



# Employment Court of New Zealand

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## Waterford Holdings Limited v Morunga [2015] NZEmpC 132 (3 August 2015)

Last Updated: 7 August 2015

### IN THE EMPLOYMENT COURT CHRISTCHURCH

#### [\[2015\] NZEmpC 132](#)

EMPC 243/2014

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN WATERFORD HOLDINGS LIMITED Plaintiff

AND NATHAN MORUNGA Defendant

Hearing: 29 June 2015 (heard at Nelson)

Appearances: M Penny, advocate for the plaintiff

No appearance for the defendant

Judgment: 3 August 2015

### JUDGMENT OF JUDGE B A CORKILL

#### Introduction

[1] Mr Nathan Morunga was a herd manager employed by Waterford Holdings Limited (WHL).

[2] As a result of animal cruelty issues coming to the attention of the Director of WHL, Mr Gregory Fellowes, an investigation was conducted. Mr Fellowes concluded that serious misconduct had occurred warranting the instant dismissal of Mr Morunga.

[3] Subsequently Mr Morunga raised a personal grievance alleging that the dismissal was unjustified, first because Mr Morunga denied involvement in the incident of animal cruelty, and secondly because there were procedural flaws in the

investigation. The Employment Relations Authority (the Authority) concluded that

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the dismissal was substantively justified, but that there had been procedural errors.<sup>1</sup>

The Authority awarded remedies which after a reduction of 50 per cent for contributory conduct amounted to lost wages in the gross sum of \$5,325, and compensation for humiliation, loss of dignity and injury to feelings in the sum of

\$2,500. WHL subsequently brought a non de novo challenge to the Court limited to the issues of procedural fairness, the extent of remedies, the assessment of contributory conduct, and as to the costs determination of the Authority where WHL was ordered to pay Mr Morunga in the sum of \$2,821.56.<sup>2</sup>

[4] There were difficulties in effecting service of the challenge on Mr Morunga, to the extent that an order for substituted

service was required. That resulted in Mr Morunga contacting the Court following which a telephone directions conference was held in which he participated. In the course of that conference, directions for the hearing were given, including a direction that a statement of defence should be filed and served; and a date of hearing was also fixed. Subsequently a minute which recorded the Court's directions and a formal notice of hearing were provided to Mr Morunga. Ultimately Mr Morunga advised the Registrar that he would not be participating in the challenge. No statement of defence or evidence was filed, and he did not attend the hearing.

[5] The issues for determination are as described in WHL's amended statement of claim. The hearing proceeded on a non de novo basis and was restricted to the alleged errors of law and/or fact as summarised earlier in this decision; in respect of its allegations WHL carried an onus of persuasion.

[6] Evidence was given by Mr Fellowes who described the process that was undertaken leading to the dismissal. Evidence was also given by Mr Alan Williams, an external contractor who witnessed one of the incidents of alleged animal cruelty; also by Mr Graeme Astwood, a co-worker who witnessed the same incident; and by Mr Hamish Burdon, an advocate who was involved in providing advice as to process

and who assisted Mr Fellowes in his decision-making. Mr Burdon then represented

<sup>1</sup> *Morunga v Waterford Holdings Ltd* [2014] NZERA Christchurch 128.

<sup>2</sup> *Morunga v Waterford Holdings Ltd* [2014] NZERA Christchurch 148.

WHL at the investigation meeting, but also gave evidence at the request of the

Authority Member.

## **Background**

[7] Because Mr Morunga attended with his representative at the investigation meeting, the determination reflects the findings which were made after a consideration of both parties' evidence. Except for one paragraph, WHL accepts the accuracy of the summary of facts contained in the Authority's determination. It is accordingly appropriate to set out its findings:

[4] Mr Morunga was employed by the respondent company as herd manager on the respondent's farm. The only other employee was Mr Graeme Astwood. The owner of the farm, Mr Gregory Fellow[e]s, also worked on the farm.

[5] Mr Fellow[e]s' evidence is that Mr Morunga and Mr Astwood did not get on and indicated that he had concerns about Mr Morunga's behaviour towards Mr Astwood, which he thought was aggressive. Mr Morunga, for his part, expressed doubts about Mr Astwood's capabilities.

