and realised that he had sustained chemical burns.

[17] The following day, Wednesday 19 October, Mr Taylor told Mr Emerson and Mr McCone that he got chemicals on his feet but carried on working that day with new boots which had arrived mid-morning. Mr Taylor took a day off sick on Thursday 20 October because his feet were painful but came back to work the following day, Friday 21 October and handed in a sick leave form and a health and safety incident form. Mr Taylor said that he thinks he had grabbed the form as he left work on the Wednesday, and completed it that night, as it was dated 19 October.

[18] Mr Berry says that it caused him concern that Mr Taylor had filled out the incident form on Wednesday 19 October, but not handed it in until Friday 21st October1. He was also concerned that Mr Taylor had continued to work in split boots. Mr Berry therefore decided that he needed to institute a disciplinary investigation meeting.

Suspension

[19] According to the respondent, when Mr Emerson approached Mr Taylor to tell him about attending the disciplinary investigation meeting, Mr Taylor refused to attend, saying that he would be hearing from Mr Taylor's lawyer. This led Mr Berry to decide to suspend Mr Taylor on pay while he investigated. Mr Emerson and Mr McCone then approached Mr Taylor a second time to tell him of the suspension and give him a letter about the meeting. Mr Taylor disagrees with this evidence, saying that he was given a letter and suspended by Mr Emerson immediately, and that there were not two conversations with Mr Emerson, but only one.

[20] The letter that was handed to Mr Taylor on 21 October 2016 read as follows:

Meeting – Health and Safety incident and reporting requirements

We are requesting you attend a meeting to discuss the course of events involving you that has taken place at work this week.

1 Mr Berry pointed out in his oral evidence that the form that Mr Taylor had used was very old, being version 3, instead of version 14, which was in force at the time, but this does not seem to have played any part in the disciplinary investigation.

We have serious concerns that you appear to have failed to follow the required health and safety procedures in place at work. This impacts on yourself and others in the workplace.

We have procedures in place that require prompt reporting of Health and safety incidents and near misses so that we can meet our obligations under the Health and Safety at Work Act 2015. You also have duties under that Act to protect yourself and others from injury and to promptly report any incidents.

We understand that you have suffered a work related injury on Tuesday 18 October 2016 and that, as a result, you were off work on Thursday 20 October 2016.

Our concern is that you do not appear to have reported the incident or injury and that we only became aware of it on October 19th when you were observed to be limping and asked what was wrong. You have filed the related injury and accident report on 21st October, even though the date you signed the report is 19th October.

Of concern also is that you continued to work with damaged split gumboots, including holes exposing the interior of your boots and you claim on your report this is the cause of your injury. This is a significant health and safety risk and a pathogen risk in the work environment you operate in, it is the employee's responsibility to ensure their own PPE is in good working order.

At the meeting you will be able to provide your account of what happened and comment on what has been reported to us. If your explanation is not satisfactory we may decide to take disciplinary action.

We do view this matter very seriously and we suggest that you have a support person or representative of your choosing present with you.

Yours truly, Simon Berry

[21] It appears that Mr Berry wished the meeting to occur on Wednesday 26 October but that Mr Cahill, Mr Taylor's representative could not attend on that day, and asked that it be held at a later date. Mr Berry refused to change the date, although he said that he did offer to meet after work to give Mr Cahill the chance to drive down from Christchurch. Mr Berry says that Mr Cahill declined. Mr Berry says that he wished to hold the meeting soon because of the risk to the business created by Mr Berry's conduct.

The disciplinary meeting

[22] The meeting with Mr Taylor occurred on Wednesday 26 October and Mr Taylor was accompanied by his mother. Mr Berry's evidence is that he was concerned to learn that, in continuing to wear split boots, Mr Taylor had not complied with the requirement to properly maintain his personal protective equipment. He said that he was even more concerned to hear him admit that he put on the same split boots the following day as, in doing so, he had crossed into the sterile area and entered the plant in breach of the pathogen management procedures.

[23] Mr Berry said in evidence that he was also concerned that Mr Taylor had not been "immediately forthcoming with his injury" and had been misleading about when the incident form had been filled out.

[24] Mr Berry said in evidence that Mr Taylor had failed to provide any satisfactory explanation for his matters of concern and that he decided that Mr Taylor could not be trusted and that his conduct was a significant risk to the business.

