



apparently to complete a timesheet. There was an unpleasant exchange between Mr Waite and the person having a discussion with Mr Williams, another employee, Peter Speechley.

[5] It is common ground that Mr Waite, addressing Mr Speechley, asked Mr Speechley whether he was going to “*get the fuck down there and help the boys*” because it was a busy night.

[6] Mr Speechley’s response, according to Mr Waite’s evidence, was something to the effect “*who the fuck are you you’re not my boss*”. There is no independent variation of that response from Mr Speechley and nothing turns on whether he responded in that way or not. A response of that type, however, would not seem unlikely in all the circumstances.

[7] Mr Speechley left the workplace the following morning just before 2am. At approximately 3am, he spoke to Mr Williams and told the latter that someone had intentionally damaged his car by deflating one tyre on his vehicle and deflating most of the air from another tyre on the same side of his vehicle.

[8] Mr Williams promptly went to the vehicle and conducted an inspection of the fully deflated tyre which was in the boot of Mr Speechley’s vehicle. Mr Speechley had already changed the wheel with the damaged tyre on it and that is why the damaged tyre was in the boot of the car.

[9] Mr Williams discerned that there was a hole in the side wall of the tyre which he considered was about the width of “*a small flat headed screwdriver*”.

[10] Mr Williams also checked the left front tyre of the vehicle, noting that most of the air had escaped from that tyre and that the valve cap was loose on that tyre.

[11] Although I did not hear this evidence directly, KiwiRail was satisfied from the formal complaint it received from Mr Speechley that when he had left the workplace at around 2am on 20 July 2013, he had driven out of KiwiRail’s carpark, noticed his vehicle was not handling correctly and on inspection discovered that the left rear tyre was completely flat. He immediately changed that tyre and in doing so noticed that the left front tyre was also significantly under-inflated. He had then driven back to the carpark and reported to Mr Williams.

[12] Mr Speechley had told KiwiRail that the tyres were in good order and condition when he arrived at the workplace at the beginning of his shift.

[13] At Mr Speechley's request, KiwiRail obtained some CCTV footage of the security cameras which covered the staff carpark area. A review of that material disclosed that Mr Waite had been seen crouching down beside the left side of Mr Speechley's car prior to departing the workplace himself in his own vehicle. Of course, Mr Waite finished work earlier than Mr Speechley.

[14] A disciplinary process was initiated with an initial letter from KiwiRail to Mr Waite dated 12 August 2013 and there followed four meetings between the parties commencing with one on 15 August 2013 and concluding with a final meeting on 28 November 2013 at the conclusion of which Mr Waite was dismissed from the employment.

[15] As a consequence of those various meetings and the exchanges between the parties in them, KiwiRail formed the view that Mr Waite had intentionally damaged Mr Speechley's vehicle, that that constituted serious misconduct and that the only possible outcome of such a finding was dismissal on two weeks' notice.

### **Issues**

[16] Mr Waite subjected KiwiRail's process and conclusions to a sustained attack in the investigation meeting that I presided over. In order to deal with all the areas of contention appropriately, I propose to consider the following questions:

- (a) What happened in the altercation in Mr Williams' office;
- (b) Did KiwiRail adequately investigate the damage to Mr Speechley's car;
- (c) Was the decision to dismiss available to a fair and reasonable employer?

### **What happened in Mr Williams' office?**

[17] I am satisfied on the evidence I heard that there is no doubt there was an altercation between Mr Waite and Mr Speechley in Mr Williams' office sometime after 7pm on the evening of 19 July 2013. The words that Mr Waite directed at

Mr Speechley are broadly agreed by the witnesses and while Mr Speechley's response is not as well remembered, what Mr Waite says Mr Speechley said in response has the ring of truth about it.

[18] It is not so much what happened in the altercation as its significance that weighs in the decision-making matrix. KiwiRail eventually concluded that the exchange between the two men was significant, that Mr Waite was known to be hot tempered, that Mr Waite and Mr Speechley did not have a good working relationship and that the altercation may have been a motivation for Mr Waite to attack Mr Speechley's vehicle later that night.

### **Did KiwiRail conduct a robust investigation?**

[19] It is common ground that there was damage discovered to Mr Speechley's vehicle and that he complained about that damage to KiwiRail, alleging in particular that the damage was done deliberately while the vehicle was parked in the staff carpark.