[6] It was Mr Fellow[e]s' intention to try to sort these differences out with the assistance of a farm adviser, Mr Brent Boyce. Mr Boyce advised that the first step to take was to ensure that employment agreements were given to both employees. Mr Fellow[e]s says that he, accordingly, purchased an employment contract from Federated Farmers (the October 2011 edition) in around April 2013. He admits that it took him some time to get the agreement completed, partly due to an accident he suffered in August 2013.

[7] Mr Fellow[e]s says that he gave copies of the Federated Farmers employment agreement to both Mr Astwood and Mr Morunga on

7 October 2013, leaving Mr Morunga's agreement in his house. He says that

he had discussed with Mr Morunga the giving of the agreement to him prior to leaving a copy at Mr Morunga's accommodation. Mr Morunga did not sign and return the copy of the agreement.

[8] Mr Fellow[e]s' evidence was that a meeting was going to take place between him, Mr Morunga and Mr Astwood, with Mr Boyce present, to try to settle the differences between the two employees. This meeting was due to take place on 17 October 2013. However, prior to that meeting taking place, Mr Fellow[e]s bumped into a Mr Alan Williams, a dairy technician working for Dairy Solutions. He says that Mr Williams told him that he had recently witnessed Mr Morunga committing an act of cruelty on one of the cows.

[9] The allegation was that Mr Williams had been doing work in the respondent's cowshed in early October 2013 when he had heard the farm motorbike coming and then saw a cow being chased towards the cowshed by the motorbike. The cow tried to escape by fleeing up the exit race, where it

got stuck. Mr Williams' evidence was that he then saw Mr Morunga jam the cow in with a heavy gate (slamming it against the cow) and then proceeded to kick the cow and yell and scream at it.

[10] The Authority heard from Mr Williams who confirmed in his oral evidence that the above had happened and that he knew it was Mr Morunga treating the cow in the way described because Mr Astwood was in the cowshed with him. Mr Williams' evidence was that he was so disgusted with the level of brutality that he immediately picked up his tools and left the farm. When asked why he did not tell Mr Fellow[e]s immediately, Mr Williams said he was mulling over his options and was wondering whether it was his place to get involved or not. When he saw Mr Fellow[e]s in a store, however, he decided to tell him.

[11] Mr Fellow[e]s' evidence is that, when Mr Williams told him about what he had seen, he wanted to buy himself some time to think about what to do and so asked Mr Williams to confirm what he had told him in writing. Mr Williams did this, producing a letter headed up "*To Whom It May Concern*". The letter from Mr Williams is undated and does not refer to Mr Morunga by name, simply saying "*a worker*".

[12] Mr Fellow[e]s' evidence is that he had mentioned to a neighbour what Mr Williams had told him and that the neighbour had referred to another mutual neighbour, Ms Billens, who had apparently seen another incident of cruelty take place during the calving season. Mr Fellow[e]s' evidence was that when he subsequently spoke to Ms Billens, she told him that she had seen a worker driving a motorbike into the legs of a cow on two occasions. He asked Ms Billens to confirm this in writing and a short letter was produced by Ms Billens. Her letter was dated 13 October 2013, but again did not refer to Mr Morunga by name.

[13] Mr Fellow[e]s says that he took advice from Mr Boyce who advised him to seek advice from an employment specialist, Mr Burdon. Accordingly, Mr Burdon drafted a letter for Mr Fellow[e]s to sign inviting Mr Morunga to a disciplinary meeting. The contents of the letter was as follows:

*Dear Nathan*

***NOTICE TO ATTEND DISCIPLINARY MEETING***

*Over the last couple of days, we have received 2 complaints with regards to possible animal abuse and welfare issues. These complaints have been formally put to us in writing and given the serious nature of these complaints; we need to conduct a meeting with you. These allegations are:*

1. There was an incident on the farm, where Bronwyn Billens witnessed you deliberately driving your farm bike into the legs of cow who appeared to be lame and was walking slowly up the race. She claims to have seen you do this twice before she looked away.
2. There was an incident when Alan Williams of Dairy Solutions witnessed you chase a cow into a narrow race where she collapsed on her front legs. At this stage Alan claims you slammed the gate into her and proceeded to kick her, whilst shouting and screaming at her.