[25] According to Mr Taylor, the day after the meeting he missed a phone call and then got a text which advised him that his employment was being terminated with effect from that day and that his letter of termination would be delivered to his mailbox. The following letter was issued to him:

Re: Outcome of meeting regarding Health & Safety incident

Dear Clinton,

After hearing your explanation today in relation to the Health and Safety incident involving your split gumboots reported as occurring on Tuesday

18 October. You explained that you were first aware of having wet socks and therefore split boots on Monday 17 October. Yet you continued to work in the same boots on Tuesday resulting in chemical burns to your feet, which required a sick day to recover on Thursday October 20th.

This is a Health and Safety breach plus split boots in our level 3 area exposes significant risk to the plant in terms of pathogen contamination risk. Maintaining Personal Protective Equipment is the responsibility of individual employees to replace their own equipment when required.

The dates on your incident report to not match your explanation, the form is dated Wednesday 19th October as being signed as completed, while you explained today that you completed the form on October 20th

and handed it in on Friday 21st October. With the incident documented as occurring on Tuesday 18th October and the report not being filed until October 21st.

I have concluded that your behavio[u]r is contrary to behavio[u]r standards expected as a Whitestone Cheese employee, this latest incident is considered serious misconduct as you continued to work with split boots after you were aware that they were split. Serious misconduct is misconduct which threatens or endangers the health, well-being or security or staff and clients or which endangers the plant, property or delivery of services.

Health and Safety is paramount in the workplace, with this breach you have demonstrated a disregard to the significance of maintaining Personal Protective Equipment and continued to work with worn out equipment.

Taking into account that you are on final written warning and your responses, employment termination is to occur effective October 26th. From this date a 4 weeks' notice period shall be paid out including any holiday pay owing on next payment run November 2nd, therefore you are no longer required to attend the workplace.

Yours Truly, Simon Berry CEO.

The issues

[26] The Authority must determine whether Mr Taylor was unjustifiably dismissed, whether he suffered unjustified disadvantage in his employment and whether a penalty should be imposed upon the respondent for breaches of the Act.

Was Mr Taylor unjustifiably dismissed?

[27] In deciding this issue, I must examine both whether the dismissal was procedurally justified and substantively justified. The starting point is the duty of good faith, which is defined in s 4 of the Employment Relations Act 2000 (the Act) and the test of justification in s 103A of the Act. These provide as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active

and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is

proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more

of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the

employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

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.

[28] Also of relevance are the terms and conditions of Mr Taylor’s employment as set out in his individual employment agreement. Mr Taylor was employed pursuant to an individual employment agreement which he had signed on 30th June 2014. This agreement contained the following clauses:

Employees shall wear or use items of safety protective clothing or equipment as a condition of employment. The failure to wear or use protective clothing or equipment shall be considered serious misconduct rendering the Employee(s) liable to summary dismissal.

...

Each Employee shall notify the Employer as soon as practicable of any hazard noticed or developing in the workplace. Failure to report hazards is considered serious misconduct rendering the Employee(s) liable to summary dismissal.

Employees shall report work-related accidents or incidents or injuries to the Employer as soon as practicable and on the day of occurrence. Late reports without good cause may lead the Employer to decline acceptance of the event as a work-related accident.

[29] The terms and conditions of employment also contained a Code of Conduct which gave examples of serious misconduct "which may lead to instant dismissal". These included:

Falsifying records or other documents;

Deliberately acting to adversely affect hygiene, safety or quality; and

Not notifying your work accident involving injury.

[30] The terms and conditions of employment also contained a procedure in relation to serious misconduct. This stated as follows:

SERIOUS MISCONDUCT

If serious misconduct has or is suspected to have occurred, the following procedure shall apply:

An investigation shall commence.

The employee shall be advised that alleged serious misconduct is being investigated and that the employee may be suspended on pay while the alleged misconduct is investigated.

The employee shall be informed that they will be required to attend an interview about the matter, and that they are entitled

to have a support person or representative of their choice present at the interview, and that a possible outcome of that meeting may be dismissal or other penalty.

The person(s) investigating the alleged serious misconduct shall ensure they do not pre-judge the matter or prejudice its outcome.

If the investigation reveals that serious misconduct may have occurred, the employee shall be notified of the time, day and place of the interview, and be requested to attend together with a support person or representative if chosen.