[20] The first attack that Mr Waite mounts on the KiwiRail investigation concerns whether KiwiRail ever properly considered alternatives to the thesis that the vehicle had been damaged by a deliberate act. Put simply, Mr Waite says that KiwiRail accepted Mr Speechley's contention that the vehicle arrived at the workplace undamaged and therefore the damage must have been done by a deliberate act while it was parked in the staff carpark.

[21] It is contended for Mr Waite that KiwiRail did not properly consider alternatives to Mr Speechley's conclusion that the vehicle had been vandalised. Further, it is said that KiwiRail did not properly interview Mr Speechley in order that it could consider alternatives to the conclusion he himself had reached.

[22] I agree with those conclusions. It seems to me axiomatic that while the damage to the vehicle is a given, it is not enough for an investigating employer in this situation to simply take the word of the complainant that the tyres were in order at the beginning of Mr Speechley's shift.

[23] Part of an investigator's obligations in a matter such as this is to eliminate other possible explanations. I am not satisfied that KiwiRail did that in relation to the damage to Mr Speechley's vehicle.

[24] This is so particularly because, although the damage to the left rear tyre appears to have been effected by a puncture of some sort, that fact of itself does not exclude the possibility that the puncture happened on the road. While, by common consent, it is accepted that a puncture in the side wall is less easy to sustain in normal road usage on a tyre, it is not impossible because, as I indicated to the investigation meeting I presided over, precisely that event has happened to me in a vehicle I was driving.

[25] Moreover, the fact that the left front tyre appeared to have been partly deflated might well have had an entirely separate cause to the damage to the left rear tyre. If the valve in that left front tyre were faulty for instance, or the valve cap had worked loose and not been regularly checked, pressure could be lost in the tyre through ordinary operational use.

[26] In the alternative, both tyres could have been damaged in some way by the same impact event on the roadway as Mr Speechley was driving to his shift and the tyres could conceivably have simply run down while the vehicle was parked.

[27] These hypotheses, or some of them, could have been eliminated if KiwiRail had properly inquired into Mr Speechley's journey to work, the maintenance of the vehicle (it was his wife's rather than his own) and the prospect that he may have driven over something which could potentially have damaged one or both tyres. Those inquiries simply were not made, and they should have been.

[28] However, I am not satisfied that that failure on its own puts at risk the investigation undertaken by KiwiRail and, of itself, undermines the conclusion that KiwiRail reached. This is primarily because I am satisfied on the evidence I heard that the damage to the left rear tyre was such as to make it more likely than not that the tyre would deflate very quickly. It follows from that conclusion that if the tyre was damaged on the roadway while Mr Speechley was driving the vehicle to work, it would have lost pressure almost immediately and he would have noticed that he was effectively driving on a flat tyre.

[29] While I observe that I am not satisfied KiwiRail properly inquired into Mr Speechley's journey to work on that day, it seems to me more likely than not that if Mr Speechley had noticed the loss of pressure while he was driving, he would not have been so obviously distressed about the discovery at 3am and would not have

complained about the position, as he did. Moreover, the limited CCTV footage of Mr Speechley's arrival does not suggest that the vehicle was being driven on a flat left rear tyre.

[30] So, while I am dissatisfied with KiwiRail's initial inquiry, I am not convinced that its failure to conduct what seemed to me to be obvious inquiries has fatally disabled its investigation. We are left then with the conclusion that Mr Speechley's left rear tyre was most likely undamaged when it arrived in the workplace on that day. I do not think that the same conclusion can be made in respect of the left front tyre when it seems to me more likely than not that the lack of air was a consequence of factors completely unrelated to anything that happened in the staff carpark, but because KiwiRail did not choose to conduct what frankly in my view seemed to be quite obvious inquiries, we will never be certain about the likely reason for the left front tyre being deflated.

[31] Ironically, because I think that it is more likely than not that the causes of the two tyres losing air are unrelated, that may assist KiwiRail because one of the persistent criticisms made of its investigation on behalf of Mr Waite was the allegation that because, on the CCTV footage, there was only an 11 second window in which to effect the alleged damage, and as a subset there is no evidence Mr Waite went near the front of the vehicle, Mr Waite could not have damaged both tyres and therefore did not damage either. I will refer again to this submission later in this determination.

