

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 82
5465225

BETWEEN JOHN WAITITI
 Applicant

A N D PEDERSEN INDUSTRIES
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: David Balfour, Advocate for Applicant
 Richard Knapp, Representative for Respondent

Investigation Meeting: 10 and 11 February 2016 at Rotorua

Submissions Received: 17 February 2016 from Applicant and Respondent

Date of Determination: 11 March 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The Applicant, Mr John Waititi, claims that he was unjustifiably disadvantaged through being suspended, and subsequently unjustifiably dismissed, by the Respondent, Pedersen Industries Limited (PIL).

[2] Mr Waititi also claims that PIL breached the duty of good faith which it owed to him.

[3] PIL denies that Mr Waititi was unjustifiably disadvantaged or unjustifiably dismissed and claims that it acted in a fair and correct manner procedurally and substantively.

The issues

[4] The issues for determination are whether or not:

- (a) Mr Waititi was unjustifiably dismissed by PIL
- (b) Mr Waititi was unjustifiably disadvantaged by being suspended by PIL

(c) PIL breached the duty of good faith it owed Mr Waititi

Background facts

[5] The Tasman Mill is one of the largest pulp and paper facilities in the world.

[6] In 2014 the Pedersen Group, of which PIL is part, took over the operation and maintenance of the log yard and chip mill at the Tasman Mill where PIL provides log yard services, mobile plant services, whole log chipping services, log debarking services, and hogging services.

[7] Mr Waititi commenced work with PIL in 2004 as a Stacker/Loader Operator. He was employed subject to the terms of an individual employment agreement and drove a High Stacker vehicle.

[8] Mr Waititi had driven the High Stacker throughout his employment. He had an unblemished work record, there were no formal or informal disciplinary proceedings against him, he trained other employees to drive the High Stacker, and Mr Hine, Site Manager, stated that he was an outstanding employee who was held in high regard in PIL.

Mr Waititi's medical history

[9] In 2012 the New Zealand Transport Agency (NZTA) standards for licensing had changed and all operators of heavy machinery, both onsite and on-road, required a Class 2 driving licence from the date of the introduction of the changed standards.

[10] Because of a possible epileptic seizure which Mr Waititi may have experienced in 2001 while not at work, he was required to refresh his Class 2 licence annually. The terms of the licence limited him to operating Class 2 machinery onsite. It also specifically debarred him from operating that class of machinery on the open road. However, his Class 1 light motor vehicle licence was unrestricted throughout the period following the suspected epileptic seizure.

[11] In a letter dated 3 April 2012 addressed to Mr Clarence Dakin, Log Yard Leading Hand and Mr Waititi's line manager, Mr Waititi's GP, Dr Ian Gourlay, advised on Mr Waititi's fitness to work. At that time Dr Gourlay was assisting Mr Waititi with his application for a Class 2 driving licence. In that letter Dr Gourlay stated:

We have carried out a medical examination today, including vision and hearing and I feel he is currently fit to do this work on site. ... There is a real question mark as to whether he actually has epilepsy and on checking his old records there is no definite evidence to prove this.

[12] On 12 April 2012 Dr Gourlay confirmed to Mr Dakin that NZTA had agreed to reissue Mr Waititi's Class 2 licence allowing him to drive loaders and the High Stacker vehicle on the Tasman Mill site only.

Health and Safety at PIL

[13] Mr Waititi explained that health and safety had a high profile at PIL, the health and safety manual, policies and procedures, were available to employees in the staff cafeteria area and there were regular health and safety meetings.

[14] He explained that any workplace accidents, incidents or hazards needed to be formally reported. In addition, anything that was of an emergency nature or presented a significant risk was required to be reported immediately.

[15] Mr Waititi's evidence regarding the high profile of health and safety at PIL was confirmed by Mr Dakin, Ms Renee Hohepa, a PIL employee and Mr Waititi's partner, Mr Richard Knapp, Human Resources Manager, and Mr Hine, who said that there were consequences if a timely health and safety report was not made of an accident, incident or workplace hazard.

Monday 21 October 2013

[16] Mr Dakin was responsible for the operation of utilities and stock in the Log Yard and supervised a team of six employees including Mr Waititi, Mr Tata Melbourne and Mr Todd Dakin, his son.

[17] He said that on Monday 21 October 2013 he had heard a rumour that an incident had occurred involving Mr Waititi. As nothing has been reported formally, he made inquiries as to what may have occurred, which included speaking to Mr Melbourne and Mr Todd Dakin about what they alleged they had seen in the log yard on the previous Thursday, 17 October 2013.

[18] On the basis of what they had reported to him, he spoke to Mr Waititi and asked if he had had a "turn" in the High Stacker which he was alleged to have almost tipped over. Mr Waititi denied that this had occurred, stating that he did not accept the report and that he was not going to say anything further on the matter unless Mr Hine was present.

[19] Mr Waititi said he had explained to Mr Dakin that it was impossible to complete the alleged manoeuvre without the High Stacker tipping. He had also pointed out that if he had

had an epileptic fit of the type described he would not have been able to continue working immediately afterwards, as had been reported.

Suspension 22 October 2013

[20] Mr Dakin informed Mr Hine on 22 October 2013 that it was suspected that Mr Waititi had had an epileptic fit whilst operating in the High Stacker. Mr Dakin had reported that the High Stacker had been spinning around out of control at the time of the incident.

[21] Mr Hine said he was significantly concerned to receive the report, being aware that Mr Waititi had a history of epilepsy and that he was taking medication. He was also aware that Mr Waititi's Class 2 drivers licence had restrictions on it.

[22] Given his concerns Mr Hine had contacted Mr Knapp by telephone, and told him of what had been reported. They had discussed the best way to proceed.

[23] Acting on advice from Mr Knapp, Mr Hine said that he had contacted Mr Waititi on 22 October 2013 and asked him to come to his office. He had spoken to Mr Waititi and informed him there had been an incident reported concerning an alleged event the previous week in which it appeared he (Mr Waititi) had had an epileptic fit at work.

[24] Mr Hine told Mr Waititi that the incident needed to be investigated and asked him not to come into work the following day until 4 p.m. when a meeting would be held to discuss the incident once he (Mr Hine) had been able to investigate the incident.

[25] Mr Hine said that as the alleged incident was of a serious nature, he was concerned that Mr Waititi had had an epileptic fit and that he could be placing himself and others at risk..

[26] Mr Waititi confirmed that Mr Hine had told him he had been 'stood down' until 4.00 p.m. the following day, so that: "*Mr Hine could check things out*". Whilst he had agreed to this, he had not done so willingly.