At the interview, the alleged specific breach shall be put to the employee, and the employee shall be invited to explain the alleged serious misconduct or to make representations about the matter.

Following that meeting, the person(s) investigating the matter shall decide the action to be taken if serious misconduct has occurred.

Actions which may be taken shall be any combination of the following:

- Instant dismissal, or

- A reduction in remuneration of not more than 15% of salary or ordinary wage and/or
- Rearrangement of the employee's responsibilities or duties or both, and/or

- Demotion to a lesser position and/or

- Suspension without pay for a period of up to 10 working days, and/or

- The issue of a final written warning.

None of the above actions shall constitute redundancy of the employee's position.

Procedural justification

[31] It is clear that there were a number of flaws in the procedure which led to Mr Taylor's dismissal. The first is that Mr Taylor was not told that alleged serious misconduct was being investigated. This is expressly required under the respondent's own disciplinary procedures that form part of the terms and conditions of employment. They state expressly that, if

serious misconduct has or is suspected to have occurred, the following procedure shall occur

(emphasis added). This leaves no room for discretion.

[32] The letter dated 21 October 2016 advising Mr Taylor of the respondent's concerns did not expressly state that alleged serious misconduct was being investigated. It is not enough to expect an employee to guess how the employer is viewing the concerns.

[33] Second, although the letter set out the two issues that were to be investigated, they were not linked to the specific examples of serious misconduct which Mr Berry said in his oral evidence had been committed by Mr Taylor; namely, the three examples referred to in paragraph [29] above. Therefore, Mr Taylor did not know what examples of serious misconduct Mr Berry had in his mind when he was investigating the allegations. This is despite the fact that Mr Berry said in evidence that he had the Code of Conduct in his mind when he was investigating.

[34] Third, Mr Taylor was not told what the possible outcome of the investigation would be. Nowhere in the letter does it state that Mr Taylor may be dismissed. It is not enough, as Mr Berry stated in his evidence, that possible outcomes are stated in the employment agreement. The Code of Conduct requires the respondent to advise the employee of the possible outcome.

[35] Fourth, Mr Berry was not allowed to have his representative of choice at the investigation meeting. Whilst Mr Berry said he was prepared to have the meeting after work on 26 October, to give Mr Cahill a chance to drive to Oamaru from Christchurch, it is not reasonable, or safe, to expect someone to drive for over three hours after a full days' work, and then take part in a disciplinary meeting as a representative. Mr Taylor was suspended, and so posed no risk to the respondent's business. There was no reason to rush into the meeting therefore. Whilst Mr Taylor was able to have his mother with him, she is not a professional advocate.

[36] Fifth, the letter of dismissal says that the final written warning had been taken into account. Mr Berry's oral evidence was contradictory on this point. He stated to a question from me that it had not been a factor in the decision to dismiss, but agreed with a question from Mr de Wattignar that Mr Taylor was on a final written warning, implying that it was a relevant factor in the dismissal.

[37] I conclude that the final written warning was a factor in the decision to dismiss. However, the warning did not comply with the respondent's own guidance set out in the disciplinary procedures. In particular, it does not contain "a clear statement that failing to complete the corrective action could result in dismissal". Whilst the guidance in the terms and conditions of employment states that written warnings 'may' include that element (including seven others) that element is an essential constituent of any warning. The whole point of a warning is to alert the employee to the employer's concerns, and the consequences of not correcting the employee's action or omission causing the concerns.

[38] In addition, Mr Taylor was not told when he attended the meeting of 11 October that he could be issued with a written warning as a result of the findings from the meeting.

[39] Sixth, Mr Taylor was also not given a chance to comment on his possible dismissal prior to it being confirmed. It is unlikely, however, that Mr Taylor could have said anything that could have reasonably persuaded the respondent not to have dismissed him.

[40] Section 103A(5) of the Act provides that the Authority must not determine a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. Mr Taylor says that he knew that he was going to be dismissed and that he knew that his actions were being treated as serious misconduct. I believe that he was implying that he was going to be dismissed whatever he had said, as he was cynical about the respondent's motives.

[41] However, s 103A(5) applies only if the defects were both minor and did not result in unfairness. Both aspects must obtain. I cannot find that the five flaws were minor. Failing to advise an employee that he faced dismissal, or that his actions were being treated as serious misconduct, are major failings. Therefore, Mr Taylor's cynicism about the outcome cannot save the process.