[32] Next, Mr Waite contends that KiwiRail failed to protect the evidence in two particular respects. The first is its alleged failure to retain the damaged tyre and the second is its alleged failure to not obtain from its security contractor all of the relevant footage.

[33] Dealing first with the tyre, it is said for Mr Waite that KiwiRail ought to have retained possession of the damaged left rear tyre in order that it could be subjected to forensic examination for instance, and also be available for inspection by Mr Waite's representatives.

[34] In fact, what happened was that after Mr Williams inspected the damaged tyre in the boot of Mr Speechley's car, Mr Speechley caused the tyre to be disposed of by

a tyre retailer when he was forced to purchase a replacement as a consequence of the damage to the subject tyre.

[35] Again, I must observe that it would have been so much better if KiwiRail had caused the subject tyre to be retained. Again, I would have thought it was an obvious thing to do. Given the seriousness of the allegation ultimately made, that a work mate had deliberately damaged Mr Speechley's tyre, it would seem self-evident that access to the tyre would be useful, both for the purposes of trying to establish forensically what actually had happened to it, and also being able to provide the tyre to Mr Waite's representatives in order that they could themselves examine it and reach their own conclusion. While it may not be central to the conclusion that KiwiRail ultimately reached in the matter, the fact that the tyre simply disappeared from the equation meant that the only person (apart from Mr Speechley himself) who had actually seen the tyre was Mr Williams and so KiwiRail's conclusion about what happened to the tyre is based exclusively on Mr Williams' evidence.

[36] That is not to impugn Mr Williams' integrity or indeed the evidence that he gave, either to his employer or indeed to me. I thought him a straightforward and honest witness who gave his evidence clearly and cheerfully and readily made concessions when they were appropriate. I also acknowledge KiwiRail's view that Mr Williams was a trained mechanical engineer and as a consequence, his view about the fate of the tyre was hardly that of a lay person.

[37] But even so, on Mr Williams' evidence, he saw the tyre once, in the boot of Mr Speechley's car, at 3 o'clock in the morning when, despite the fact that the carpark area was lit, one would have to imagine that the light was less ideal than it might have been, either in daylight hours or indeed in any sort of laboratory analysis that might have been undertaken of the tyre itself.

[38] In the end, I am forced to the conclusion that the failure by KiwiRail to secure the tyre for evidentiary purposes represents another weakness in its process. It is conceivable that different conclusions could have been reached about what happened to the tyre if the tyre was available for analysis. Balanced against that is the fact that Mr Williams has an appropriate professional background and KiwiRail felt comfortable about placing reliance on his judgment. As a matter of fact, it had no choice; by the time it was required to turn its mind to the question, the tyre had long since disappeared.

[39] A similar allegation is made in respect of the CCTV footage. It is common ground that the only CCTV footage that was provided to Mr Waite was what amounted to a highlights package. To be fair, as counsel for KiwiRail is at pains to point out, that was all that KiwiRail had as well.

[40] But it is KiwiRail's obligation to ensure that the material it needs for its disciplinary investigation is available to it and it should have made certain that the whole of the relevant footage was available, not only for its investigation but also for disclosing to Mr Waite's representatives so that they could properly review and comment on the material.

[41] KiwiRail attempts to deal with this by relying on the evidence of Mr Paul Rooney. Mr Rooney is an employee of the firm which provides the CCTV footage that is relevant to this matter.

[42] His unchallenged evidence was that he viewed everything from the arrival of Mr Speechley's vehicle at 1.11pm on Friday, 19 July 2013 down to the departure of the same vehicle at 1.56am the following day. He says that he extracted "*the relevant footage*", copied it onto a CD and left the original footage "*on the hard drive*".

[43] It is plain that this process relies on what Mr Rooney thinks is relevant.

[44] Clearly this is unsatisfactory. KiwiRail ought to have issued directions to protect and retain all of the footage for the whole period that was relevant to the potential inquiry. It is, in principle, unsatisfactory to have to rely on the evidence of a third party, a stranger to the employment agreement, to give evidence about what is relevant and what is not.

[45] However, I accept the submissions for KiwiRail that, looked at in the round, KiwiRail did comply with the law in respect of the disclosing of the relevant material, notwithstanding the fact that the CCTV footage that was available to both parties amounted to what I rather unkindly characterised as a highlights package, earlier in this determination.