*Both of these incidents, if proven to have happened are both breaches of your employment contract, and breaches to animal welfare guidelines. If proven, would constitute serious misconduct and could result in disciplinary action up to, and including summary dismissal, as outlined in Schedule 1 of your employment contract.*

*We intend conducting this meeting at 5.00pm on Thursday 17 October at our home. We will have Brent Boyce from Farmwise there to support us. We recommend you bring either a support person or representative. We have made no decisions at this stage but are very concerned regarding the nature of the allegations.*

*We look forward to meeting with you on Thursday. Yours faithfully*

*Gregory Fellow[e]s*

[14] Mr Fellow[e]s said that he was concerned about giving Mr Morunga this letter as he feared he would react aggressively. He had asked Mr Astwood to be present but ended up turning on the recording function of his telephone in order to record the interaction. The Authority saw a transcript of this recording which, indeed, shows that Mr Morunga became angry with Mr Fellow[e]s. The gist of Mr Morunga's immediate concern on reading the letter was that Ms Billens did not know him and so he wanted to know how she could identify him as having committed the alleged action referred to in the letter.

[15] As a result of Mr Morunga shouting and swearing at Mr Fellow[e]s, Mr Fellow[e]s' partner, Ms Nicola Grey, telephoned the Police, who arrived and, at Mr Fellow[e]s' request, issued Mr Morunga with a trespass notice.

[16] The investigation meeting then took place on 17 October 2013. Mr Morunga was present with a support person, Mr David Prebble. Mr Fellow[e]s had Mr Boyce with him. Both parties recorded the meeting and the Authority has seen a transcript of the meeting.

[17] In the meeting, Mr Morunga denied both allegations against him, saying they were false allegations and that the incidents did not happen to him. Mr Boyce asked Mr Morunga about what personal possessions he had on the farm, to which

Mr Morunga remarked that asking those questions sounded very *predetermined*.

[18] Mr Morunga explained that he had approached Ms Billens after he had received Mr Fellow[e]s' letter and Ms Billens had confirmed that she did not know him. She also told him that she had not made a complaint about him but that she had *concerns that a farm worker had hit a cow*. Mr Morunga made the point that Mr Fellow[e]s was accusing him of having hit a cow, as witnessed by Ms Billens, whereas Ms Billens herself was not making that same allegation. When Mr Morunga confronted Mr Boyce about this, Mr Boyce said *maybe let's take that out then*.

[19] During the disciplinary meeting, Mr Morunga also stated that he wanted to lay a formal complaint of animal cruelty against Mr Astwood. The transcript shows that Mr Boyce stated that that was not part of the meeting. Mr Morunga did not get an answer when he asked whether his allegations would be looked into.

[20] Mr Morunga also made a statement that Mr Astwood's children had stated on the school bus that Mr Morunga had been fired for hurting animals. Mr Morunga said this was a breach of confidentiality. During the Authority's investigation meeting Mr Morunga clarified that he had learned this via his partner's mother, whose grandchildren had been on the bus at the same time.

[21] Finally, the transcript shows that Mr Prebble suggested that Mr Morunga was prepared to accept a warning on the basis that he rejected the allegations but so that he could maintain his employment. In addition, it was confirmed that Mr Morunga was not required to do the milking on the forthcoming weekend.

[22] Mr Prebble gave evidence to the Authority that he received a telephone call on Saturday, 19 October 2013 from Mr Burdon. He said that Mr Burdon told him that, based on the evidence he had, it was cut and dried that Mr Morunga had committed the action he was accused of and that there was no way he could keep his job. He then asked Mr Prebble to find out whether Mr Morunga had any further information he wanted to give. Mr Prebble said that, given the feedback he had received, he did not wish to bother Mr Morunga with that news of the decision to dismiss him on a Saturday night and so told him this on the following Sunday, at which point Mr Morunga said that all he could do then was to get a lawyer. Mr Prebble's view is that dismissal was overly harsh for the act that Mr Morunga was accused of and that it was common for all farmworkers to get frustrated with their animals.