PIL's actions prior to the meeting on 23 October 2013

[27] Prior to the meeting held on 23 October 2013 Mr Knapp, who had no formal medical training and whose own knowledge of epilepsy was limited, said he had contacted the New Zealand Epilepsy Society (ENZ) to discuss the support that was available in order that PIL could in turn offer this form of support to Mr Waititi.

[28] Mr Hine said he had asked Mr Dakin to put in writing the information he had received verbally, which Mr Dakin had done via an email dated 23 October 2013. The email stated that Mr Melbourne and Mr Todd Dakin had seen Mr Waititi start to back the High

Stacker out of a row onto the runway in the Log Yard. Mr Todd Dakin had reported seeing the cab of the High Stacker being lowered and the feet being raised while reversing and when the High Stacker reached the runway the cab and feet movements were halted, and the cab started rotating clockwise. The cab was still raised and the feet were half way up, also the High Stacker had stopped reversing. The rotating action causing the machine to tilt from side to side vigorously, This was not seen by Mr Melbourne who said only that he had witnessed the cab tipping up on its legs.

[29] Mr Todd Dakin had reported he had seen Mr Waititi's face and body movements in his cab while the events were taking place and he had been forcibly pushing back in the chair and his face was not reflecting the events taking place. It was blank.

[30] Mr Dakin reported that Mr Todd Dakin claimed that he had become: "*very scared*" at this point and did not know what to do. The event had happened in less than a minute after which Mr Waititi had continued to work as normal.

[31] Mr Hine said Mr Dakin also verbally informed him on 23 October 2013 that a second matter had come to light which had been reported by Mr Barry Amalfitino, a highly respected employee, a health and safety representative and a coastguard trained medic.

[32] Mr Amalfitino told Mr Dakin that on a day in the previous week, although he could not identify which day it had been, he had been sitting with Mr Waititi in the PIL 'smoko' room and had seen Mr Waititi having what he thought was a "*turn*".

[33] Mr Hine said this second matter added to his concern on the basis that he felt it added validity to the fact that Mr Waititi had had some form of an epileptic incident.

Meeting 23 October 2013

[34] The meeting held on 23 October 2013 was attended by Mr Hine, Mr Knapp, Mr Waititi, and Ms Hohepa who attended as Mr Waititi's support person.

[35] Mr Knapp conducted the meeting and outlined the incident as described by Mr Todd Dakin and Mr Melbourne. Mr Waititi denied the allegations and said it was impossible to do the things which had been described by the two witnesses. He had requested that he be allowed to carry out a demonstration on the High Stacker to show that it was impossible to carry out such manoeuvres, however, he was told it was not safe for him to do and Mr Knapp declined his request.

[36] Mr Waititi said the meeting had continued with a discussion on various aspects of the allegations and epilepsy, and he had continued to point the lack of truthfulness in the allegations.

[37] He said he had also addressed his concerns as to the possible improper motives on the part of Mr Clarence Dakin and Mr Todd Dakin, and as a result it was agreed by Mr Hine that the evidence of Mr Todd Dakin would not be included in the investigation.

[38] Mr Waititi said that Mr Knapp had also advised him that another PIL employee, whose identity was not revealed at the time to Mr Waititi had reported that he had seen Mr Waititi having a 'turn' in the smoko room a few days earlier. The employee alleged he had seen him (Mr Waititi) reading a newspaper with a glassy look in his eye. Mr Waititi denied this allegation.

[39] Mr Knapp said that during the meeting Mr Waititi stated that he had had a couple of turns at night which related to the drug, Champix, a smoking cessation drug, which had upset his medication. This was confirmed by Ms Hohepa who said in fact it was she who had said that the turns had only been at night and that he had not had any for a while.

[40] Ms Hohepa confirmed at the Investigation Meeting that during the meeting on 23 October 2013 she had discussed the concerns regarding the mixing of Mr Waititi's epilepsy medication with the Champix as there could be side effects. However, she explained that this had occurred in February 2013 and there had been no epileptic incidents arising since. The Champix medication had been a three months course which had finished before October 2013.

[41] Mr Hine said he had been concerned that Mr Waititi was not in full control of himself and the incidents as reported to him constituted a serious health and safety risk to his and others' safety at work given Mr Waititi operated machinery in the log yard.

[42] Irrespective of whether Mr Waititi had had the epileptic seizures or not, he felt he needed to further investigate the incidents and also seek advice from a medical source. As a result of his concerns, he was not prepared to allow Mr Waititi to continue driving the High Stacker.

[43] In response to Mr Waititi's denials and concerns about Mr Todd Dakin, he had given an undertaking that he would not involve him in the matter but would talk to the other witnesses and seek clarification on the incidents.

[44] Mr Hine said that he made the decision that Mr Waititi would have to get a full medical clearance before he could return to work. As the meeting concluded Mr Hine said to

Mr Waititi, “*All we need is a medical certificate and you will be back at work, we need you here.*”. PIL had said it would arrange a letter of referral for this and also arrange for him to talk to a representative of ENZ.

[45] Mr Hine confirmed that at the end of the meeting he had made the decision that he required Mr Waititi to produce a medical certificate that he was fit to operate the PIL High Stacker and told him that he could not drive any of the machinery onsite until he was able to produce such a certificate.

[46] Mr Waititi had agreed that he would obtain a medical certificate. The option of alternative work duties was discussed; however, there were no alternative work duties available which did not require Mr Waititi driving heavy machinery.

[47] Mr Knapp said that he had informed Mr Waititi that in the event he was unable to obtain a medical certificate stating he was fit to drive within a reasonable time period then his employment was liable to be terminated.

[48] Mr Knapp explained to Mr Waititi that he had contacted ENZ and that he would give them Mr Waititi’s contact numbers if he was prepared to allow him to do so and that Mr Waititi had agreed to this. He had also said that PIL would meet the costs relating to Mr Waititi obtaining the medical certificate.

[49] During the meeting, Ms Hohepa said she had asked for the identity of the witnesses to the incidents and asked if she and Mr Waititi could speak to them. Mr Knapp replied that he was not prepared to reveal who the witnesses were but said that PIL would be investigating the witnesses’ reports.

Events following the 23 October 2013 Meeting

[50] Mr Hine provided a referral letter dated 24 October 2013 to Ms Hohepa. The letter stated:

John Waititi is employed by Pedersen Industries Limited in Kawerau as a plant operator. His role requires that he constantly and regularly operates heavy mobile plant in a busy log yard environment. This work requires that he is constantly alert to his environment with the consequences of not being on his game potentially placing his and other employees’ safety and wellbeing at risk.

...

It has been reported to the company in the last week that John, whilst at work has had two incidents which would indicate that he has had some form of blackout or turn. ... John ... when confronted on these incidents vehemently denied that they had occurred.

Pedersen Industries is not prepared to allow Mr Waititi to work given the above and has stood Mr Waititi down.