[46] This is because the law requires that prior to any employment investigation, the affected employee must be told that there is video footage available, told that the employer is relying upon it or thinks it is relevant to the employer's inquiry and advised what allegations the employer has framed as a consequence of the visual

material. Moreover, the affected employee must be given a copy of the material so that it can be viewed and considered and ideally, at any investigation meeting with the employee, the footage is played and replayed as often as is necessary for the protagonists to debate what they are viewing and verbalise allegations from the employer and explanations from the employee.

[47] I discern those principles from decided cases and I consider they fairly state the relevant law. I also consider that those principles were applied by KiwiRail in the instant case.

[48] This was not a case where KiwiRail had material available to it which it withheld from Mr Waite; the criticism that I make of the failure of KiwiRail to ensure that the totality of the CCTV footage was available, applies equally to Mr Waite's entitlement to see the material as it does to KiwiRail's own ability to conduct a meaningful inquiry because both parties were deprived of the totality of the evidence.

[49] That seems to me to take us fairly and squarely to the effect of the decision in *Vice Chancellor of Massey University v. Wrigley* [2011] ERNZ 138, where the Full Court decided that where an employer was intent upon making a decision which might affect the employment of an employee, the employer was under a duty to give the employee all of the information available and allow an opportunity for the employee to comment before that decision is made. At para.[55] of the judgment, the following passage appears:

*That opportunity must be real and not limited by the extent of the information made available by the employer.*

[50] In the present case, the question is whether the failure to provide the totality of the CCTV footage somehow limited Mr Waite's opportunity to be heard on the issues of concern to KiwiRail.

[51] I am not persuaded that there was any practical limitation on Mr Waite's opportunity to be heard. Certainly it is true that the CCTV footage was not provided to him in its entirety. But as I have been at pains to emphasise, that failure affected not only him but also KiwiRail itself and so in a real sense, it could be argued that KiwiRail provided everything that it had.

[52] But that is sophistry because I am satisfied KiwiRail ought to have done a better job of protecting the totality of the CCTV footage if only to avoid this kind of

argument. The real answer to the submission made on Mr Waite's behalf, I am satisfied, is that KiwiRail provided access to the information contained in the footage that neither KiwiRail nor Mr Waite saw, through another medium. It is evident from the notes of the various meetings between the parties that KiwiRail explained to Mr Waite that the only person seen approaching Mr Speechley's vehicle was Mr Waite. That obviously is the critical point.

[53] Having been provided with that intelligence orally by KiwiRail, Mr Waite had an appropriate opportunity to respond to the provisional conclusion that KiwiRail might have derived from those facts and more importantly, I am satisfied that Mr Waite would have been in no better position to respond to that material had he been able to physically see all of the relevant footage.

[54] Put another way, and to do violence to the conclusion of Marshall McLuhan's book, this is an example where the medium is not the message. There was no information that KiwiRail had that it relied upon that it did not provide to Mr Waite; all that is in issue is that the medium from which that information was originally derived, was no longer available, and so KiwiRail adopted the practical course of telling Mr Waite what its contractor had seen. I am satisfied that that process complies with the law.

[55] The next allegation that I must deal with is the contention that KiwiRail relied on the evidence of the CCTV footage to ground its finding of misconduct and yet the CCTV footage does not show misconduct. Moreover, it is contended for Mr Waite that what the CCTV footage does show is absolutely consistent with the explanation that Mr Waite has offered throughout the process of inquiry to the effect that when Mr Waite was walking towards his vehicle and pulled out his car keys, he dislodged loose money from his pocket which went all over the ground and which he subsequently bent down to retrieve.

[56] Specifically, Mr Waite says that the CCTV footage does not show him either holding an implement capable of puncturing a tyre or indeed of puncturing the tyre itself.

[57] KiwiRail denies that its conclusions of wrongdoing rest exclusively on the CCTV footage. Amongst other things, it relied on the context of the troubled relationship between Mr Waite and Mr Speechley, as evidenced by the altercation

earlier in the night, the fact that it was not persuaded by Mr Waite's explanation and, critically, that notwithstanding the inconclusive nature of the CCTV footage (inconclusive in the sense that it does not actually show Mr Waite damaging Mr Speechley's vehicle), Mr Waite was the only person who was close enough to Mr Speechley's vehicle to effect the relevant damage.