[23] A letter was then sent from Mr Burdon to Mr Morunga dated

20 October 2013 in the following terms:

*Dear Nathan*

***RE: TERMINATION OF EMPLOYMENT***

*I confirm I act for Gregory Fellow[e]s with regard to the disciplinary matters of last week. The meeting you attended with Dave Prebble was recorded. I have taken the time to listen to the recording, speak with witnesses and gather any relevant information that needed to be considered prior to making any decisions. I then spoke with Dave yesterday with regards to the likely outcome of the process and allowed until lunchtime today for any further comments or input you may have.*

*With regard to the allegations:*

*1. The incident where Bronwyn Billens witnessed a farm worker deliberately ramming a cow with a motorbike [cannot] be substantiated against either you or [Graeme] as she [cannot] clearly identify who the worker was. We believe this incident did occur, but [cannot] clearly substantiate either worker, so no action will be taken on this matter.*

*2. With regards to the complaint from [Alan] Williams of Dairy Solutions, you claimed that it was not you. You stated the "incident did not happen", and the allegation was "False and Foundless!" I have now received a statement from [Graeme]*

*who also witnessed the alleged incident and he has confirmed that it did happen and that it was very disturbing. He also advises that he intended bringing it to [Gregory's] attention but was very concerned as to retribution from you if you found out. It so transpired that Allen raised the complaint before [Graeme] had the opportunity to discuss it with Gregory.*

*Although no action is to be taken with regards to the first allegation, the second allegation is considered to be that serious that it is worthy of summary dismissal. There were two further issues that I discussed with Dave, (your support person) yesterday, and wish to outline them as follows:*

- Dave submitted in the meeting that you should only receive a warning from this matter and that the parties should learn from this experience. The serious nature of this matter, juxtaposed with your denial that it never occurred would concern me that nothing would be learned from a warning, and that this issue could arise again, next time with far greater consequences for the employer.*

- Dave also outlined that you had no previous formal disciplinary history whilst in this position. Although there have been no formal written warnings, there have been incidents where your demeanour has concerned Gregory and other staff. These*

*incidents have gravitated around actions where people have felt threatened and intimidated.*

***In conclusion,** I have now spoken with Dave today and he advises that there is nothing further to add. With that in mind, I have spoken again with Gregory, and he has decided to terminate your employment, effective as of 5.00pm today. He has decided that this is appropriate given the fact you have committed an example of serious misconduct as outlined in the first schedule of your contract. Accordingly, your employment ends today.*

*You were issued a trespass notice on 15 October, when you intimidated Gregory and the Police had to be called to remove you from the cowshed. This incident was witnessed by others and accordingly a trespass notice was issued until Sunday in order for the process to be fairly undertaken without fear of retribution. The trespass that was put in place until the end of this process is now extended for the full duration of 2 years.*

*You are entitled to remain for a further 14 days in accordance with your contract. You must have vacated the property no later than*

*5.00pm, Sunday 3 November 2013. You will be paid any holiday pay and final pay following a house inspection, once you have vacated the property.*

*On other matters, I understand that you have two pigs and two sheep on the property. Please advise of any other personal property you may have on the farm. You are instructed that given the trespass notice, you are required to contact my office in order to make arrangements on uplifting these animals. Accordingly, I will facilitate the return of any personal property. I expect this to occur in the next week.*

*Under no circumstances, are you to approach Gregory or any of his family and employees with regard to this matter.*

*Yours faithfully*

*Hamish Burdon*

[24] Although Mr Burdon was the advocate for the respondent at the Authority's investigation meeting, I felt it important to inquire of him as to what steps he had taken on behalf of the respondent between the date of the disciplinary meeting on 17 October 2013 and the writing of the dismissal letter on 20 October 2013. Accordingly, Mr Burdon was sworn in to give evidence. Mr Burdon said that, having listened to the tape of the disciplinary investigation meeting, he then spoke with Mr Williams who confirmed what he had told Mr Fellow[e]s. Mr Burdon also spoke to Mr Astwood. He said Mr Astwood was a reluctant witness who felt uncomfortable complaining about Mr Morunga. However, Mr Astwood did write a statement dated 18 October 2013. The Authority saw a copy of this written statement, which was brief, and which stated the following:

*I Graeme Astwood witnessed the incident involving with Nathan and the cow with the gate. I did not say anything at the time to anyone because of [an] incident that occurred in August in the fear that Nathan would hurt me and my family. But I did talk to my partner and by the time I decided to talk to Greg the plant maintenance man from Waikato Services had spoken to Greg about the incident.*

[25] Mr Burdon confirmed that he had not shown a copy of that statement to Mr Morunga or Mr Prebble prior to writing the letter of termination. He said, however, that he had told Mr Prebble that Mr Astwood had corroborated the evidence given by Mr Williams.