Mr Waititi has been asked to produce evidence from an appropriately qualified medical practitioner that he is able to carry out his duties and that his condition does not affect his ability to carry out his normal role.

[51] Mr Waititi said that on 5 November 2013 he and Ms Hohepa met with a representative of ENZ. His understanding was that the ENZ representative had confirmed his own view that if he had had a seizure of the type alleged he would have had no knowledge of it at the time and would be incapable of continuing to work after the seizure although the witnesses stated that after the ‘turn’ he had continued working normally.

[52] Mr Waititi attended an appointment with Dr Gourlay on 7 November 2013 who advised him that he would refer the PIL referral letter to Dr Andrew Chancellor, a specialist neurologist. Dr Gourlay also issued a medical certificate which stated; *“The above employee (Mr Waititi) was seen and examined by Dr Ian Gourlay and is considered likely to be fit for normal work but I need further information on the reported seizure before confirming this decision. It would be useful if the eye witnesses could come to see me to describe the events.”*

The PIL investigation

[53] Mr Knapp said that following the meeting with Mr Waititi and Ms Hohepa on 23 October 2013, he and Mr Hine agreed that they would interview Mr Melbourne and Mr Amalfitino, the two witnesses to the two alleged separate incidents. The interviews took place the following day, 24 October 2013.

[54] Mr Knapp and Mr Hine interviewed Mr Melbourne and he provided a verbal account of what had happened on 17 October 2013. He also stated that *‘I don’t know if John was having a turn or not.....it was not normal.’*

[55] Following the interview with Mr Melbourne, Mr Amalfitino was interviewed. He stated he had seen Mr Waititi having “some sort of a turn” in the cafeteria, however he could not recall the day or date.

[56] Mr Knapp said that after they had spoken to both Mr Melbourne and Mr Amalfitino, he had typed up the details of the information he had gained from the interviews from handwritten notes he had made in his diary during the meeting. He had not asked Mr Melbourne or Mr Amalfitino to read or sign the witness statements as being correct typed up versions of the statements he had produced nor were the handwritten notes made available at the Investigation Meeting

[57] Mr Knapp's typewritten notes reported the following:

Incident A

Interview with Barry Amalfitino

Last week I cannot remember which day I was sitting in the log yard smoko room at the table with John.

I spoke to him and he seemed withdrawn, totally different, and very quiet. He did not engage with me.

He then started tapping his foot for about 30 seconds and his face went blank and he was staring into space. He was like this for about 30 seconds and then sort of snapped out of it and got up and walked outside. He was away with the fairies for about a minute all up and then he came right and was himself.

I am aware that John has some health issues and was concerned about it so I mentioned it to his supervisor Clarence.

A discussion then took place with Barry Amalfitino in regard to his knowledge of John Waititi and he informed us that he had the evening before come around to his house and wanted to discuss the incident.

Incident B

Witness statement Tata Melbourne

Thursday of last week, I can't remember what time I was in the loader and I saw the high stacker coming out of a row.

John turned the cab around so that it was facing forward in sync with the machine. Suddenly the boom came out forward and hit the ground and then the machine pushed up on the boom. The machine lurched forward and then backwards onto its hind feet and it almost tipped over. The machine then lurched forward again back into its normal position the boom was lifted and John headed off. I could see John in the cab and he was stiff his arms out straight and pushing on both controls at once. ...

I wasn't as close as the truck driver and you should talk to him as well.

I know John is really good on the high stacker but the actions were dangerous and the machine almost tipped over.

I don't know if John was having a turn or not but the machine did just about tip over and it didn't look right. It wasn't normal.

[58] There was a note at the end of these notes which said:

These notes were transcribed from handwritten diary notes taken contemporaneously to the interviews with the witnesses.

[59] Mr Knapp confirmed that (i) 'No signed statements exist from the persons who witnessed the events.' and, (ii) 'the employees concerned are no longer employed by Pederson Industries limited.'

Medical steps

[60] Dr Gourlay is Mr Waititi's GP, and also the medical centre practitioner for Norse Skog. PIL have no contractual arrangements with Dr Gourlay.

[61] Dr Gourlay made a referral to Dr Chancellor on 24 October 2013. In the accompanying letter to Dr Chancellor, he said:

Thank you for seeing John again. You saw him in 2012 to look at his potential fitness to drive a loader machine on the mill site here in Kawerau. NZTA have issued a Class 2 licence for him for use on the site here but not on the public highway.

John remains well and has worked without incident. Recently he has become the victim of an alleged false report of a seizure at work. It is of note that he was not referred to the site occupational health centre at the time. He and his partner assure me that John has had no seizures and has had no genuine incidents at work.

I would appreciate your opinion.

[62] In his own file note contained on the same document, Dr Gourlay had noted:

Has been accused of having a seizure of work and they accused or suggested that John made the machine arm spin around 360 degrees during the "seizure". Apparently such a move is mechanically impossible. John denies any seizures in recent years. Generally he is well and has had no changes to treatment. Of note John has never had any driving accidents at work and never attended here with any incidents related to seizures loss of consciousness etc. Would like a referral to Dr Chancellor again.

[63] Dr Chancellor responded in a letter dated 5 November 2013 to Dr Gourlay and stated:

It appears you are asking me to comment on events that may or may not have happened at work in relation to his history of possible epilepsy.

I do not see how I can possibly give an opinion without any substantive data on which to base this. The concern seems to come down to a difference of opinion between the patient and a co-worker about what did or did not happen? ...

I suggest that you interview the person(s) who saw the incident and get a witnessed account in writing as John's work is at stake and after this feel free to give me a call.

Meeting 7 November 2013

[64] There was a meeting between Mr Hine, Mr Knapp, Mr Waititi and Ms Hohepa on 7 November 2013. The purpose of the meeting was to update the situation. Mr Hine said he had expressed concerns to Mr Waititi and Ms Hohepa that they had been harassing Mr Amalfitino.

[65] Mr Waititi and Ms Hohepa denied they had been harassing Mr Amalfitino although they had visited him as they were friends.

[66] Mr Waititi said that during the meeting on 7 November 2013 Ms Hohepa had endorsed his report that at their meeting with the ENZ representative they had received the advice that if Mr Waititi had had an epileptic seizure as alleged he would have been unable to continue working, and not carry on as normal as had been reported by Mr Melbourne and Mr Amalfitino.

[67] He said that Mr Knapp had responded that he did not want to hear about the ENZ meeting or the information provided, and had stated that even though he was willing to discount Mr Todd Dakin's statement, PIL still had other witness statements to rely on.

[68] Mr Waititi said he had maintained that he still had a Class 2 licence and pointed out that he had a clear driving record in relation to accidents. He had also pointed out that PIL had known about the appropriate endorsements on his licence during the whole period he had been employed.