[58] I am satisfied that a good and fair employer could follow the evidentiary chain beginning with a conclusion that the damage had to have happened in the carpark, eliminating the possibility that anybody else was near the vehicle, and therefore fixing its attention on Mr Waite. In reaching the conclusion that it did, I am not persuaded that KiwiRail relied improperly on the evidence derived from the CCTV footage. In particular, I do not think the evidence before me shows KiwiRail concluding that the CCTV footage shows Mr Waite effecting the damage to Mr Speechley's car.

[59] What KiwiRail did was eliminate the other possibilities for the self-evident damage to Mr Speechley's vehicle, reflect on the troubled relationship between the two men, including the altercation that very night, identify that Mr Waite was the only person seen adjacent to Mr Speechley's vehicle during the period when KiwiRail had legitimately deduced that the damage must have been done, and then seeing Mr Waite crouching down beside the left rear of Mr Speechley's car.

[60] While I have identified criticisms of KiwiRail's investigatory process, I have not been persuaded that those failings undermined its process nor made the conclusion that it ultimately drew, unsafe.

[61] Critically, this simply is not a case where the only evidence against Mr Waite is inconclusive video material. Mr Waite refers me to an earlier decision of mine, *Taki v. Spotless Facility Services (NZ) Ltd* [2012] NZERA Auckland 248 as evidence for the proposition that exclusive reliance on inconclusive CCTV footage cannot ground a disciplinary investigation. If this were a case where KiwiRail had made its decisions exclusively on the basis of inconclusive video evidence, the submission would be well founded. But this is not such a case.

[62] The video evidence here shows Mr Waite doing something by the left rear quadrant of Mr Speechley's vehicle and KiwiRail dismissed Mr Waite's explanation of what he was doing, as implausible.

[63] As I have already noted, Mr Waite's explanation for him being crouched down beside Mr Speechley's car was that when he went to his pocket to extract his car keys to enable him to unlock his car and leave the workplace, he dislodged a sum of money, that came out of his pocket and spilled onto the ground. In order to retrieve the money, Mr Waite says he had to crouch down to pick up the money.

[64] It is plain on the evidence I heard that KiwiRail was never attracted by this explanation. First, it was always puzzled by the fact that, on the video footage, Mr Waite does not seem to dispose of his lunch bag which he carried out to his car, before crouching down. The suggestion made to Mr Waite in cross-examination was that his apparent retention of the lunch bag is difficult to square with the need to presumably use both hands to re-gather the spilled money.

[65] Moreover, KiwiRail alleges that there is a sense in which Mr Waite's story about the money became subject to embellishment over time. Initially, his description about the money was somewhat vague. Amongst other things, there was a reference to money blowing around in the wind which presumably precludes coins or at least is strongly suggestive of notes rather than coins.

[66] Then, in his brief of evidence, as the submissions for KiwiRail astutely point out, Mr Waite is saying that it was notes and coins and that the notes were effectively wrapped around the coins.

[67] While these differences of themselves may not be significant, what is telling is that Mr Waite seems to have adopted a truculent and unhelpful response with the employer rather than a helpful problem-solving one. If his attitude had been less brittle, he might well have been able to persuade KiwiRail that he did have money in his pocket, that it did fall out, and that he did retrieve it.

[68] But his explanation was couched in terms of an aggressive staccato response rather than an attempt to persuade KiwiRail that what he was saying was truthful. In the meeting held between the parties on 20 August 2013 for example while he is being questioned by Mr Williams about the money, Mr Waite, when asked the pretty obvious question of why he had a whole lot of money loose in his pocket, said that he did not know and that it was "*in my pocket so what*". Earlier in the same exchange, he said in response to Mr Williams that he did not touch Mr Speechley's car and that

KiwiRail could not prove that he had and that he had his lawyer waiting to take the case. None of that really helps KiwiRail to believe his story.

[69] Furthermore, there does not seem to have been any genuine effort to explain why such a significant amount of money would have been loose in Mr Waite's pocket. Again at the 20 August 2013 meeting, the notes of the meeting have Mr Waite saying there were two \$20 bank notes and one \$5 bank note together with some coins. KiwiRail wanted to understand why that money was in Mr Waite's pocket rather than, for example, in his wallet. Did he have to pay a bill or buy something during his shift? Given the hours that Mr Waite was required to work on 19 July 2013, it seems more likely than not that there would have been no reason for him to have any significant amount of money in his pocket.