### **Evidence provided to the Court**

[8] It is next appropriate to record Mr Burdon's evidence relating to the events that followed the investigation meeting of Thursday, 17 October 2013, since it is the steps that were taken at that point that were the subject of criticism from the Authority and which must be reviewed for the purposes of the challenge.

[9] Mr Burdon said that following the disciplinary meeting he received a copy of the recording which had been made of the meeting, to which he listened. He also spoke to Mr Fellowes and Mr Boyce, both of whom had attended that meeting. From this emerged two issues. The first was that Mr Morunga was adamant he was not involved in the incident described by Mr Fellowes and the second was that Mr Morunga's support person, Mr Prebble, had asked if a possible outcome from that meeting could be a warning for Mr Morunga.

[10] On Friday, 18 October 2013, given Mr Morunga's denial of his involvement in the incident, Mr Burdon telephoned Mr Williams and sought clarity as to what had happened. He asked Mr Williams how he could be certain that the perpetrator was not Mr Astwood, who was Mr Morunga's co-worker. Mr Williams told Mr Burdon that he had been talking to Mr Astwood, and therefore knew that it was not Mr Astwood who was involved in the incident. Both Mr Williams and Mr Astwood gave evidence to the Court which confirmed that the two had been speaking. Mr Williams then moved to a location where he observed the incident with the cow, knowing the perpetrator was Mr Morunga and not the person he had just been talking to, Mr Astwood.

[11] Returning to the chronology, Mr Burdon said he had not known previously that Mr Astwood had been present and was a witness. Mr Burdon therefore telephoned Mr Astwood who confirmed what had happened, his information being similar to that of Mr Williams. Mr Burdon asked Mr Astwood why he had not come forward earlier and he explained that he was fearful as to how Mr Morunga would react if he did so.

[12] On Saturday, 19 October 2013, Mr Burdon contacted Mr Morunga's support person, Mr Prebble. He explained that Mr Astwood had confirmed that he had witnessed the incident as well as Mr Williams; both stated that the perpetrator was Mr Morunga. He told Mr Prebble that what was of most concern to Mr Fellowes' was the fact that Mr Morunga refused to acknowledge that the incident had occurred. He also asked Mr Prebble whether he had any issues with the process to date; Mr Prebble said he did not.

[13] In addition, he asked why it had been suggested that a warning would be a suitable outcome at the disciplinary meeting, if Mr Morunga had not beaten the cow. A warning would be unfair if Mr Morunga had not committed the act. He said Mr Prebble was unable to provide an answer.

[14] Mr Burdon told Mr Prebble that a further 24 hours would be provided for

Mr Morunga to consider the new information, since two people had now confirmed

that he was seen beating the cow; this was to provide an opportunity for a further response, before a decision was made as to the outcome.

[15] It was this telephone call which was summarised by the Authority Member at para [22] of the determination. Mr Burdon, commenting on that summary, said that although Mr Prebble had used the term "cut and dried" when giving his evidence-in-chief at the investigation meeting, and had agreed in cross-examination that those words may not have been used, albeit Mr Burdon had made it clear that there was reliable evidence that Mr Morunga was the perpetrator. Mr Burdon also commented that Mr Prebble did not tell him that given the feedback he did not wish to bother Mr Morunga with news of the decision to dismiss him on a Saturday night. Mr Burdon told the Court that he did not know Mr Prebble had decided to deal with matters in this way.