[69] Mr Hine confirmed that Mr Waititi stated he had met with Dr Gourlay and was waiting for an appointment to meet with his specialist. He acknowledged Mr Waititi's advice from ENZ but pointed out that Mr Waititi still needed to obtain a medical certificate stating that he was fit and capable of carrying out his duties.

[70] Mr Hine said that he had further stated during the meeting that given what had been reported by two employees, that was sufficient to give him cause to believe that Mr Waititi was a potential risk to himself and to others.

Provision of information

[71] During the meeting held on 7 November 2013 Mr Waititi and Ms Hohepa had further requested an opportunity to meet with the two employees concerned and to hear first-hand their versions of events.

[72] Mr Waititi said he had also asked to be given a copy of the witness statements, however, Mr Knapp had refused the request stating that PIL was not obliged to provide the information and that Mr Waititi was not entitled to it. Mr Knapp did not inform Mr Waititi that there were no signed witness statements by the employees concerned.

[73] Mr Hine explained that he and Mr Knapp had not been prepared to provide the witness statements to Mr Waititi and Ms Hohepa because of the intimidation by them that had been alleged to have occurred.

[74] A medical certificate was issued by Dr Gourlay dated 7 November 2013. It concerned Mr Waititi and named the company as 'Pedersen Ind' and stated:

The above employee was seen and examined today by Dr Ian Gourlay and is considered medically:

Likely to be fit for normal work but I need further information on the reported seizure before confirming this decision. It would be useful if the eye witness[es] could come to see me to describe the events.

Appointments available on Monday 11/11/13 and Tuesday 12/11/13.

[75] At the Investigation meeting Mr Knapp said he had not seen this medical certificate, but there is no reason to suspect it had not been provided to PIL.

[76] Mr Knapp said that he had been contacted by Dr Gourlay on 8 November 2013 seeking to interview the witnesses to the incidents. Mr Knapp had refused that request but agreed that he would provide Dr Gourlay with a redacted copy of the typed notes prepared after his interviews with the witnesses. He had also informed Dr Gourlay that the reason he was not prepared to release the names of the witnesses was because one had been approached by Mr Waititi and asked to change his story.

[77] Mr Knapp said he was contacted on 12 November 2013 by Dr Gourlay who informed him that given the statements and descriptions provided by the witnesses, he was unable to issue Mr Waititi with a clearance to return to work.

[78] Mr Knapp said he had discussed with Dr Gourlay the information provided at the meeting on 23 October 2013 that Mr Waititi had had epileptic seizures at night and had recently had these whilst using Champix. Mr Knapp said Dr Gourlay had responded that the admission in relation to the epileptic seizures at night was in itself a reason to suspend his licence for six months, and that having reviewed the statements, he had no choice but to adopt this position. There is no written record or confirmation from Dr Gourlay of the conversation.

[79] Mr Knapp said he had reported this telephone conversation with Dr Gourlay to Mr Hine and it was agreed that he would obtain confirmation of the discussion with Dr Gourlay..

[80] Mr Waititi said he attended an appointment with Dr Gourlay on 13 November 2013. Dr Gourlay had informed him that he had been unable to make decisions and make recommendations concerning him until he had met with and interviewed the informants, namely Mr Todd Dakin, Mr Melbourne and Mr Amalfitino about what they had observed of the alleged events.

[81] Mr Waititi said he had agreed to try and arrange this with PIL. Dr Gourlay had also informed him that he was working with the clinical opinion of Dr Chancellor.

[82] Dr Gourlay sent an email to Mr Knapp dated 14 November 2013 in which he confirmed that on the basis of the information in the witness statements he could not certify Mr Waititi as medically fit to drive machinery: *“but could consider this if any other information came to light”*.

[83] Later that same day, 14 November 2013, Mr Waititi met with Mr Knapp and Mr Hine. He asked for copies of the informants’ witness statements and for Dr Gourlay to be able to interview the employee informants. However, Mr Knapp had immediately informed him that he would under no circumstances allow: *“his men”* to be interviewed by Dr Gourlay. He had also informed Mr Waititi that he was not entitled to have the witness statements as he was: *“not entitled to information held by PIL”*.

[84] Mr Waititi said he had met with Dr Gourlay on 14 November 2013 when he repeated his position that he was unable to complete his assessment without interviewing the employee informants.

[85] Dr Gourlay also stated that until he had done so, Dr Chancellor could not complete an informed assessment as to whether or not he was fit to continue holding a Class 2 licence. He also informed Mr Waititi that he was going on leave until early December 2013.

[86] Dr Gourlay had provided Mr Waititi with a copy of the type-written notes made by Mr Knapp of the employee interviews. Mr Waititi said he had noticed these contained inaccuracies and pointed them out to Dr Gourlay who had responded by reaffirming that an informed assessment could only be completed if he could meet the informants.

[87] Mr Waititi said that although he was not a Union member he had spoken to Mr Taane Phillips, Secretary of the Pulp and Paper Industry Council of the Manufacturing Construction Workers (PPWU), who agreed to represent him during the investigation process with PIL.

Meeting 15 November 2013

[88] Mr Phillips said he represented Mr Waititi at the meeting held with PIL on 15 November 2013 which was chaired by Mr Knapp. Mr Hine was also present. Ms Hohepa also attended the meeting in the capacity as Mr Waititi's support person.

[89] Mr Phillips said he raised the following points of concern and received the following responses:

- (a) The refusal by PIL to provide Mr Waititi with all the information it had obtained about the alleged seizure.

Response: Mr Knapp had replied that he considered PIL was not obliged to release the information.

- (b) The need for Dr Gourlay to interview the employee informants.

Response: Mr Knapp had refused to agree to the request.

- (c) The lack of accuracy in the employee statements. In particular Mr Waititi had managed to obtain a copy of Mr Melbourne type-written statement by Mr Knapp from Dr Gourlay which had been written by Mr Melbourne and the errors in it were dealt with and discussed in some detail.

Response: Mr Knapp had refused to address the concerns.

[90] Mr Phillips said that he regarded the points he had raised as very significant as regards the lack of fair and reasonable process, failure to disclose material relating to job security, and good faith obligations.

[91] He had asked for the entire investigation to be restarted and for full information to be obtained and disclosed. However, Mr Knapp had refused to agree to this suggestion, but had agreed that there was a need for further information and investigation.

[92] Mr Phillips said that the outcome of the meeting was an agreement that the parties would meet again, and Mr Waititi had agreed he would obtain a second opinion from Dr Gourlay.

[93] Mr Knapp confirmed that Mr Phillips had requested that the investigation was recommenced from the beginning as he wanted to interview the witnesses to check the truth of their statements. However he had not been prepared to recommence the investigation as his view was that Mr Phillips wanted to re-litigate the matter to prevent a decision being

made, and all relevant documents had already been supplied to Mr Waititi. He had also raised the issue of intimidation by Mr Waititi.