[70] But if for instance he did have the money in his pocket for ready access during his shift on that day, it was always available to him to explain to KiwiRail what the money was there for and he never did.

[71] I turn now to a consideration of what I referred to at the investigation meeting as the "*11 second problem*". This is the elapsed time taken from the CCTV footage that would have been available for Mr Waite to damage Mr Speechley's car. In effect, this is the time that Mr Waite is in a position where he could damage Mr Speechley's car but not be visible to the CCTV camera. Put another way, it is the elapsed time that Mr Waite is unable to be seen on the CCTV footage.

[72] Mr Waite says that it is illogical to imagine that the 11 second window was long enough for him to be able to effect the damage to Mr Speechley's left rear tyre and also cause the air to escape from the left front tyre. I agree with that analysis because it is supported by one of the experts who I heard at the investigation meeting, Mr Graham Goldsmith, a person consulted on Mr Waite's behalf who had been engaged in the tyre industry for 37 years and whose evidence was effectively the evidence of an expert witness.

[73] Mr Waite says that because he was accused of causing the air to escape from the left front tyre of Mr Speechley's car and puncturing the left rear tyre, and because he was only adjacent to Mr Speechley's car for that 11 second window and expert evidence made clear that both of those tyres could not have been tampered with in the

11 seconds available, it follows that Mr Waite was not responsible for the events complained of.

[74] While I accept the expert evidence that it would not have been possible to tamper with both tyres in 11 seconds, I do not accept Mr Waite's conclusion that it necessarily follows that he is blameless.

[75] This is because of a point I made earlier in this determination where I concluded that it was more likely than not that the damage to the two tyres had separate and distinct causes.

[76] That view of matters is supported by the CCTV footage which does not show Mr Waite being near the front of Mr Speechley's car at all. The point I made earlier in this determination is, because KiwiRail failed in my view to make obvious inquiries about the maintenance of the subject vehicle, the route that Mr Speechley took to get to work and other matters to do with effectively eliminating the possibility of damage occurring prior to Mr Speechley's car getting to the carpark, I am not persuaded that we will be able to establish how the pressure was lost in the left front tyre. However, without in any way wishing to impugn the maintenance regime relating to the vehicle, it is conceivable, indeed perhaps not uncommon, for tyres to lose pressure over time and for that not to be noticed by the vehicle's driver.

[77] Of course, Mr Waite maintains that he was accused by KiwiRail not just of the puncturing of the left rear tyre but also of the deflating of the left front tyre.

[78] KiwiRail's submission on this point is that its disciplinary focus was always on the left rear tyre and it was Mr Waite's union which kept returning to the left front tyre, presumably because of the difficulty in seeing how one individual could effect damage to both within the available 11 seconds.

[79] As a matter of fact, the complaint from Mr Speechley related to both left tyres on the vehicle. That said, I am satisfied that KiwiRail's submission on the point is accurate to the extent that the company's focus was primarily on the left rear tyre and the damage sustained by that tyre.

[80] That approach is absolutely consistent with the evidence of Mr Steven Lammie. Mr Lammie was KiwiRail's decision-maker. His evidence makes it absolutely plain that what he was inquiring into was the damage to the left rear tyre.

He refers to the loss of pressure in the left front tyre, but only, it seems to me, in the context of reflecting the totality of the complaint made by Mr Speechley.

[81] I turn now to consider the allegation that KiwiRail improperly directed itself on the consideration of a previous warning which Mr Waite had received. That warning was about the improper completion of timesheets. It was not challenged by Mr Waite. He now protests that as it did not go to his integrity, it should not have been considered in the instant case.

[82] Mr Lammie, the decision-maker, told me in his evidence that while he referred to it in the disciplinary process, “... *it did not subsequently pay any material part in the outcome*”. I accept that statement at face value.

[83] For the avoidance of doubt, I also disagree with Mr Waite’s claim that the earlier warning did not go to his integrity; the earlier warning was about the inaccurate completion of timesheets and the company’s unchallenged evidence on the point was that Mr Waite accepted what he had done was wrong and did not challenge the warning at the time. On that basis, I do not consider that claim can be taken any further in the present case.