[16] Mr Burdon, in his evidence, said that at approximately 12.30 pm on Sunday,

20 October 2013, he received a call from Mr Prebble who advised that he had spoken with Mr Morunga. He reported that Mr Morunga's only response was an expletive. Mr Burdon said that Mr Fellowes wished to resolve the issue by the end of the weekend, and Mr Prebble made no further substantive comment.

[17] The comment that Mr Morunga had made to Mr Prebble, as recorded in the determination to the effect that "all he could do then was to get a lawyer", was not passed on to Mr Burdon by Mr Prebble in that telephone conversation.

[18] Mr Prebble did not tell the Authority that the remark meant a lawyer would make representations as to whether dismissal was appropriate. I infer that the reference to obtaining legal advice was intended to indicate what Mr Morunga would do if he was in fact dismissed.

[19] The evidence is that a lawyer did subsequently become involved, but not until

31 October 2013, some 11 days following the dismissal. The correspondence from the lawyer does not suggest that WHL had made the decision to dismiss before Mr Morunga had an opportunity of obtaining legal representation. I conclude that

there is no evidence that Mr Morunga intended to obtain legal advice at that point of the process.

### **First issue: procedural fairness**

[20] The Authority made three adverse findings on procedural matters. The first related to the conclusion that the brief written statements which had been obtained from Ms Billens and Mr Williams were not provided to Mr Morunga or to his representative, Mr Prebble. The Authority found that there was a failure to comply with the obligations of [s 4\(1A\)](#) of the [Employment Relations Act 2000](#) (the Act), which provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of one or more of his employees must provide to the affected employee access to information relevant to the continuation of the employee's employment, about the decision, together with an opportunity to comment on the information to their employer before the decision is

made.<sup>3</sup> The Authority observed that neither Ms Billens nor Mr Williams statements

named Mr Morunga, and that had Mr Morunga seen those documents prior to the disciplinary hearing, he would have been able to ask questions to illicit how a link had been made between him and the actions which had been recorded.

[21] With regard to the allegation made by Ms Billens, the Authority determined that Mr Fellowes had initially assumed it was Mr Morunga who had committed the acts complained of, but had subsequently admitted that he could not have been

sure that it was not Mr Astwood. Whilst the allegation as raised by Ms Billens was discontinued, it illustrated the inherent difficulty which arose from the non-disclosure of the written statement.

[22] With regard to Mr Williams' statement, the Authority determined that Mr Morunga could have asked questions as to how it had been concluded he was the perpetrator; disclosure could have revealed that the incident had also been observed by Mr Astwood. The Authority found that this may well have persuaded Mr Morunga to change his position with respect to his denials. This was an

important fact, because Mr Fellowes said in evidence to the Authority that a major

3 [Employment Relations Act 2000, s 4\(1A\)\(c\)](#).

factor in deciding to dismiss Mr Morunga was his failure to admit what he had done. Mr Burdon confirmed this was the case. Had Mr Morunga been in receipt of all the information, then he would have had the option of taking a different approach in the disciplinary hearing, by conceding inappropriate conduct.

[23] Ms Penny represented WHL at the hearing of the challenge. She submitted that the essentials of the two statements were provided to Mr Morunga at the disciplinary meeting. She argued that when Mr Morunga eventually obtained a lawyer, no request was made for the documents. Even when they were tabled at the investigation meeting Mr Morunga continued to deny involvement in the animal cruelty incidents. It was her submission that the failure to provide the written statements was a technical breach only, and that the failure to provide copies of those documents did not lead to actual unfairness.

[24] I do not accept this submission. I agree with the Authority Member that the obligation in [s 4\(1A\)\(c\)](#) of the Act, on the facts of this case, meant that the written statements should have been provided, and that the failure to do so was not a mere technicality. This is because those statements did not identify Mr Morunga, and identification was the key issue raised by Mr Morunga.

[25] The second adverse finding made by the Authority Member was to similar effect; Mr Astwood's written statement was not provided to Mr Morunga or his representative. Whilst Mr Burdon told Mr Prebble in the Saturday telephone call that Mr Astwood had also witnessed the incident and had positively identified Mr Morunga, the written statement was not provided. Again I agree with the conclusion reached by the Authority Member. The provision of the further statement put the issue of identity beyond doubt. There has never been any suggestion that Mr Astwood had his own reasons for being anything other than truthful in his account. If apprised of this information, Mr Morunga would at least have had the option of considering whether he should, in the face of all the evidence, accept that he had acted inappropriately.

[26] The third adverse finding was that there was a breach of the principles of natural justice on the basis that Mr Morunga was not given an opportunity to pose

questions to Mr Williams, either directly or via the employer. Ms Penny submitted that this was tantamount to requiring an employer to conduct a formal hearing in the nature of a trial, a standard which it is clear from the authorities an employer is not required to meet.<sup>4</sup>

[27] Whilst the Authority Member referred to the possibility of questions being able to be put to Mr Williams directly, he also raised the alternative of questioning via the employer's representative. The Authority did not contemplate a formal or judicial process. In any event, this procedural issue flows from the failure to provide Mr Williams' statement. Because Mr Morunga was unaware he was not identified in Mr Williams' statement, he did not raise the issue of identity. Had he done so he could have requested that Mr Williams explain why he had not identified a perpetrator. I find the primary procedural flaw in this instance was the failure to provide Mr Williams' statement and consider it is preferable to consider this issue as an aspect of that defect.

[28] In summary, the failure to provide the written statements were steps that a fair and reasonable employer could not have taken, because Mr Morunga was thereby denied a reasonable opportunity to respond to the employer's concern before a decision was taken to dismiss him.

[29] It is next necessary to consider the significance of these procedural breaches. This is because a major factor in deciding to dismiss Mr Morunga was his failure to admit what he had done.

[30] Detailed evidence was provided as to the significant relationship problems that existed in the workplace – to the point where Mr Morunga's actions resulted in Mr Fellowes and Mr Astwood at times fearing for their safety.

[31] Having regard to those relationship difficulties, it was inherently unlikely Mr Morunga would have accepted fault had the written statements been provided to him. Even at the Authority hearing he persisted in his denial that he was the

perpetrator. I also find that it is more likely than not that WHL would have

<sup>4</sup> For example, *The Warehouse Ltd v Cooper* [2001] NZEmpC 39; [2000] 2 ERNZ 351 at [31].

considered dismissal as being appropriate in all the circumstances, even if Mr Morunga belatedly accepted that he was the perpetrator. Mr Morunga behaved in a very aggressive way when confronted with WHL's concerns, and against the background of inappropriate conduct, dismissal was the most likely outcome in the end.

[32] Consequently, in assessing the consequences of the procedural failures, I find that the ultimate outcome would not have been any different had the statements in question been provided. The process may have been more elaborate and lengthy, but I find the outcome would have nonetheless been dismissal. Ultimately, Ms Penny accepted that the breach was more than minor, so that [s 103A\(5\)](#) of the Act does not apply.

[33] The dismissal was found by the Authority to be substantively justified; since no cross-challenge has been filed in respect of that conclusion, I consider it no further. This Court must proceed on the basis of the Authority's finding on that point.

[34] The result is that Mr Morunga's personal grievance on the ground of procedural error is established, but not on the ground of substantive unfairness. The question is whether, in those circumstances, he is entitled to any remedies.

### **Second issue: remedies**

[35] As outlined earlier, the Authority granted lost wages for a period of three months as well as compensation for hurt, humiliation and loss of dignity in the sum of \$5,000, but reduced those awards by 50 per cent for contributory conduct.

[36] Ms Penny submitted that given substantive justification for the dismissal, a personal grievance established only as to procedural flaws in the circumstances of this case should not have resulted in the award of remedies.

[37] [Section 123\(1\)\(b\)](#) and [s 128\(1\)](#) of the Act confirm that before an award for lost remuneration is made, the loss must be as a result of the grievance.<sup>5</sup> Here, the procedural error did not result in lost remuneration. Any actual loss suffered arose from the decision to dismiss, which was substantially justified. Consequently, no award for lost remuneration is appropriate.

[38] The Court must also consider [s 124](#) of the Act, which requires a consideration of contributory conduct. The section provides that when deciding the nature and extent of remedies in respect of the personal grievance, the Court must consider the extent to which the actions of the employee contributed towards the circumstances

that gave rise to the personal grievance,<sup>6</sup> and if the actions so require, reduce the

remedies that would otherwise have been awarded.<sup>7</sup>

[39] Lost remuneration would not have been awarded, as the personal grievance did not cause loss. Accordingly, that topic requires no further consideration.

[40] The situation as to hurt, humiliation and loss of dignity does however require consideration. The Authority recorded that Mr Morunga gave little evidence as to the effects of the dismissal on him, though reference was made to the fact that it had been a life-altering experience, and it had been hard to find new employment. The Authority determined that the way the dismissal had been carried out could have had an adverse effect on Mr Morunga, and that an award of \$5,000 was appropriate subject to a 50 per cent contribution for contributory conduct. Since there is no cross-challenge as to the finding of substantive unfairness, the question for this Court is now whether there are any grounds for awarding compensation for humiliation, loss of dignity and injury to feelings.

[41] The Court has no evidence to satisfy it that any such effects have been suffered. Even if there was such evidence, I am satisfied that Mr Morunga's

misconduct when considered in context was so egregious as to lead to a conclusion

<sup>5</sup> See also *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81]; *Waitakere City Council v Ioane* [2004] NZCA 218; [2004] 2 ERNZ 194 (CA) at [23] and *Waitakere City Council v Ioane (No.2)* [2005] NZCA 376; [2005] ERNZ 1043 (CA) at [28].

<sup>6</sup> [Employment Relations Act, s 124\(a\)](#).

<sup>7</sup> [Section 124\(b\)](#).

that this is one of those very rare cases where a 100 per cent contributory finding in respect of such consequences should be made.<sup>8</sup>

[42] The challenge accordingly succeeds, and no remedies are payable. This

decision replaces the Authority's determination.

### **Costs**

[43] The final issue raised by WHL relates to the costs awarded to Mr Morunga, in

the Authority's costs determination.

[44] Since the challenge has succeeded, I set aside the Authority's determination

as to costs.<sup>9</sup>

[45] The plaintiff is entitled to costs incurred with regard to the Authority's investigation. The Authority determined that a half daily tariff, in the sum of \$1,750, was appropriate, and that this should be increased to \$2,750 to reflect the provision of closing submissions after the investigation meeting. For the purposes of the WHL's challenge, Ms Penny submitted no uplift was justified. The same proposition must apply to WHL if it is to be awarded costs. Accordingly, I order Mr Morunga to pay WHL \$1,750 with regard to its costs in the Authority.

[46] Because Mr Morunga took no part in the challenge, and did not resist it, there will be no order as to costs in this Court.

### **Discharge of stay order**

[47] Prior to the hearing, the Court was required to consider an application for stay. As a result of a statutory notice being served on WHL on behalf of

8 I acknowledge the issues regarding this approach, as explored in *Harris v The Warehouse Ltd* [2014] NZEmpC 188. There, Chief Judge Colgan did not finally determine whether s 124 permitted complete remedy extinguishment, stating the issue should be considered by a full Court. As I did not, and could not, receive full argument on this issue in the present case, I consider it appropriate to follow the line of authority which culminates in the very recent decision of Judge Inglis in *Knapp v Locktite Aluminium Specialties Ltd* [2015] NZEmpC 71, at [34].

9 *Morunga v Waterford Holdings Ltd*, above n 2.

Mr Morunga, it had paid \$6,815.91 to Mr Morunga, part only of the remedies which were awarded by the Authority.

[48] In respect of the lost wages award, the sum of \$1,009.09 was payable by the company to the Inland Revenue Department (IRD). At the time the stay application was considered, Ms Penny confirmed that any issues relating to payment of that sum would be dealt with directly by the company and the IRD, so that no formal order on that matter was required.

[49] Also payable were costs of \$2,821.56, which were awarded to Mr Morunga in the costs determination. The parties agreed that WHL would pay that sum to the Registrar of the Employment Court within seven days, and that such sum would remain in Court until further order thus operating as a stay of execution of the Authority's orders. This subsequently occurred.

[50] Having regard to the conclusions reached in this judgment, I discharge the order of stay, and direct the Registrar to repay the accrued sum to WHL.

B A Corkill

Judge

Judgment signed at 4.00 pm on 3 August 2015