[42] In conclusion, I am satisfied that the above flaws, together, mean that the dismissal was procedurally unjustified, as no fair and reasonable employer could have failed to have followed the required process in all the circumstances.

Was the dismissal predetermined?

[43] I have not seen any cogent evidence to suggest on a balance of probabilities that the dismissal was predetermined. Whilst Mr Taylor believed he was being picked on, I believe that the respondent reasonably had genuine concerns about aspects of Mr Taylor's performance and attitude.

[44] With regard to Mr Berry's approach in relation to Mr Taylor's diabetes, I believe that Mr Berry was genuinely concerned about the disruptive effects of Mr Taylor's occasional need to take early and unexpected lunch breaks. He had a right to address his concerns with Mr Taylor. However, I get the impression that he did so in a manner which suggested that Mr Taylor was somehow wilfully failing to manage his condition. Whilst there is no legal requirement upon an employer to be empathetic, there is a requirement not to treat an employee detrimentally by reason directly or indirectly of a disability.

[45] Although Mr Cahill addresses the respondent's actions regarding Mr Taylor's diabetes, Mr Taylor did not formally allege unlawful discrimination in his statement of problem, nor unjustified disadvantage in his employment specifically relating to Mr Berry's approach to Mr Taylor's diabetes, and so I can make no findings in those respects, as it would be unjust to do so. I

confine myself to observing that a more consultative, rather than a directive approach by Mr Berry may have avoided Mr Taylor jumping to the conclusion he did.

Was the dismissal substantively justified?

[46] The role of the Authority is not to substitute its own views for that of the employer, but to assess whether the actions of the employer were ones that a fair and reasonable employer could have taken in all the circumstances.

[47] At first sight, dismissal appears overly harsh. Mr Taylor's explanation was that he only discovered he had split gumboots at the end of his working day, and that he could not order new ones because Mr McCone was in a meeting. He then wore them for an hour the following morning, because he had forgotten, and then changed into a spare pair and ordered a new pair. He discovered he had injured himself that night, and reported it the following morning. He filled out the incident form that evening, and handed it in after his day off sick.

[48] However, the respondent's rationale for finding that serious misconduct had been committed was reasonably convincing. Mr Berry explained his reasoning as follows;

a. Mr Taylor had allowed his boots to become so worn that they had split. This was a breach of his duty to keep his personal protective equipment maintained in a serviceable condition;

b. That failing had, in turn, exposed the sterile environment in which Mr Taylor worked to contamination;

c. Instead of discarding the damaged boots as soon as he had discovered them to be split, he returned them to the boot rack;

d. Mr Taylor did not need to report the split boots to Mr McCone, but could have asked another employee (Jandy) to have ordered a new pair for him;

e. Spare boots were available in any event, which he should have used the following morning;

f. Mr Taylor knew he was injured by Wednesday morning, but did not report the injury. He only revealed the injury when he was seen limping and was asked what the matter was;

g. He did not complete an accident and incident report form immediately;

h. Even though he completed the form on the Wednesday, he did not give it to his manager until the Friday.

[49] Mr Berry stated in evidence that his two concerns stated at sub paragraphs (f) and (g) above contributed about 25% each to his decision to dismiss, but that he would not have dismissed for those two factors alone. The serious misconduct was, in his mind, the failure to maintain his gumboots, and then exposing the sterile environment to contamination.

[50] My factual findings are as follows:

a. That the gumboots had become worn and had not split suddenly and unexpectedly;

b. That, although the Authority saw no written requirement that an employee must maintain his or her personal protective equipment, such a requirement must be implied into the employee's employment agreement by reason of business efficacy, as otherwise the requirement to wear PPE would be vitiated;

c. That Mr Taylor was sufficiently experienced to know that he had to maintain his PPE;

d. That the split boots had created a de facto risk of contamination in the sterile area;

e. That Mr Taylor was sufficiently experienced to realise that split gumboots could contaminate the sterile area in which he worked;

f. That contamination of the product could have caused significant economic and reputational impact on the respondent, which Mr Taylor should have realised;

g. That Mr Taylor had not had any reason for failing to discard (or put to one side) the boots when he found them split;

h. That Mr Taylor could have asked Jandy for replacement boots, or left a note for Mr McCone to ask for new boots;

i. That Mr Taylor had no reasonable reason for forgetting that his boots were split on the Tuesday morning;

j. That Mr Taylor did not proactively report his injury; and

k. That Mr Taylor did not promptly complete the accident and incident form, and did not promptly give it to his manager.

[51] In other words, I find that all of Mr Berry's findings were reasonable ones. Would any of the findings have differed had

the procedural flaws not occurred?

[52] I find that none of the flaws would have made any substantive difference to the outcome. Mr Taylor knew that the respondent's concerns were serious ones, and knew that he could be dismissed. Whilst Mr Taylor could not have his representative of choice present, I

am not satisfied, on balance, that Mr Cahill's presence would have made any material difference as Mr Taylor's answers would have been unlikely to have been any different.

[53] I am also satisfied that, although Mr Berry did take the written warning into account, it did not tip the balance into a dismissal situation for him. In other words, the finding of misconduct was serious enough in Mr Berry's mind to have justified dismissal even without the final written warning.

[54] Was the dismissal substantively justified? On balance, I believe it was. Against the background of the environment in which Mr Taylor worked, his experience and his knowledge of the sterile working requirements in place, his knowledge of the risk of working with split boots and his knowledge that he needed to maintain his PPE in a serviceable condition, his dismissal in response to his failures did fall within the range of actions open to a fair and reasonable employer.

Conclusion

[55] I have found that the dismissal was procedurally unjustified but substantively justified. This renders the dismissal unjustified overall, as s 103A of the Act does not differentiate between procedural and substantive justification.

Remedies for unjustified dismissal

[56] I refer to the Employment Court judgement in *Waterford Holdings Limited v Morunga2* in which His Honour Judge Corkill held3 that, where a decision to dismiss was substantively justified, and where the loss of remuneration came not from the procedural flaws but from the substantively justified dismissal, no award for lost remuneration can be made under s 123 (1)(b) and s 128(1) of the Act because the loss does not result from the grievance.

[57] I am satisfied that, in Mr Taylor's case, the three months' loss of wages he claims was not due to the procedural flaws I have found but was due to the dismissal, which was substantively justified. There is one aspect, though, which could have caused loss; the failure

to agree to adjourn the meeting until Mr Cahill was available. I understand that he would

2 [2015] NZEmpC 132

3 At [37]

have been available the following Monday. Therefore, Mr Taylor is entitled to a further three days' pay.

[58] Turning to the issue of an award under s 123(1)(c)(i) of the Act, any award for humiliation, loss of dignity and injury to feelings must flow from the procedural flaws, and not the dismissal itself, as that was justified. The failings to advise Mr Taylor that the matters of concern were considered as serious misconduct and that he may be dismissed could not have caused Mr Taylor any humiliation, loss of dignity or injury to feelings because he said in evidence that he knew that he was facing dismissal and that the concerns were being treated as serious misconduct.

[59] Mr Taylor did not give any written evidence about the effect on him of having to proceed to the meeting without his chosen representative. I cannot guess what the effects were, and there may have been none. I am therefore unable to award any remedies under s 123(1)(c)(i) of the Act for this failing.

Was Mr Taylor unjustifiably disadvantaged in his employment?

[60] Mr Taylor complains he suffered unjustified disadvantage in his employment by being suspended, not being able to have his representative of choice attend a disciplinary meeting, and because the respondent took too long to produce wage and time records, and other information sought.

[61] I can deal with the last matter in short order. Mr Cahill asked for this information in the personal grievance letter after Mr Taylor had ceased to be employed. Therefore, he was no longer an employee, and therefore his employment could not have been affected to his disadvantage4. I will address the failing below, though, under the heading of penalties.

Suspension

[62] The terms and conditions of employment in force between the parties state that "the employee shall be advised that alleged misconduct is being investigated and that the employee may be suspended on pay while the alleged misconduct is investigated". There is a conflict in evidence between the parties as to how the suspension eventuated. Mr Taylor says he was

just told he was being suspended when he was told he was to attend a meeting. The

4 Section 103(1)(b) of the Act.

respondent's witnesses say that Mr Taylor initially refused to attend a meeting, and that he was suspended as a result.

[63] I believe that Mr Taylor did initially refuse to attend a meeting, but that this was because he was either asked to attend it there and then, or that he believed he was being asked to do so. In either case, his refusal was not unreasonable.

[64] Was the suspension reasonable? Suspension is clearly contemplated in the employment agreement, although I do not believe that Mr Taylor was warned he may be suspended, nor given a chance to comment on it. Mr Berry says he suspended Mr Taylor because he believed he could cause further risk to the business. I am not convinced that if Mr Taylor had been given a chance to comment on the suspension he could have said anything that could reasonably have changed Mr Berry's mind. Mr Berry said that he was concerned about the apparent failure of Mr Taylor to follow basic health and safety and hygiene procedures. I accept that this was the reason for the suspension.

[65] Was the suspension the action of a fair and reasonable employer in the circumstances? On balance, I believe that suspension did fall within the range of responses open to a fair and reasonable employer in all the circumstances that prevailed at the time. I find this because Mr Taylor had ostensibly taken actions which had objectively put the hygiene of the factory's food processing at risk, and because those actions appeared not to have been for any reasonable reason. The respondent was entitled to take permitted steps to safeguard its processes until it had heard Mr Taylor's explanation for his actions.

[66] I therefore do not find that the suspension caused an unjustified disadvantage in

Mr Taylor's employment.

Not having the representative of his choice

[67] As I have stated above, it is not clear why Mr Berry could not have waited a few more days until Mr Cahill was available to attend the meeting with Mr Taylor. This refusal to wait did create a disadvantage in Mr Taylor's employment because he was unable to have his chosen representative with him. I also find that the disadvantage was unjustified, as it was not what a fair and reasonable employer could have done in all the circumstances. No risk was present in waiting as Mr Taylor had been suspended from duties. Whilst it meant that the

respondent would have had to have paid Mr Taylor for a few days' more pay, this would not have amounted to a large amount.

Remedies for the unjustified disadvantage

[68] I have already found that I heard no evidence of the effect on Mr Taylor of not having his chosen representative present at the investigation meeting. It was Mr Cahill, rather than Mr Taylor who spoke of this procedural failing in any depth at the Authority's investigation.

[69] I have no idea, therefore, whether this failing caused any humiliation, loss of dignity or injury to Mr Taylor's feelings, or if it did, the extent of the effect. On occasion, one can infer such effects from other evidence and the surrounding circumstances. However, I cannot safely do so in this case. This is particularly so given the clear signal from the Employment Court that awards under s 123(1)(c)(i) need to be more meaningful to properly reflect the

impact on individual grievants5.

[70] I must therefore decline to award any remedies for this disadvantage, save the three days' loss of wages already referred to above.

Should penalties be imposed upon the respondent for breaches of the Act?

[71] In his statement of problem, Mr Taylor seeks the imposition of penalties against the respondent for breaches of the Act, but he does not specify what those breaches are, and Mr Cahill does not address penalties in his written submissions. I cannot guess what alleged breaches Mr Taylor believes should attract the imposition of penalties. The personal grievance letter does not give any clues, as it also just states that Mr Taylor was seeking "penalties for breaches of the Employment Relations Act 2000".

[72] The imposition of a penalty is an expression of disapproval by the Authority, and is in the nature of a punishment. It is a serious matter to impose penalties, and the respondent has a fundamental right to know exactly what it is facing so it may make representations. It is noteworthy that Mr de Wattignar did not address penalties in his submissions, presumably because he did not appreciate that the respondent was still facing a claim for penalties to be

imposed.

5 I refer, for example, to the recent Employment Court judgement of *Waikato District Health Board v Archibald*, in which Chief Judge Inglis awarded $20,000 under s 123(1)(c)(i) of the Act which she designated as falling "around the middle of band 2" where band 2 involves "mid-range loss/damage".

[73] Under these circumstances I cannot impose any penalties upon the respondent.

Order

[74] The respondent is to pay to Mr Taylor within seven days of the date of this determination the equivalent of three days' ordinary pay.

Costs

[75] I reserve costs and direct the parties to seek to agree how costs are to be dealt with. If they are unable to agree how costs are to be dealt with within 14 days of the date of this determination, then any party seeking a contribution towards their costs may serve and lodge within a further 14 days a memorandum setting out what contribution they seek, and the basis of it. Any reply must then be served and lodged within 28 days (taking into account that the Christmas and New Year holiday period will have started).

David Appleton

Member of the Employment Relations Authority