[84] There remains one final matter to deal with. Mr Waite says that KiwiRail’s decision was predetermined. This seems to rest in part on a misapprehension about KiwiRail’s process. It is the case that KiwiRail formed provisional conclusions and over a lengthy investigation and subsequent disciplinary engagement with Mr Waite, it maintained its view about those matters and they subsequently became final findings. There is nothing improper in that. An employer is entitled to reach provisional conclusions and, if those provisional conclusions cannot be disturbed by submission or argument from the employee, then it is inevitable that those provisional conclusions will become final conclusions.

[85] Of more moment is the allegation that Mr Lammie, the decision-maker, as it were “*telegraphed his punches*” by allegedly preparing rosters which disclose that Mr Waite was no longer rostered on and thus allowed of the conclusion that a decision had already been taken to dismiss Mr Waite even although, at the relevant time, the disciplinary process was still going on.

[86] The Authority was presented with copies of the relevant rosters. They appear to have come from two different sources. The evidence is that one copy of the roster

was held in the manager's office and one copy goes up in the lunch room for staff to peruse.

[87] There are annotations on the rosters with names crossed out and the like, but it is by no means clear to me who crossed out whose name and it was evident that various supervisors had various different approaches for identifying when men were away sick, on holiday leave, or on ACC.

[88] The short point is that I am unable to discern any evidence that KiwiRail deliberately removed Mr Waite's name from the roster in advance of his termination of employment thus evidencing, so it is alleged, predetermination. Given that Mr Waite was on special leave from 10 September 2013 down to the date of his dismissal (28 November 2013), the fact that Mr Waite's name may have been crossed out on one or more rosters does not seem in any way unusual and I am not persuaded that the evidence I heard, or studied, allows me to take this particular aspect any further.

[89] Finally, I refer to the evidence of three KiwiRail staff who were all called by Mr Waite to provide evidence broadly to the effect that another employee (Mr Darrin Hawkins) had told them that Mr Lammie had indicated prior to the termination of Mr Waite's employment that Mr Waite would be dismissed.

[90] Mr Lammie told me that he had had a conversation with Mr Hawkins but that what he said was something to the effect that Mr Waite's matter was in the hands of the union's lawyers. He was adamant that he did not indicate to Mr Hawkins that Mr Waite would be dismissed. I am not satisfied I need to take that matter any further.

**Was the decision to dismiss available to a fair and reasonable employer?**

[91] I have concluded that the decision that KiwiRail made to dismiss Mr Waite on notice was one of the decisions that a good and fair employer could have made in the particular circumstances of the case after conducting a proper inquiry.

[92] I acknowledge immediately that, first, there were deficiencies in KiwiRail's investigative process but I am not satisfied that those deficiencies invalidated the totality of KiwiRail's process. In particular, I have considered the test of justification set out in the statute and in this connection especially s.103A(5) of the Employment

Relations Act 2000 (the Act) and I conclude that the deficiencies I have identified in KiwiRail's process were minor and did not result in unfairness to the employee.

[93] Moreover, my overall conclusion that the decision to dismiss was available to KiwiRail is, I am satisfied, one of the responses that an employer in KiwiRail's position could have made. It is clear law that, since the amendment to the statute which took effect from 1 April 2011, the Authority's task is to consider not whether the decision the employer made was the correct decision but whether it was one of the correct decisions that was available to an employer in those circumstances.

[94] As the Court said in *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 (para.[23]):

*The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in the circumstances.*

[95] Later, the Court summarises the new test in the following terms (para.[37]):

*The effect of new section 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority ... will find that justified.*

[96] In essence, the decision-maker, Mr Lammie, focused on what he referred to throughout his evidence as "three core issues". In time order (Mr Lammie uses a different order), these three core issues are:

- (a) The dispute with Mr Speechley around 7pm on 19 July 2013;
- (b) The intelligence that Mr Waite was the only person near Mr Speechley's vehicle to effect the damage; and
- (c) The subsequent discovery of the damage.

[97] Dealing with each of those issues in turn, it is, I am satisfied, common ground that Mr Speechley and Mr Waite had an uncertain relationship. The evidence was that they had had limited interpersonal contact for some little time prior to the events in question and it was also common ground that there was an altercation between them in Mr Williams' office on the night of 19 July 2013.

[98] There was criticism by Mr Waite's representatives of KiwiRail's failure to adequately investigate the interpersonal difficulties between Mr Waite and Mr Speechley, and particularly Mr Speechley's complaint, of being bullied by Mr Waite, but KiwiRail says that Mr Speechley was adamant that he did not wish to make a formal complaint of bullying and therefore the matter could not be proceeded with.