[94] Mr Knapp said he had informed Mr Phillips that Dr Gourlay had provided written confirmation that he was not prepared to issue Mr Waititi with a medical certificate clearing him to return to driving the High Stacker, and provided it for Mr Phillips to read.

[95] After Mr Phillips had read the letter from Dr Gourlay, he stated he had spoken to the witnesses who had withdrawn their statements and stated that what they had said about the alleged incidents was untrue.

[96] Mr Knapp said that whilst he doubted the veracity of what Mr Phillips had said regarding the witness evidence, he had nonetheless been concerned. Mr Phillips had then requested that before PIL made any decisions on the matter that they had better check the veracity of the witness statements. Mr Phillips had also suggested that a second opinion on the medical for Mr Waititi was obtained.

[97] Mr Hine said it was agreed that prior to making any decision as to Mr Waititi's employment, PIL would obtain a second opinion and would review the witness statements of Mr Melbourne and Mr Amalfitino.

Following the meeting on 15 November 2013

[98] Mr Knapp said that following the meeting he had re-interviewed Mr Melbourne and Mr Amalfitino. He had shown Mr Melbourne the transcript he had made of the discussion held on 25 October 2013. Mr Melbourne had read the document and said he was not sure he had used the word "*stiff*", and that he thought Mr Waititi was coherent. Mr Knapp said to Mr Melbourne: "*that is not what you told me and Marty is it?*" to which Mr Melbourne replied that: "*he could not remember*". Mr Knapp also asked him: "*is what you said correct, did it lurch out of control*". To which Mr Melbourne had responded: "*yes it did*".

[99] Mr Knapp had then re-interviewed Mr Amalfitino who confirmed that the notes he was shown of the typewritten statement Mr Knapp had made was correct.

[100] Mr Knapp said following these interviews he was comfortable that both incidents had occurred and the accounts as recorded by him were factual.

[101] Mr Hine received an email from Mr Knapp on 18 November 2013 attached to which was an email from Mr Phillips who had attached a copy of the witness notes made of Mr Melbourne's interview. Mr Hine said a number of matters had been changed from the original notes as recorded by Mr Knapp in the interview in which he had been present and it

appeared Mr Melbourne who had signed the changes as being correct had changed his account of the facts.

[102] He had discussed this with Mr Knapp who stated that he was satisfied when he has spoken to Mr Melbourne that the material facts had not changed.

[103] Mr Knapp said he had visited the medical centre which provided PIL with medical services on 19 November 2013. He had not been able to meet with the usual PIL company doctor, however he had seen a locum doctor, Dr Cosgrove, and outlined his version of the situation relating to Mr Waititi to him. There were no written notes of the meeting or confirmation from Dr Cosgrove.

[104] Mr Knapp stated that Dr Cosgrove had said that

It is inherently unsafe for a person with a diagnosis of epilepsy to be involved in a position which requires a person to operate any type of machinery whether mobile or fixed plant. ... there is also a risk that a person may forget to take their medication.

Dismissal Decision

[105] Mr Hine said that on 19 November 2013 he received an email from Mr Knapp which outlined the discussions he had had with Dr Cosgrove. He had subsequently telephoned Mr Knapp and discussed the issues and Mr Knapp had provided to him a 2009 NZTA generally available publication 'Medical Aspects of Fitness to Drive'. Mr Knapp had explained that these were the rules that doctors were required to follow when conducting a medical in regard to the fitness of the person to drive a Class 2 vehicle.

[106] Mr Hine, who has no medical training, said he had read the document and become alarmed that Mr Waititi had also suffered from a number of epileptic seizures while taking medication and this had been attributable to Champix. He stated that the event in the PIL smoko room as described to him by Mr Amalfitino was clearly similar to what was described in the document as 'mepilepsy' and 'aura'. In addition he knew Mr Waititi was taking medication for epilepsy.

[107] Mr Hine said that, given the fact that Dr Gourlay was not prepared to issue Mr Waititi with a medical certificate stating he was cleared to operate Class 2 machinery, he made the decision that for the foreseeable future Mr Waititi would not be able to work in the log yard. As there was no alternative work on the site, he formed the view that he had no alternative but to terminate Mr Waititi's employment.

[108] He had discussed his decision with Mr Knapp who agreed that there was no alternative but to terminate Mr Waititi's employment.

Meeting 21 November 2013

[109] Mr Hine, Mr Knapp, Mr Waititi, Mr Phillips and Ms Hohepa attended a meeting held on 21 November 2013. Mr Phillips said Mr Knapp had opened the meeting by stating that because of Mr Waititi's condition and his inability to get a medical clearance, his employment was terminated.

[110] He said he had referred the matter to the PIL company doctor, who had said that Mr Waititi was not fit for work and should not be driving. Mr Knapp informed Mr Waititi of the medical aspects of fitness to drive which had been provided to PIL by Dr Cosgrove. He said that according to that document, the minimum period that Mr Waititi should be stood down from driving would be for five years without taking any anti-seizure medication.

[111] Mr Phillips said he had asked what information had been provided to the doctor Mr Knapp had seen, and for his identity, however, PIL would not provide the doctor's name. When he asked to be provided with a copy of the doctor's report, he said Mr Knapp had refused to provide one.

[112] Mr Phillips said he had been very concerned as his understanding from the meeting held on 15 November 2013 had been that there was to be a further opportunity to continue gathering relevant information. He believed that PIL, and in particular Mr Knapp, had reneged on their agreement.

[113] Mr Knapp said he had specifically asked Mr Waititi if he had obtained a medical clearance to drive from a medical practitioner and he had responded that he had not, but that his Class 2 licence was still valid.

[114] Mr Knapp said he had reiterated that Dr Gourlay had provided in writing that he was not prepared to provide a medical clearance to drive given the events that had occurred, and that in the circumstances, PIL had no alternative but to terminate Mr Waititi's employment.

[115] He had informed Mr Waititi that he did not have to work his notice and that PIL would ensure that all moneys would be deposited into his bank account that evening.

[116] The decision was confirmed by letter dated 21 November 2013 in which it was stated:

... The reason for this decision, which is made after conducting a full investigation surrounding your health and ability to work, given your medical condition, is one which we have made after considering all of

the relevant facts which had been presented to us and having sought outside medical advice. ...

Further your doctor has refused to provide you with a clearance to return to work.

For the reasons listed above it is with regret that we made the decision to terminate your employment forthwith by providing you with 2 weeks' notice, which obviously you can not, and we do not require you to work.

[117] Mr Phillips sent an email to PIL dated 18 December 2013 in which he noted that a personal grievance on behalf of Mr Waititi relating to the process which had been followed and the termination outcome would be raised, stating:

We believe it was procedurally unfair by not having all the evidence available that was needed to make a fair and reasonable decision.

[118] Mr Knapp agree to meet with Mr Phillips to discuss the matter, and in an email dated 14 January 2014 suggested that: "... *this process can wait until after meeting so as to ensure that John does not incur expense if there is no need to do so*".

Meeting 21 January 2014

[119] Mr Phillips said that he met with Mr Knapp and Mr Hine on 21 January 2014. At that time he was in receipt of a letter from Dr Gourlay which stated:

Dear Tane,

The initial reports given to me suggested that John had suffered a seizure at work and if this had been the case then he would certainly have been medically unfit for driving.

I have now spoken to Maynard Tata, who describes a different incident and confirms that he had no concerns about John on the day. There is also no report of John being drowsy after the "incident" which is something I would have expected after a seizure. If Mr Tata's report is correct then this goes against the suggestion that John had a seizure.

My other concern is that if anyone did suffer a seizure at work the appropriate response would have been an immediate 800 emergency call.

[120] Mr Phillips he believed that Mr Waititi should be reinstated on the basis that he had a medical clearance from Dr Gourlay, and he held a Class 2 driving licence.

[121] During the meeting PIL had confirmed that Mr Waititi's position had not been filled and that it would remain vacant for at least two more weeks, but refused to reinstate Mr Waititi.

[122] Mr Phillips said he asked for more time to investigate options. Mr Knapp had refused the request.

[123] By letter dated 14 February 2014 a personal grievance was raised on behalf of Mr Waititi with PIL and a Statement of Problem was lodged with the Authority on 10 November 2014.

Determination

Was Mr Waititi unjustifiably dismissed?

[124] Mr Waititi was dismissed from his position as a Stack/Loader Operator at PIL at the meeting held on 21 November 2013. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. 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).*
- ii. 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.*

[125] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. PIL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[126] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

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 these circumstances. If the employer's decision to dismiss or to disadvantage the employee is

¹ [2011] NZEmpC 160

² *Angus at para [23]*

one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[127] Mr Waititi was a long serving employee with an exemplary work record, who was entrusted with the responsibility of training other employees to operate the High Stacker.

[128] He had advised PIL that he took medication for suspected epilepsy. In a letter dated 3 April 2012 Dr Gourlay had advised Mr Clarence Dakin that he had conducted a medical examination of Mr Waititi and was certifying him as fit for work at PIL. In addition Dr Gourlay stated that: *“There is a real question mark as to whether or not he actually has epilepsy There is no definite evidence to prove this”*.

[129] Mr Waititi had been issued with a Class 2 licence by NZTA with the restriction that he was licenced to drive loaders on the Tasman Mill site only. This restriction, together with Dr Gourlay’s comments that there was some doubt as to whether or not Mr Waititi actually had epilepsy, was known to PIL prior to the alleged incidents which were reported in October 2013.

[130] I accept that when confronted with health and safety concerns, employers have to act circumspectly and take into consideration the health and safety implications for the particular employee and his or her colleagues. In such a case a fair and reasonable employer could reach a decision to dismiss in all the circumstances at the relevant time.

[131] Such a decision however must be considered in good faith and in light of the factors in s 103A (3) of the Act which states:

(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 employee had with the employer 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

[132] In accordance with the factors set out in s 103A (3) of the Act, PIL was required to carry out a fair investigation and follow a fair procedure.

[133] The duty of good faith as contained in s 4 of the Act is also relevant to this case, in particular s 4(1A)(b) and (c) which state:

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

(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.

[134] Mr Hine and Mr Knapp considered, based on the oral allegations of (Mr Todd Dakin), Mr Melbourne and Mr Amalfitino that it was possible Mr Waititi had suffered two epileptic seizures whilst at work. In accordance with s 103A of the Act, it was incumbent on PIL to sufficiently investigate the oral allegations before dismissing Mr Waititi. In addition, pursuant to s.4 (1A)(b) and (c) of the Act, to provide the relevant information to Mr Waititi.

(i) Witness Evidence

[135] The circumstances at the time the allegations arose included PIL's contractual responsibilities to Mr Waititi, and PIL's acknowledged health and safety requirements. All the witnesses attending at the Investigation Meeting stated that it was a requirement that health and safety concerns had to be reported and any serious concern in regard to incidents, accidents and hazards should be reported immediately.

[136] The work site of PIL has the potential to offer major health and safety hazards. In this case Mr Waititi operated a High Stacker moving heavy stock.

[137] The circumstances at 21 October 2013 included PIL's awareness of (i) Mr Waititi's restricted Class 2 driving licence, (ii) Mr Waititi's health problems and in particular Dr Gourlay's comments, set out in writing, that there was some doubt as to whether or not Mr Waititi actually had epilepsy, and (iii) the fact that although Mr Waititi was taking medication for epilepsy, there had been no record of any epileptic or other medical, incidents occurring at work.

[138] According to Mr Dakin, there was no report, formal or otherwise, made of the alleged incident which took place on Thursday 17 October 2013 until he had sought information on a rumour he had heard on Monday 21 October 2013, some four days after the alleged incident on the High Stacker.

[139] Mr Todd Dakin gave a verbal report to Mr Dakin that he had become: "*very scared*" when witnessing the alleged incident on 17 October 2013. Mr Melbourne who claimed to have witnessed the same incident claimed in the first version of his verbal statement typed up by Mr Knapp that: "*the actions were dangerous*".

[140] Despite the alleged incident as described having the potential to cause serious injury to Mr Waititi and all the employees operating at the time in that vicinity, I find the failure to report the incident is surprising.

[141] There was no report made of the other alleged incident seen by Mr Amalfitino some days earlier until Wednesday 23 October 2013. Mr Amalfitino was a PIL health and safety representative and in addition a coastguard trained medic, yet he had not reported the alleged incident at the time it occurred. In fact Mr Amalfitino, who could not recall the date it had occurred, did not report the incident until at least a week after it had apparently occurred. Although he had provided a witness statement, and agreed to appear as a witness, he did not give such evidence at the investigation meeting.

[142] Mr Hine attributed the witnesses' reluctance to report the incidents despite the requirements of the PIL health and safety procedures to a concern for the ongoing employment implications for Mr Waititi. This does not accord with the facts that the employees concerned did make the incidents known, and neither Mr Hine nor Mr Knapp appeared to have addressed the reasons for non-reporting with the employees concerned.

[143] As noted above, I observe that if the incident on the High Stacker had occurred as alleged there would have been a danger to Mr Waititi and all personnel in the vicinity, and in

the case of the incident Mr Amalfitino reported, Mr Waititi would be operating machinery thereafter, again with the potential to cause harm to himself and others.

[144] These potential consequences would in terms of the PIL health and safety requirements confirmed by the witnesses at the Investigation Meeting, have mandated a formal report being made.

[145] Moreover none of the witnesses sought medical attention for Mr Waititi after the incidents. I note Mr Melbourne's typed statement description of Mr Waititi: "*.. he was stiff his arms out straight and pushing on both controls at once*", however neither he nor Mr Todd Dakin had sought medical attention for Mr Waititi at the time or contacted Mr Waititi and enquired as to his health as should have been expected of reasonable employees and colleagues..

[146] In the case of Mr Amalfitino, as a health and safety representative employee and given his medic background, it might have been expected that he might have sought medical assistance for Mr Waititi. However he too had failed to do so.

[147] I note the comment of Dr Gourlay in his letter to Mr Phillips dated 17 December 2013 that if an employee suffered a seizure at work: "*the appropriate response would have been an immediate 0800 emergency call*". Yet none of the witnesses sought medical assistance for Mr Waititi nor were the site based medical facilities alerted to ensure assistance to Mr Waititi.

[148] Mr Melbourne, according to the type-written unsigned statement produced by Mr Knapp, stated "*I don't know if John was having a turn or not....*" This is clearly a statement that Mr Melbourne did not offer a view that Mr Waititi was having an epileptic seizure, as put forward by PIL.

[149] There is no evidence that prior to making a decision to dismiss him, PIL investigated and questioned the witnesses' about their failure to report such potentially serious incidents in a timely manner, or their failure to have sought medical assistance for Mr Waititi.

(ii) *Provision of information*

[150] An employer investigating allegations of incidents, which if accepted have the potential to adversely affect an employee's continued employment, is expected to provide that employee with all relevant information. It is also good practice to make written notes of meetings held and to provide copies to all attendees.

[151] PIL did not produce any written notes of any meetings held, when questioned at the Investigation Meeting Mr Knapp stated that he had made such notes, but could not produce

them. I also note that Mr Knapp confirmed that no signed statements existed by the employees who witnessed the alleged events.

[152] PIL refused to allow Mr Waititi to speak to the witnesses. I accept that might be reasonable in circumstances in which intimidation was likely, but Mr Waititi did not have a history of aggressive behaviour.

[153] At the time of the meeting on 23 October 2013 the only written information available was a third hand report from Mr Dakin, based on verbal comments from two employees. However that does not explain PIL's refusal to provide Mr Waititi with a copy of the statements, which could have been redacted, taken and typed up by Mr Knapp from Mr Melbourne and Mr Amalfitino on 24 October 2013.

[154] Although Mr Phillips raised the non-provision of information to Mr Waititi at the meeting held on 15 November 2013, Mr Knapp's response had been that all relevant documentation had been provided to Mr Waititi. I observe that the witnesses' statements were not been provided to Mr Waititi by PIL, but provided second-hand via Dr Gourlay.

[155] At the meeting on 23 October 2013 PIL asked Mr Waititi to provide a medical certificate stating that he was fit to return to work following suspension for alleged medical reasons. Mr Waititi met with Dr Gourlay on 5 November 2013 and in those circumstances Dr Gourlay made a request to interview the witnesses to the alleged incidents both via Mr Waititi and directly to Mr Knapp, however PIL refused to allow him to do so.

[156] PIL said that it was concerned that the witnesses would be intimidated. Whilst I might accept that PIL considered it had grounds to do so in the case of Mr Waititi and Ms Hohepa, I find it extraordinary that PIL might consider that Dr Gourlay, a professional medical doctor, would attempt to interfere with the witnesses.

[157] I find it was entirely reasonable that Dr Gourlay would wish to interview the only witnesses to the alleged incidents involving Mr Waititi before issuing the requested medical certificate which would be based on a diagnosis which had serious implications for Mr Waititi and his continued employment.

[158] I find it significant and of relevance to the reasonableness of his request that when Dr Gourlay did eventually speak with Mr Melbourne he wrote, "*I have now spoken to Mr Maynard Tata who describes a different incident and confirms that he had no concerns about John on the day,.....If Mr Tata's report is correct then it goes against the suggestion that John had a seizure.*"

[159] I find that the fair and reasonable employer would have fully consulted with Dr Gourlay and facilitated the process enabling Dr Gourlay to reach a decision based on valid medical grounds, and not prevent him from interviewing the employees with the most relevant information on which to base such a diagnosis.

[160] Dr Gourlay provided Mr Knapp with a medical diagnosis on 14 November 2013 based on the information PIL had provided, namely the redacted typed witness statements, with the caveat that he: : *“could consider this if any other information came to light”*.

[161] At that stage, prior to any dismissal decision, it was open to PIL to reconsider its earlier decision to refuse Dr Gourlay access to the witnesses, however it did not do so.

[162] PIL’s refusal to allow Dr Gourlay access to the witnesses not only prevented Dr Gourlay providing a informed medical opinion as to Mr Waititi’s fitness to work, it also prevented a specialist opinion being obtained from Dr Chancellor who stated in his letter to Dr Gourlay dated 5 November 2013 that: *“.. I do not see how I can possibly give an opinion without any substantive data on which to base this. The concern seems to come down to a difference of opinion between the patient and a co-worker what did or did not happen,”* and suggested that Dr Gourlay interview the witnesses and obtain a witnessed account in writing...

[163] Mr Knapp sought an opinion from the PIL company medical officer, who was unavailable and saw a locum, Dr Cosgrove. I note that Dr Cosgrove did not interview Mr Waititi, the witnesses, nor did he have access to Mr Waititi or his medical records before providing information to Mr Knapp which Mr Hine took into consideration when making the decision to dismiss Mr Waititi.

[164] There is no record of the meeting with Dr Cosgrove, nor did Dr Cosgrove provide written evidence of his considerations. From the email Mr Knapp sent to Mr Hine it is obvious that the matters did not refer to Mr Waititi’s specific situation by reference to Mr Knapp’s introduction *“ He (Dr Cosgrove) stated ‘A person who has a seizure is subject to the following...’*. There followed a generalisation of the symptoms and treatment of epilepsy and a copy of the generally available NZTA requirements relating to epilepsy. The documents could have been obtained from general sources or the internet and could apply to any person.

[165] Mr Phillips stated that when asked to provide a copy of Dr Cosgrove’s report Mr Knapp refused to provide a copy, this was clearly not a wholly truthful answer because there was no report made by Dr Cosgrove.

[166] I find there was a failure to provide Mr Waititi access to information pursuant to S 4 (1A)(i) of the Act, and as a consequence PIL did not follow a fair and reasonable procedure pursuant to s 103A (3) of the Act.

(iii) *Pre-determination*

At the meeting held on 23 October 2013 following his suspension, Mr Waititi was informed by Mr Hine that he had to obtain a medical certificate stating that he was fit to drive prior to being able to return to work and carry out his duties. Mr Knapp informed him that failure to obtain medical clearance could result in the termination of his employment.

[167] Whilst a decision to dismiss Mr Waititi had not been confirmed at that meeting, I find that PIL had imposed a requirement upon which Mr Waititi's continued employment was dependent prior to having commenced its investigation, or having substantiated any findings from such an investigation.

[168] At that stage the only information that PIL had on which to base its decision to seek medical clearance for Mr Waititi was the effectively the 'second-hand' evidence of Mr Dakin that Mr Waititi had had an epileptic seizure. There was no medical evidence relating to the incidence. Also, Mr Waititi had all the necessary driving licences in force.

[169] I observe that it was open to PIL acting as a fair and reasonable employer to have continued its suspension of Mr Waititi without imposing such a requirement on him on 23 October 2013, in circumstances in which he was a long-serving employee with an unblemished work record and no history of epileptic or driving incidents at work, and it had not commenced a full investigation.

(iv) *Opportunity to comment prior to a decision being made*

[170] Mr Waititi had consistently denied the allegations made by the witnesses to the two incidents.

[171] He had been refused copies of the allegations made against him by PIL, and thereby denied the opportunity to comment on them until such time as Dr Gourlay had provided them to him.

[172] Following his failure to obtain copies of the allegations Mr Waititi had asked for Dr Gourlay as per his request to PIL, to be allowed to interview the witnesses but this request had been refused. Mr Waititi had thereby been refused the opportunity to comment upon their evidence.

[173] Mr Phillips stated that Mr Knapp opened the meeting by advising Mr Waititi that his employment at PIL was over. At no time was Mr Waititi asked to comment either before or after the dismissal.

[174] I find that Mr Waititi was denied the opportunity to comment prior to a decision to dismiss him having been made by PIL.

(v) *Resources available to the employer*

[175] PIL was a reasonably larger employer and part of the Pederson group of companies. It had the services of a company medical officer based in Rotorua, Mr Knapp, a Human Resources Manager with 35 years' experience in that field, to advise it. Mr Knapp assisted and advised Mr Hine at all stages of the investigation process.

[176] I find that PIL had access to adequate resources with which to carry out a sufficient investigation, however it failed to do so.

[177] I have considered PIL's evidence that Mr Waititi and/or Ms Hohepa had advised during the meeting held on 23 October 2013 that Mr Waititi had suffered epileptic seizures during the night.

[178] This was denied by Mr Waititi and Ms Hohepa who said that they referred to the possibility that Mr Waititi might have suffered epileptic seizures when he had started the Champix medication, but said at the Investigation Meeting that he had not done so.

[179] I find that Ms Hohepa's evidence is supported by Dr Gourlay's comments in his referral to Dr Chancellor dated 24 October 2013 in which he states: "*... John remains well and has worked without incident. ... He and his partner assure me that John has had no seizures at work.*"

[180] I determine that Mr Waititi was unjustifiably dismissed by PIL.

Was Mr Waititi unjustifiably disadvantaged by being suspended?

[181] PIL had no contractual entitlement to suspend Mr Waititi. However I accept that an employer which believes that there is a possible risk to the health and safety of its employees might act reasonably in suspending an employee³.

[182] I also note that Mr Waititi agreed to the suspension albeit unwillingly.

[183] I determine that Mr Waititi was not disadvantaged by being suspended by PIL.

³ Graham v Airways Corporation of New Zealand LTD ERNZ 587

Did PIL breach the duty of good faith it owed Mr Waititi?

Procedural justification

[184] I find that contrary to the provisions of s4 (1A)(3) of the Act, PIL breached the good faith duties it owed Mr Waititi by failing to provide him, and his medical advisor with all relevant information, and by not allowing him an informed opportunity to comment on the information to dismiss him prior to a decision being made.

[185] I determine that PIL breached the duty of good faith it owed Mr Waititi.

Remedies

[186] Mr Waititi has been unjustifiably dismissed and he is entitled to remedies.

Lost wages

[187] Mr Waititi was unemployed from 21 November 2013 until he obtained alternative employment in March 2014. Although Mr Waititi was subsequently made redundant from that position on 23 May 2014, I find that PIL cannot be held responsible for that decision.

[188] I order that PIL pay Mr Waititi lost wages from 21 November 2013 until the date he obtained alternative employment in March 2014.

[189] PIL is also to pay Mr Waititi the relevant holiday pay to which he would have been entitled had his employment continued throughout that period.

[190] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[191] As a result of the termination of his employment, Mr Waititi said that he found the decision to termination his employment: “*heart wrenching*” He had felt devastated by the lack of loyalty shown to him by PIL

[192] He had experienced not only financial loss, but also suffered emotionally from the loss of mana and the loss of an ability to provide financially for his whanau.

[193] I order that PIL pay Mr Waititi the sum of \$18,000.00, pursuant to s 123(1) (c) (i) of the Act.

Penalty

[194] Mr Waititi has applied for a penalty against PIL as a result of its breach of good faith.

[195] The Employment Court in *Xu v McIntosh*⁴ said that the first question to be asked in contemplating the award of a penalty is “*how much harm has the breach occasioned?*”

[196] I find that the harm in this case has been significant, the breach of good faith by PIL meant that Mr Waititi was not allowed or given access to information leading to the termination of his employment.

[197] The Employment Court said in *Xu v McIntosh*⁵ that the next question to be examined is the culpability of the perpetrator. Was the “*the breach technical and inadvertent or was it flagrant and deliberate?*”

[198] I find that the breach of good faith by PIL persisted on a continuous basis following the meeting held on 23 October 2013 through to the 15 November 2013 meeting at which Mr Phillips stated his view regarding the lack of fair and reasonable process, and PIL’s good faith obligations.

[199] I find the breach to have been flagrant and deliberate.

[200] I find the breach of good faith by PIL to be significant, and the penalty should be set to reflect the Authority’s disapproval of such behaviour. I determine that a penalty of \$5,000.00 is appropriate in the circumstances.

[201] I order PIL to pay \$5,000.00 as a penalty pursuant to ss 4A and 135 of the Act. I direct that the whole of that sum is to be paid by PIL to Mr Waititi.

[202] *Filing Fee*

[203] PIL is also to pay Mr Waititi the filing fee of \$71.56.

⁴ Ibid at para [47]

⁵ Ibid at para [48]

Contribution

[204] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded. Mr Waititi did not contribute to the situation which resulted in his dismissal and there is to be no reduction in the remedies awarded.

Costs

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

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

Eleanor Robinson
Member of the Employment Relations Authority