[99] In any event, the short point is that a few hours prior to damage being identified to Mr Speechley's car, there had been an unpleasant exchange between Mr Speechley and Mr Waite which I am satisfied KiwiRail was entitled to see as symptomatic of an unsatisfactory, perhaps even toxic, workplace relationship.

[100] By the time of the investigation meeting, various concessions were obtained from key witnesses about that exchange on 19 July 2013. Mr Williams for example was prepared to accept that a "*heated exchange*" was not uncommon in the workplace, that there was lots of bad language in the workplace, and that Mr Waite was "*understandably frustrated*" about Mr Speechley not being on the floor working because it was a very busy night.

[101] Moreover, Mr Williams accepted that the only reference to a "*heated exchange*" was in the brief of evidence he filed in the Authority. But I am satisfied this is all in the nature of *ex post facto* rationalisation; the fact is that KiwiRail acted on the original intelligence provided to it from the source documents and source interviews, in particular Mr Williams' engagement with his superior Mr Lammie, the decision-maker. That source information was considered by KiwiRail in the context of its knowledge that there was an interpersonal difficulty between Mr Speechley and Mr Waite. I am satisfied a fair and reasonable employer could conclude that the historical context of the difficult relationship and the blow up on the night in question are relevant factors in a disciplinary inquiry.

[102] The next of Mr Lammie's core issues (in time sequence) is without doubt the most important. If KiwiRail could establish that the damage to Mr Speechley's left rear tyre could not have been occasioned by an incident on the road but must have happened while the car was parked in the staff carpark, then the key factor in the case against Mr Waite is that he was the only person seen near the vehicle.

[103] Without wishing to go over material I have already considered, I acknowledge again at this point that there were deficiencies in KiwiRail's investigation and in particular in its proper elimination of alternative explanations for the damage to Mr Speechley's vehicle. But I am satisfied that in the end the conclusions that KiwiRail reached were robust enough to stand up to scrutiny and to lead it to this pre-eminent core issue, the fact that Mr Waite was the only person sighted near the damaged vehicle during the period of time that KiwiRail had satisfied itself that the car must have been damaged.

[104] I make the self-evident observation that Mr Waite's shift finished before Mr Speechley's; it follows that Mr Waite departed the workplace before Mr Speechley and KiwiRail says that it was in his departing from the workplace that Mr Waite effected the damage to Mr Speechley's vehicle, the latter being still actively about his duties at the time.

[105] The third of the core issues is the machinery point relating to the discovery of the damage. As I have already noted, Mr Speechley reported the damage to Mr Williams about 3am on 20 July 2013. Mr Speechley had finished his shift around 2am and by the time he had first left the workplace, then discovered the damage, changed the tyre and reported back to Mr Williams, another hour had passed.

[106] Mr Williams, an experienced mechanical engineer, sighted the damaged tyre in the boot of Mr Speechley's car, formed a view about what had happened to it and reported the incident to his superiors within KiwiRail. A day or so later, Mr Speechley filed a formal complaint with his employer about the incident and the report from Mr Williams on what he had seen together with the complaint subsequently received from Mr Speechley constituted the ground for KiwiRail to begin its investigation.

[107] I note that that investigation took four months or thereabouts, that it involved a succession of meetings between Mr Waite and his representatives on the one hand and KiwiRail and its representatives on the other.

[108] Mr Waite was represented throughout by experienced union officials and latterly by extremely competent legal advice so while Mr Waite and his advisers appeared to me frustrated that they were unable to disturb any of KiwiRail's preliminary findings, I am satisfied on the evidence I heard that they were given

ample opportunity to attack those findings, both preliminary and final, and that they used the opportunities they were given to good effect.

[109] The fact that KiwiRail was not satisfied with Mr Waite's explanation and associated denial of wrongdoing does not invalidate KiwiRail's conclusion or process. As I say, I am satisfied on balance that the conclusion that KiwiRail reached after an investigation which was certainly not perfect, was a conclusion that was available to a fair and reasonable employer in the particular circumstances of the case.

### **Determination**

[110] For reasons that I have advanced at length in this determination, I am not satisfied that Mr Waite has a viable personal grievance and accordingly, he is not entitled to any remedies.

### **Costs**

[111] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority