

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 241  
5363624

BETWEEN            TERRY WATSON  
                                 Applicant  
  
AND                    OCEANA GOLD (NEW  
                                 ZEALAND) LIMITED  
                                 Respondent

Member of Authority:    David Appleton  
  
Representatives:        Jeff Goldstein, Counsel for Applicant  
                                 Lesley Brook, Counsel for Respondent  
  
Investigation Meeting:    10 and 11 September 2012 at Christchurch  
  
Submissions received:    11 September 2012  
  
Determination:            6 November 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.    The Applicant was unjustifiably dismissed due to procedural deficiencies. He is entitled to remedies which are reduced in accordance with his contribution to the situation that gave rise to the personal grievance.**
- B.    The Applicant did not suffer an unjustified disadvantage in respect of the final written warning dated 5 October 2011.**
- C.    Costs are reserved**

**Non publication order**

[1]    During the course of the investigation meeting detailed evidence was produced which related to Mr Watson's medical history which, by consent, is the subject of a non publication order, on the grounds that its disclosure could prove prejudicial to Mr Watson.

**Employment relationship problem**

[2] Mr Watson claims that he was unjustifiably dismissed on 31 October 2011 and unjustifiably disadvantaged when he was given a final written warning on 6 October 2011. The respondent denies that Mr Watson was either unjustifiably dismissed or unjustifiably disadvantaged.

**The events leading to the warning and the dismissal**

[3] The respondent operates a mine at Reefton. Mr Watson was employed as a maintenance supervisor. This role required him to be responsible for the maintenance of the plant at the mine which included directing electricians and other staff.

[4] Mr Watson was a qualified electrician in South Africa but had not obtained his electrical trade certificate in New Zealand. Accordingly, he was not permitted to carry out any electrical work in New Zealand.

[5] On 2 September 2011, Mr Watson noticed a fault with a piece of equipment which he regarded as potentially serious. He opened one of the electrical cabinets, pushed a reset button, and tried to operate the equipment again. It continued to malfunction. Mr Watson opened the panel again (having first isolated it) and removed a fuse which had blown. He closed the panel and asked one of his staff to take the fuse to one of the electricians (Mr Brewerton). Mr Brewerton knew that Mr Watson should not have removed the fuse, as he was not qualified in New Zealand to do so, and so filed a formal incident report. This led to Mr Watson being told by the process manager (Mr Johns) that he was not to open electrical cabinets and that he was to circulate a safety alert to all staff stating that nobody was to open electrical cabinets unless they were a qualified electrician. Mr Watson prepared this alert and circulated it, but opened an electrical cabinet in order to take photographs of it to be included in the alert. (This was not known by management at the time).

[6] On 23 September 2011, another piece of equipment failed and Mr Watson was informed of that fact by a crew leader (Ms Swaine) saying that the equipment was required. Mr Watson discovered that Mr Brewerton and the other electrician were both absent at that time so Mr Watson decided to look at the electrical panel himself in order to avoid production being halted. Mr Watson's evidence was that he was unable to diagnose the fault from following procedures on a touch pad and that, as well as both plant electricians being unavailable, the operations manager and

Mr Johns were also absent. He therefore decided to open the panel, which he did in the presence of Ms Swaine, and saw that a fault light was on. His evidence was that he immediately closed the panel and told Ms Swaine that she was going to have to wait for one of the electricians to return as the local contractor would not be able to rectify the fault. That particular fault was eventually rectified by downloading a programme, by which time Mr Brewerton had returned. However, a further fault occurred which prevented the operation of the equipment, which Mr Brewerton found was the result of a communications cable having been pulled out. Mr Brewerton believed that Mr Watson had removed this cable although Mr Watson denied this.

[7] Ms Swaine informed Mr Brewerton that Mr Watson had opened the electrical cabinet, and that Mr Watson had told her not to tell Mr Brewerton that he had done so. Although merely opening the cabinet door was not itself contrary to the Electricity Regulations 1997 in Mr Brewerton's view, Mr Watson had disobeyed an order from Mr Johns and the policy to which he himself had alerted all the staff. Mr Brewerton therefore asked Ms Swaine and another employee to write up accounts of what they had witnessed. Ms Swaine emailed her statement to the acting process plant manager (Mr O'Connor), in the absence of Mr Johns.

[8] Mr Watson's evidence was that he later told Mr Johns by telephone that he had opened the cabinet on 23 September and that Mr Johns had been upset with him for having done so. On 26 September, Mr Watson was told by Mr O'Connor that an incident report had been raised against him for opening the panel. Mr O'Connor requested Mr Watson not to talk to Mr Brewerton about him opening the cabinet without a third party being present.

[9] Despite this advice from Mr O'Connor (who was of equal status to Mr Watson but who was also standing in for Mr Watson's superior, Mr Johns, at the time), Mr Watson decided to talk to Mr Brewerton on Tuesday, 27 September 2011. His evidence was that, as he did not intend to discuss the incident at all, he did not believe he needed a third party present. He agreed, however, that he had fetched the incident report from Mr O'Connor's office and placed it on his desk.

[10] Mr Watson's said that he made Mr Brewerton aware that he was not talking to him about the incident but about how Mr Brewerton felt if anything went wrong electrically onsite. This was because Mr Brewerton had expressed fears in the past that he would lose his electrician's licence if anything occurred on site that could be in

breach of the Electricity Regulations. Mr Watson said that Mr Brewerton became very agitated and so he decided to stop talking to him about it. He said that he apologised to Mr Brewerton and that at no time was any foul language or verbal abuse was used.

[11] Mr Watson's evidence is that, before Mr Brewerton left, Mr Watson asked him to give him all the hours he had worked on a certain project (the Lime Project) as he needed to decide whether the cost of the project should be carried under operational expenses or go into capital expenditure. Mr Brewerton again became agitated, according to Mr Watson, and stated that Mr Watson was watching him and the hours he worked. Mr Watson's evidence was that he told Mr Brewerton (in a loud voice) that he was not watching his hours and that he only needed to know the hours for the reasons he had already explained. He said that Mr Brewerton also stated that he had serious personal problems.

[12] Mr Watson's evidence was that, after that conversation, he went down to the workshop later that afternoon and met Mr Brewerton again and said that he was sorry to hear that Mr Brewerton had some personal problems, and offered for him to take some leave. Mr Watson said that Mr Brewerton said bluntly that he did not want to take leave until the project was finished.

[13] Mr Watson then telephoned Mr Brewerton that night to tell him that *all would be fine*. Mr Watson said that Mr Brewerton's first response to that was that he would be seeking legal advice.

[14] Mr Brewerton's evidence was that, when Mr Watson called him into his office on 27 September, Mr Watson gave him a *dressing down* for going over his head. Mr Brewerton said that Mr Watson was very intimidating and that he inferred that Mr Watson was asking him to withdraw the paperwork. Mr Brewerton's evidence was that he was initially very shocked by this but then realised that he did not have to put up with it as he viewed Mr Watson as abusing his position of authority. Mr Brewerton's evidence was that he immediately wrote up in his diary what had happened. A copy of the diary page was shown to the Authority and it read as follows:

*It hit the fan today with Terry Watson, after I gave the incident report book to Ged O'Connor (acting boss). I was called in & told I was going behind his back then he threatened to reign [sic] me in and*

*keep a very close eye on all that I was doing, including the time spent on site. A general rant to get me to capitulate – he later calmed down and apologised. I accepted the apology but only for that part of it. I told Terry that my actions were consistent and that if I saw Gareth Thomas doing something wrong I would ping him as well. Terry got me to one side twice during the rest of the day, and tried to get me to withdraw the paperwork I'd put in. To get out of even further argument I said I'd think about it. I reported both of these incidences to Ged O'Connor at the earliest opportunity. Ged advised me that during a talk with Terry Watson, he had advised Terry not to talk to me without a third party being present. I will not withdraw the incident report in any case. During the heated part of the debate, Terry said "this discussion never happened". I believe that this amounts to workplace harassment, even if I'd begrudgingly accepted his apology.*

[15] Mr Brewerton typed up his account of what had happened on 27 September and went to see Mr Johns on Monday, 3 October, and told him that he had written up an incident about Mr Watson. Mr Johns cautioned Mr Brewerton to think carefully before submitting his report. Mr Brewerton decided to submit the report anyway and handed it over on Wednesday, 5 October. On the same day, before he had submitted the report, Mr Watson and Mr Brewerton had been in a meeting discussing pay when Mr Watson stated that he had been doing some research into the Electricity Regulations and that he had been told by the Electrical Workers Registration Board that Mr Brewerton would not lose his licence because Mr Watson had opened the cabinet. This had upset Mr Brewerton who had left the room.

[16] On 5 October 2011, Mr Johns issued Mr Watson with a final written warning for opening the electrical cabinet on 23 September. It is common ground that this was without any meeting having taken place to allow Mr Watson to have his say. Mr Watson did, however, sign the warning to acknowledge that he had read and understood the implications of the warning and that he was committed to the agreed action plan.

[17] Mr Brewerton wrote a letter of complaint to Mr Johns in the following terms:

***Incidents regarding T. Watson, Maintenance Supervisor***

*"Discussions". (of verbal abuse, depending on how you see it).*

- 1) 29th June 2009. [This has been omitted as it was not taken into account by the respondent]
- 2) 27th September 2011. *I got called in to Terry Watson's office during the afternoon, after giving Ged O'Conner [sic] the*

*incident reports that I had had filled out by operations staff over the weekend. (re the Larox filter)*

*First of all, I was accused of going behind his back, once again, having delivered this report to the acting plant manager. I replied by saying that he had put into a rather invidious position – that I shouldn't have to report an issue of safety against a person who is my superior in the organisation and that I wasn't very happy having to do so. Then he really got stuck in, saying that he was going to come down hard on me from now on, watching everything I do, watching my hours, watching what work I carry out and don't carry out, presumably watching when I come to work and when I go home again.*

*When I said that I would be telling other people what had taken place, his furious retort was that “this conversation has never taken place – I'll deny everything”.*

*Terry calmed down a bit after that and offered to apologise. I **reluctantly** accepted his apology for that part of it, but reinforced that fact that I am consistent. It doesn't matter who I see flouting safety rules, whether it be himself, Gareth Thomas or anyone else on site – if I see it (or as in this case, if it's electrical and I hear about it) then I'll gather the evidence and report it. I also reminded Terry that we all have a legal obligation, as well as a duty of care, to maintain a safe working environment for ourselves and everyone else and have a duty to report it if it isn't.*

*During this time, I also put a scenario to Terry, saying “if I caught or was told about someone else doing the same thing, did the same paperwork and presented it to you, what would you do? His reply – its not the same thing, I'm an electrician. As he is unregistered here, I contend that it **is** the same thing, that anybody who is not registered electrically in this country should **not** be opening any box with live electrical parts in it for any reason whatsoever – that is why the company employs properly registered people.*

*Terry was attempting to get me to withdraw the paperwork regarding this incident – I said I'd think about it.*

*Please note that this “conversation” took place after Terry was expressly told, by Ged O'Conner, not to discuss it with me without a third party being present. I was again that afternoon asked to withdraw the incident forms and gave him the same answer as before. Ged O'Conner was informed of both of these discussions at my earliest opportunity.*

*I was rung by Terry that evening. When I learned that it was him on the phone, the first thing that I said to him was that I intend to take legal advice on this matter. Terry talked about letting things stand as they were. I had nothing further to say to him regarding the matter.*

*I find Terry Watson's attitude and manner over these issues to be offensive, arrogant and intimidating.*

*His insinuation that I am operating behind his back all the time is simply wrong, particularly in light of the fact that I can provide an email from him which says exactly the opposite.*

*Terry doesn't know all that I do for the company and I'm not in the habit of going to him every five minutes telling him what I'm doing next – I know what needs to be done and I simply get on with it. As I pointed out to him, I have spent a great deal of time, unpaid, taking paperwork home regarding the current Lime project and working on it there, simply because I understood the scope of the job, understood that it had to be completed within some kind of time frame and didn't want to put myself in a position where I would be behind and at some point, holding the job up. After all, I have still been expected to carry out the normal maintenance duties I am there to provide while also carrying out this project.*

*The other thing I don't appreciate is his demeaning of my attitude toward my job and my expertise in doing that job. Rightly or wrongly, I infer that from the comments he made above.*

*If Terry has any concerns about my attitude or performance towards my work, I would suggest that he takes that up through the proper channels, not through some heated argument.*

*I've put a fair bit of effort into this company over the last few years, not all of it obvious. I don't expect a medal for this but I also don't expect to be treated like s\*\*t, simply for carrying out the job I believe I'm expected to do.*

*To sum up – if Terry continues to do what he is doing, then I will continue to report such breaches.*

[18] On 6 October 2011 Mr Watson was required to attend a meeting with Mr Johns and Ms Sutton, the HR manager, at which Mr Watson was given a letter in the following terms:

*Dear Terry,*

*I write to advise that I have received notification of serious allegations that you may have engaged in abusive and inappropriate behaviour towards Trevor Brewerton on 27 September 2011 at a meeting initiated by you, later in the afternoon and by telephone that evening. It is understood that this was after being told by Acting Process Plant Manager, Ged O'Connor, that this was not advisable without a third party being present.*

*I emphasise these are allegations at this stage and no predetermination of outcome has been made.*

**Allegations:**

*Specifically, it is alleged that:*

1. *On 27 September 2011 you called Trevor Brewerton into your office and threatened to “come down hard on him” if he did not withdraw the incident report that you had breached Oceana Gold policy by opening an electrical cabinet.*
2. *You approached Trevor again that afternoon to put pressure on him to withdraw the incident report.*
3. *You telephoned Trevor again later that evening, again to put pressure on him to withdraw the incident report.*
4. *The three contacts with Trevor were in breach of the instruction from Ged O’Connor not to talk to Trevor without a third party present.*
5. *Your “attitude and manner” was “offensive, arrogant and intimidating” and you showed a “demeaning attitude toward my job and expertise in doing that job”.*

*If proven, the allegations breach an employee’s common law duty of reasonable behaviour, Oceana Gold’s Bullying and Harassment Policy, Code of Conduct, and are outside the company’s expectations of employee behaviour, and would constitute serious misconduct.*

**Process**

*These allegations are a matter of serious concern to the company and therefore the need to investigate your alleged behavior [sic] is required. Given the nature and circumstances of the alleged behaviour, I am obliged to advise you that the investigation could result in disciplinary action that may include dismissal.*

*The investigation will follow the company’s Corrective Action policy. Subject to adjustment pending any developments and further information, outlined below is the general process that will be followed:*

1. *Providing you with this letter;*
2. *A copy of Trevor Brewerton’s complaint. Please note we are not considering the 29 June 2009 matter;*
3. *Receiving your comments either in person or in writing;*
4. *Carrying out such further investigation as is necessary, which may involve interviewing your supervisors and other members of the Process Trades team;*

5. *Advising you of the preliminary views as to findings and any penalty (if applicable);*
6. *Receiving and considering your representations on these preliminary views; and*
7. *Issuing a final decision as to findings and any penalty (if applicable).*

*You have a right to seek advice, assistance and representation in this matter and I strongly urge you to do so, given the serious nature of the allegations.*

*As previously indicated, if the allegations are true they would constitute serious misconduct as a breach of the bullying and harassment policy, and we believe it would be inappropriate for you to continue your normal duties during the investigation.*

*Therefore we advise that we intend to suspend you from the workplace for the period of the investigation of this incident. You would receive your normal entitlements as an employee for your rostered shifts for the period of the suspension. The suspension will be for the shortest time possible and you have not been dismissed and should remain available to return to work or for further interviewing.*

*We invite you to comment on the possibility of your suspension and request that you do so at a meeting with myself and Deb Sutton at the Meeting Room at the main Reefton site at 12.00 noon today, Thursday 6 October 2011, to discuss the possibility of your suspension.*

*In the interests of the integrity of the process, privacy of all involved and working relationships, I ask that you maintain strict confidentiality with respect to this matter and request you limit your discussions to your advisors and support people.*

[19] A second meeting was held with Mr Watson on 6 October at which he was asked for his comments on paid suspension. Mr Watson did not object to the proposed suspension and so that took effect from that day.

[20] Mr Watson provided a written response to the allegations on 10 October in which Mr Watson said that he just wanted to talk to Mr Brewerton about him losing his licence and not about the incident. His response contained the following points:

*Allegation made against me of Bullying and harassment by Trevor Brewerton*

*It is with disappointment that I have to reply to such malicious allegations. One area of great concern to me is that at the meeting attended by Deb, Justin and myself to go over the allegation brought against me, after I had briefly explained my situation, Deb said to Justin "If this goes the other way we have got a problem".*

*I have no idea why Deb said this but would like an explanation in writing.*

*We then continued our discussion.*

*It must be clearly understood that Trevor was not the person to lodge the said incident so ... he had no influence over the outcome.*

*I question, did Trevor think he had the power to do as he pleased regarding this matter.*

[Passages omitted]...

### *Bullying and Harassment*

*Gerard O'Connor as Acting Process Manager requested me not to talk to Trevor unless a third party was present.*

*I asked Trevor to come up to my office to discuss the issue of him losing his practicing licence and **NOT** the incident.*

*I did get the incident book out of Gerard O'Connor's office to use as an example for explanation to Trevor. I told him that I had obtained an email from EWRB which would confirm that (he) Trevor can relax about losing his practicing license [sic].*

*He is very fixated on the fact that if someone else even with a licence breaches the law his licence will be taken away which is not the case according the **EWRB LAW**.*

*Trevor was very frustrated with our discussion so I left it at that.*

*In the same meeting I requested Trevor to please give me hours that he has spent on the lime project as I need to discuss with Justin the hours spent by all on the lime project to see if it would still go under operational costs or CAPEX.*

*He has obviously interpreted this the wrong way and he has stated in his letter that "I will be watching him".*

*He then went on to tell me he had huge personal problems worth hundreds of thousands of dollars and Trevor left the office very agitated.*

*Later on I emailed the letter from EWRB to Trevor and Jeff for their information.*

*After a while I went down to the workshop and met with Trevor. The reason was to find out if he was ok and asked if he would like to take some leave with regards to his personal issues.*

*His reply was he will after the lime project (but in a very blunt manner).*

*I told him that all I am trying to do is explain that his licence is not always on the line.*

*That night I decided to phone Trevor to see if he was ok, out of concern for him. When he came onto the phone the first thing he said was I will be seeking legal advice.*

*This shocked me but, all I said to Trevor was that he must be fully aware that the discussion today had nothing to do with the incident.*

[Passages omitted]

**In conclusion**

*I am a very trusting, open, fair and honest person.*

*Safety at the plant is my number one concern (3 years without an LTI in Dept) and we have a very good team environment. Yes, I have made mistakes the same as anybody else but, I have stood up and accepted my punishment and will learn from them but, it is still the team that is important to me.*

*If you look at my record, all incidents have been because I have wanted to help. My intention with Trevor was exactly the same (losing his licence). He has taken this issue completely out of context and used it to his advantage.*

**General**

*Once this case has been finalised, I would like to take up the issue of Trevor "bullying" me in the case of the possible employment of Keith Teasdale as a separate issue.*

*Trevor came across as very threatening to me.*

*My biggest regret in this matter is that I never spoke to Trevor with a 3rd party present as advised by Ged O'Connor, which in my view doesn't say a lot about Trevor's trustworthiness and integrity.*

*Is this the way we are going to have to communicate with Trevor in the future, always have a third party present??*

*If this is a habit we get into, where will it end and who carries the authority, as Trevor states even if it is Gareth he will question it.*

[Passages omitted]

*It must be clearly understood that this document is subject to change as Solicitors advice has been sought.*

[21] Ms Sutton carried out the investigation and prepared a memorandum for Mr Johns which included a report of her interviews with a number of staff, all of which touched on Mr Watson's relationship with Mr Brewerton, and her preliminary findings. A copy of this preliminary report was sent to Mr Watson and he prepared a statement in reply.

[22] Mr Watson obtained legal representation and the disciplinary investigation meeting took place in Christchurch on 31 October. Mr Watson's representative made a number of submissions at the meeting which, Mr Johns stated, were considered and legal advice obtained.

[23] Mr Johns' evidence was that he liked Mr Watson, who he recognised got on well with people at work, but that he would at times say inappropriate things. It was for this reason that Mr Watson had previously been sent on a management training course. Mr Johns stated that he was satisfied that the only reason that Mr Watson had spoken to Mr Brewerton on 27 September was because Mr Brewerton had made a complaint about him opening the cabinet again on 23 September. Whilst Mr Johns was not satisfied that Mr Watson had actually asked Mr Brewerton to withdraw the report in those words, he was satisfied that that was what Mr Watson was driving at. He was also satisfied that Mr Watson had raised his voice and spoken in an inappropriate way to Mr Brewerton. He reached that conclusion on the strength of a witness (Mr Systemans) who had overheard part of the conversation between Mr Watson and Mr Brewerton.

[24] Mr Johns said that he was particularly influenced by the fact that Mr Watson had put pressure on Mr Brewerton when Mr Brewerton had been raising a safety issue. Mr Johns' evidence is that safety is critically important in the mining environment, that Mr Watson had quite deliberately opened an electrical cabinet on 23 September but that his response had been to come down on the person whom he had seen had got him into trouble over it. Mr Johns said that he was satisfied that Mr Watson had threatened to come down hard on Mr Brewerton by watching his hours. He believed that that amounted to overbearing supervision by Mr Watson.

[25] Mr Johns also took into account the fact that Mr Watson had approached Mr Brewerton twice more that day which had come across as Mr Watson putting more pressure on Mr Brewerton.

[26] Mr Johns said that he had thought that Mr Watson had learned from a previous incident at the end of 2010 and had taken on board the training he had received. However, the fact that this had happened again made him believe that Mr Watson could behave inappropriately to any staff member again in the future.

[27] Mr Johns' evidence was that he considered whether he could give Mr Watson a final written warning instead of dismissing him but that, as he had now lost trust in him as a supervisor, he did not think that would work. He also considered demoting Mr Watson but there was no permanent position he could put him in without supervisory responsibilities. He was not qualified as an electrician in New Zealand so he could not give him an electrician's job.

[28] In the light of all this, Mr Johns said he reluctantly came to the conclusion that he had to dismiss Mr Watson. Ms Sutton prepared a letter recording Mr Johns' decision dated 31 October 2011. The text of this letter was as follows:

*Dear Terry,*

**RE: Termination of Employment**

*Further to our letter dated 6 October 2011, a meeting was held on 31 October 2011 at the office of Goldstein Ryder McLelland [sic] with you, your legal representative Jeff Goldstein and the company representatives being myself as Process Plant Manager and Deb Sutton, Senior HR Adviser.*

*In this meeting you were asked to communicate your version of the events that took place on 27 September 2011 resulting in you being stood down on Thursday 6 October 2011.*

*Whilst you refute the circumstances around the safety incidents for which you received warnings, and your stated commitment to the company to keep production going, the incident for which you were suspended related to alleged actions towards a subordinate. We have the statement of complaint from Trevor Brewerton and your own written statement. We also have a witness statement from Bennie Systemans.*

*We accept that Ged O'Connor's comment was advice, but you chose not to take that advice. We also accept that in following up with Trevor Brewerton after the first discussion on 27 September, you were trying to retrieve the situation, but instead made it worse and you should have known that was likely.*

*We are satisfied that you made the comment about watching Trevor's hours. The comment was made in the context of the discussion of Trevor Brewerton's licence not being at risk, that being partly why he supported the incident report about your safety breach. In that context and given the tone that you used, we are satisfied that the comment about watching Trevor's hours was unwelcome behaviour towards another person, overbearing supervision, and inappropriate towards a subordinate. That conduct breaches Oceana Gold's Bullying and Harassment Policy, Code of Conduct, and is outside the company's expectations of employee behaviour.*

*Given that it occurred in response to reporting of a genuine safety issue and contrary to Ged O'Connor's advice, we are satisfied that it constitutes serious misconduct, and is a culmination of repeated breaches of safety standards by yourself. As a result I cannot trust you as a supervisor to support and respect subordinates in respect of safety issues. Accordingly, your employment with the company is terminated effective immediately.*

*This letter confirms your termination verbally. The company will pay by direct credit all outstanding monies due and owing to you in relation to your salary up to and including 31 October 2011 (date of termination) and including holiday pay.*

*Yours sincerely*  
**OCEANA GOLD (NEW ZEALAND) LIMITED**

*Justin Johns*  
*Process Plant Manager*  
*Reefton Operation*

## **The issues**

[29] The Authority must determine the following issues:

- (a) Whether the dismissal of Mr Watson was unjustified; and
- (b) Whether the giving of the final written warning to Mr Watson on 5 October created an unjustifiable disadvantage.

## **Was Mr Watson unjustifiably dismissed?**

[30] Mr Watson argues that his dismissal was unjustified for several reasons. These are as follows:

- (a) That Mr Johns took into account Mr Watson's opening the electrical cabinets in his decision to dismiss, although this was not part of the disciplinary investigation;
- (b) That Mr Watson was found to have breached the company policy on not displaying unwelcome behaviour towards other employees which was designated as serious misconduct by Mr Johns although it was listed under the heading of *misconduct* in the company's Corrective Action Policy;

- (c) That Mr Johns gave evidence that he had taken into account historical issues relating to Mr Watson's conduct but that it had never been made clear to Mr Watson that these would be taken into account;
- (d) That the allegations that Mr Watson spoke to Mr Brewerton in an inappropriate tone, that he was going to watch Mr Brewerton's hours and that the respondent saw this as serious misconduct, were never put to Mr Watson;
- (e) That Mr Brewerton had, in any event, accepted Mr Watson's apology for what he had said during that part of the conversation;
- (f) That the respondent should have re-interviewed Mr Systemans;
- (g) That the respondent should have re-interviewed Mr Brewerton;
- (h) That there were no grounds to have concluded that Mr Watson used an inappropriate tone;
- (i) That Mr Brewerton's complaint did not provide any details as to what Mr Watson said or did that was *offensive, arrogant and intimidating*;
- (j) That the respondent failed to take any action on Mr Watson's complaint that Mr Brewerton had bullied him;
- (k) That the decision to dismiss was predetermined;
- (l) That the preliminary report did not provide a preliminary finding on penalty;
- (m) That the respondent did not investigate Mr Watson's explanations;
- (n) That Ms Sutton interviewing Mr Johns, the decision-maker, as part of the investigation, prejudiced the process;
- (o) That Mr Brewerton had prejudiced the process by disclosing to his work mates his allegations in relation to Mr Watson;
- (p) That the decision to dismiss was not substantively justified and that Mr Watson was found to have committed serious misconduct by

having said that he would watch Mr Brewerton's hours, having used a certain tone and having spoken loudly, which did not constitute misconduct at all.

*The opening the electrical cabinets*

[31] During his evidence to the Authority, Mr Johns, the decision maker at the disciplinary process, said that he had not dismissed Mr Watson for opening the electrical cabinets or for acting in breach of the final written warning, but that the fact that Mr Watson had opened an electrical cabinet again, despite being told not to, did form part of the decision to dismiss. Mr Johns would still have dismissed Mr Watson for the harassment issue alone, he said.

[32] I accept Mr Johns' evidence in this respect. Whilst it is the case that Mr Johns' letter dated 6 October 2011 setting out the allegations against Mr Watson made no mention of Mr Watson opening the cabinets, and Mr Johns must inevitably have had the knowledge of the opening of the cabinets in his mind, as it formed the background to Mr Brewerton's complaint, there is no evidence that Mr Johns dismissed Mr Watson for doing so. I cannot, therefore, find that Mr Watson was prejudiced in this respect.

*Displaying unwelcome behaviour towards other employees was not serious misconduct*

[33] The letter of dismissal dated 31 October 2011 (which was not very clearly expressed in my view) records that the company was satisfied that Mr Watson had made a comment about watching Mr Brewerton's hours, and that, given the context of the discussion of Mr Brewerton's licence not being at risk, and the *tone* used by Mr Watson, the company was satisfied that the comment was unwelcome behaviour towards another person, overbearing supervision, and inappropriate [behaviour] towards a subordinate. The letter went on state that, as this conduct occurred in response to Mr Brewerton reporting a genuine safety issue, it constituted serious misconduct.

[34] Whilst *unwelcome behaviour towards other employees* is treated as misconduct, and not serious misconduct in the Corrective Action Policy, the Bullying and Harassment Policy of the company in force at the material time includes, as an example of harassment, *overbearing supervision or other misuse of power or position*.

Harassment includes *the threat of dismissal, loss of promotion, benefits or other entitlements, as a result of refusal of sexual or other favours. Harassment (sexual, racial, physical, psychological)*, is characterised as an example of serious misconduct in the Corrective Action Policy.

[35] Mr Johns found that Mr Watson had threatened to watch Mr Brewerton's hours, implying that he would curtail them. My understanding of Mr Johns' evidence is that he understood this threat to mean that Mr Watson was acting in retribution towards Mr Brewerton for encouraging staff members to put in an incident report about Mr Watson wrongfully opening an electrical cabinet again. Mr Johns designated this threat as *unwelcome behaviour towards another person, overbearing supervision, and inappropriate [behaviour] towards a subordinate*. I am satisfied that, in all the circumstances, a fair and reasonable employer is capable of treating these types of conduct as amounting to serious misconduct. Even if they do not technically constitute *harassment* as strictly defined in the respondent's Bullying and Harassment Policy (and I believe they do), given the context of the conversation between Mr Watson and Mr Brewerton, a reasonable employer could treat these actions as a serious failure by a supervisor to behave appropriately towards a subordinate employee.

[36] In addition, whilst Mr Johns accepted that it was *advice* that Mr O'Connor had given to Mr Watson not to meet with Mr Brewerton without a third person present, and not an instruction, the Corrective Action Policy also characterises as serious misconduct *wilful disobedience to a lawful and reasonable request*. I believe that Mr O'Connor's advice did amount to a lawful and reasonable request, which Mr Watson wilfully ignored (to his later avowed regret). However, this failure to follow Mr O'Connor's advice did not form a material part of the reason for dismissal and so no more will be said about it.

*Mr Johns took into account an historical issue which Mr Watson had not been told would be taken into account*

[37] The historical matter in question related to a 12 month Final Written Warning that had been given to Mr Watson with effect from 29 November 2010 for smoking in a non designated area, failing to implement a formal risk assessment before activating the hydraulic power pack of a crusher, and for making comments of an inappropriate personal nature to several team members.

[38] The memorandum to Mr Watson that accompanied the written warning, given to him in January 2011, referred, *inter alia*, to remarks made to his team members, which it was stated, displayed *poor judgement, and appeared to be deflecting attention from the real issues, which in this case the company considers to be your own performance as a leader of the maintenance work team*. The company expressed a willingness to allow Mr Watson to attend *Turning Point* training, and a 9 day supervisory course to ensure that Mr Watson had *access to opportunities to develop skills required for the position of Maintenance Supervisor, some of which you need to improve*.

[39] During his evidence, Mr Johns acknowledged that he had considered part of the history (namely this final written warning and the incidents giving rise to it). Under cross examination, Mr John said that he had been considering the behaviour that had been demonstrated by Mr Watson, but that Mr Watson had not been dismissed due to the incident in 2010.

[40] Whilst Mr Johns was entitled to consider that history when reviewing the incident with Mr Brewerton, especially as the 2010 written warning was still live on Mr Watson's file, Mr Johns accepts that he did not tell Mr Watson that he was doing so. However, Mr Johns should have made clear to Mr Watson that it was relevant to his decision making, so as to give Mr Watson a chance to comment on the relevance of the 2010 written warning to the matter at hand.

[41] Section 103A(3)(b) of the Employment Relations Act 2000 (the Act) requires an employer to raise its concerns with the employee before dismissing. The respondent had concerns about Mr Watson's behaviour towards Mr Brewerton, and Mr Johns had in his mind (quite reasonably) the previous behaviour of Mr Watson towards subordinate staff members. However, by not sharing this concern about the previous behaviour being similar to the behaviour under investigation, the respondent acted in breach of s. 103A(3)(b).

[42] Therefore, this failing does render the procedure defective, and contributes to my finding that the dismissal was unjustifiable for reasons of procedure.

*That the allegations that Mr Watson spoke to Mr Brewerton in an inappropriate tone, that he was going to watch Mr Brewerton's hours and that the respondent saw this as serious misconduct, were never put to Mr Watson*

[43] The thrust of this submission is that the reasons for the dismissal are different from the original allegations. The allegations letter dated 6 October 2011 from Mr Johns to Mr Watson did not contain specific reference to watching Mr Brewerton's hours and an inappropriate tone. However, prior to the disciplinary meeting Mr Watson had been given a copy of Mr Brewerton's letter of complaint and that stated that Mr Watson had said he would, inter alia, watch Mr Brewerton's hours. Mr Watson was also given a copy of the 17 October 2011 Investigation Report prepared by Ms Sutton prior to the disciplinary meeting. That Report referred to Mr Systemans' statement relating to Mr Watson's tone of voice and the nature of comments heard.

[44] Ms Sutton's Report states:

*I am therefore satisfied that Terry's intention was to pressure Trevor to either withdraw his statement relating to the electrical cabinet incident or to tell Trevor that he(Terry) intended to punish Trevor for what he had done. Terry knew Trevor was uncomfortable with the discussion.*

[45] I am satisfied that the totality of the documents given to Mr Watson via his legal advisors prior to the disciplinary meeting made clear what the detailed allegations against him were, including the manner and contents of the conversations which were the subject matter of Mr Brewerton's complaint. I am also satisfied that Mr Watson was, or should reasonably have been clear that he faced allegations that could amount to serious misconduct justifying dismissal for having made threatening comments to Mr Brewerton. In my view, the dismissal letter, on a careful reading, does indicate that Mr Watson was indeed dismissed for having made comments which Mr Johns construed as threatening towards Mr Brewerton. Mr Watson also had ample opportunity and time to address in detail the substance of the investigation report that was given to him on 18 October.

[46] In summary, although the dismissal letter focuses on different aspects of the totality of the allegations than those highlighted by the allegation letter dated 6 October, the totality of those allegations was made clear to Mr Watson in the documents that were provided to him. Given that Mr Watson was represented by experienced and professional counsel during the period leading up to the disciplinary

meeting, I do not believe that Mr Watson would have been disadvantaged by the contents of the allegation letter. Had Mr Watson been an unsophisticated, low level employee with no representation, I might well have found differently.

*Mr Brewerton had accepted Mr Watson's apology for what he had said during that part of the conversation*

[47] Mr Brewerton's letter of complaint states that he *reluctantly accepted* [Mr Watson's] *apology for that part of it, but reinforced that fact as I am consistent*. It is not clear exactly what part Mr Brewerton believed Mr Watson apologised for, but the letter appears to suggest it was for Mr Watson shouting *this conversation has never taken place – I'll deny everything*. Mr Brewerton's diary entry suggests that the apology was for saying he would keep an eye on what Mr Brewerton was doing on site. Mr Watson's evidence to the Authority was that he had apologised *if [he] had upset [Mr Brewerton] in anyway*.

[48] The fact is, however, that Mr Brewerton was plainly still very exercised by the conversation that he had had with Mr Watson, as is evidenced by the fact that he submitted his letter of complaint despite having been asked by Mr Johns to reconsider doing so, and to reflect upon the ramifications. Therefore, whatever it is exactly that Mr Watson apologised for, it did not assuage Mr Brewerton's feelings of upset. Under such circumstances, I believe that it was reasonable for Mr Johns not to have considered that the apology lessened the effect of Mr Watson's actions to the extent that dismissal was no longer justified.

*That the respondent should have re-interviewed Mr Systemans*

[49] Mr Johns said in evidence that he was in part persuaded that Mr Watson had spoken inappropriately to Mr Brewerton by the evidence of Mr Systemans, a senior metallurgist whose office was next to or very close Mr Watson's. Mr Systemans had told Ms Sutton that he had heard Mr Watson say *I don't know what your objective is but I'll definitely be watching you*. Mr Systemans effectively told Ms Sutton that he interpreted that as a threat of retribution. He also said that he heard Mr Watson use a *slightly intimidating tone* and that he had never heard that kind of dialogue between the two men before. Mr Systemans also said that he did not hear Mr Brewerton's voice but that Mr Watson's voice was coming through quite strongly.

[50] It is not clear from the interview notes made by Ms Sutton whether Mr Watson's account of the conversation that Mr Systemans had overheard had been put to Mr Systemans. It would appear not. Given that, and the fact that Mr Johns relied upon Mr Systemans' account to help justify a finding of serious misconduct, I believe that Mr Johns should have re-interviewed Mr Systemans (or got Ms Sutton to have done so) to have put to him Mr Watson's account of the conversation that Mr Systemans had overheard. Mr Systemans was the only third party who witnessed anything about the conversation between the two men. It would also have been useful for the respondent to have established why Mr Systemans had believed that Mr Watson had been threatening retribution for example.

[51] On balance, I believe that this failure to re-interview Mr Systemans and put to him Mr Watson's account was a failure to sufficiently investigate the allegations against Mr Watson, in breach of s 103A (3)(a) of the Employment Relations Act 2000. This contributes to my finding that the dismissal was procedurally flawed.

*That the respondent should have re-interviewed Mr Brewerton*

[52] I also believe that Mr Johns' failure to interview Mr Brewerton was a flaw which renders the process unfair. First, Mr Brewerton had declined to speak to Ms Sutton about his complaint. This alone should have alerted Mr Johns to the possibility that Mr Brewerton may have been hiding something. Second, and more importantly, Mr Watson had, in his response, raised a complaint of having been bullied himself by Mr Brewerton in the past. The line of questioning by Ms Sutton of other staff indicated that she was aware that there may have been a history between Mr Brewerton and Mr Watson which needed further investigation. The failure to explore whether Mr Brewerton was biased against Mr Watson and motivated by malice in his complaint was not in anyway explored with Mr Brewerton.

[53] Third, Mr Watson was dismissed by Mr Johns on the strength of a written complaint by Mr Brewerton, which was partially supported by Mr Systemans, whom Mr Johns also did not interview. Such a serious sanction demanded a thorough exploration of the allegations, given the size and resources of the respondent, and this must include speaking to the very person whose words were preferred above those of Mr Watson.

[54] In summary I believe that the failure to question Mr Brewerton was not the action that a fair and reasonable employer could have taken in all the circumstances and so contributes to my conclusion that the decision to dismiss was procedurally unjustified.

*That there were no grounds to have concluded that Mr Watson used an inappropriate tone*

[55] Mr Johns' letter of dismissal stated:

*We are satisfied that you made the comment about watching Trevor's hours. The comment was made in the context of the discussion of Trevor Brewerton's licence not being at risk, that being partly why he supported the incident report about your safety breach. In that context and given the tone that you used, we are satisfied that the comment about watching Trevor's hours was unwelcome behaviour towards another person, overbearing supervision, and inappropriate towards a subordinate.*

[56] This wording suggests that the reason for the dismissal was not the tone used, but the words used by Mr Watson and the intent behind them. The respondent's conclusion about the tone used supported the interpretation it placed upon those words; namely unwelcome behaviour and overbearing supervision. The conclusion reached about the tone came from Mr Systemans' evidence, that he had heard Mr Watson call Mr Brewerton in to his office *by saying loudly "come here, come here" in a get over here now! Kind of tone*. He said it was a *slightly intimidating tone*. He also referred to Mr Watson saying that he would *definitely be watching you* as sounding revengeful, like *retribution* and that *it sounded a bit rough*.

[57] In light of this evidence from Mr Systemans, I believe that it was perfectly reasonable for Mr Johns to have concluded that Mr Watson said the words *I'll be watching you* in an inappropriate tone.

*That Mr Brewerton's complaint did not provide any details as to what Mr Watson said or did that was offensive, arrogant and intimidating*

[58] Mr Brewerton's complaint said that Mr Watson's *attitude and manner over these issues to be offensive, arrogant and intimidating*. This was repeated in Mr Johns' letter of 6 October 2011 as one of five numbered specific allegations that would be investigated.

[59] It is true that this letter did not provide details as to what exactly constituted an *offensive, arrogant and intimidating* attitude and manner. However, the letter of

dismissal does not make mention of this aspect of the list of allegations and it can be safely concluded that this aspect did not form part of Mr Johns' reason for dismissal. Whilst the allegation was too vague and generic to properly form a separate allegation capable of investigation, as no finding was made in respect of it I cannot find that Mr Watson was treated unfairly in respect of this allegation.

*That the respondent failed to take any action on Mr Watson's complaint that Mr Brewerton had bullied him*

[60] I have already found that Mr Johns' failure to interview Mr Brewerton was a flaw in the process which renders the dismissal procedurally unjustified. This arises partly from the fact that Mr Watson had stated that he had been bullied by Mr Brewerton. Such an allegation, even if unlikely on its face, and despite the fact that Mr Watson said he wanted to take it up *after the case was finalised*, still needed to be taken seriously by the respondent as part of the disciplinary investigation into Mr. Watson's conduct as it may have coloured the complaint by Mr Brewerton. Therefore, this failure to investigate Mr Watson's complaint does render the dismissal unjustified.

*That the decision to dismiss was predetermined*

[61] I am satisfied that there is no cogent evidence to suggest that the decision to dismiss had been predetermined. I believe that Mr Johns was a credible witness who had tried to approach the disciplinary matter with an open mind. I am also satisfied that Mr Johns explored ways of avoiding Mr Watson's dismissal.

*That the preliminary report did not provide a preliminary finding on penalty*

[62] Mr Johns' letter dated 6 October 2011 stated that Mr Watson would be advised of *the preliminary views as to findings and any penalty (if applicable)*. The investigation report that had been given to Mr Watson did not mention any recommended penalty however. This is clearly a failure by the respondent to follow its own procedures. However, it does conclude that Mr Watson's actions amounted to serious misconduct and the letter of 6 October does state that the investigation could result in disciplinary action that may include dismissal. Overall, therefore, I do not believe that Mr Watson was misled by this failure into believing that he did not face dismissal as a possible outcome; especially as Mr Watson was represented by counsel at the time.

*That the respondent did not investigate Mr Watson's explanations*

[63] Mr Watson put forward a number of explanations for his conduct on 27 September 2011. The principal ones were that he had been speaking to Mr Brewerton about the (non-existent) risk of him losing his licence and not about withdrawing the report or opening the electrical cabinet; that his comment to Mr Brewerton about hours related to the Lime Project; that Mr Brewerton had taken his comments out of context; and that he had spoken loudly because the environment was noisy.

[64] Mr Johns did not interview Mr Brewerton to verify what his response was to these explanations. In light of the fact that Mr Johns and Ms Sutton had never spoken to Mr Brewerton about the substance of his complaints, the respondent's failing did not fall within the range of actions that a fair and reasonable employer could have taken in all the circumstances. I therefore agree that, in this sense, the respondent did not fully investigate Mr Watson's explanations and that this rendered the dismissal unjustified.

*That Ms Sutton interviewing Mr Johns, the decision-maker, as part of the investigation, prejudiced the process*

[65] It was an unusual step for Ms Sutton to have interviewed the decision maker. However, I do not believe that this step tainted the process, as was submitted by Mr Goldstein, because Mr Johns would only have articulated to Ms Sutton what would have been in his mind in any event when he made his decision.

*That Mr Brewerton had prejudiced the process by disclosing to his work mates his allegations in relation to Mr Watson*

[66] Mr Brewerton admitted that he had told his workmates about the conversation he had had with Mr Watson. He said he did this before he had been told to keep the matter confidential. Ms Sutton spoke to the staff to investigate the matter after this had happened.

[67] Whilst there is the risk that Mr Brewerton speaking to his workmates about the issue may have coloured their views about Mr Watson's relationship with Mr Brewerton, there was not a great deal that the company could have done about that. It was bound to investigate Mr Brewerton's complaint. It was also not

unexpected that Mr Brewerton would have felt inclined to tell his colleagues of a conversation with his supervisor which he felt had been inappropriate.

[68] Having reviewed the reports of the interviews with the staff, there is nothing that particularly suggests their evidence was tainted by their knowledge of the conversation. Therefore, I do not conclude that the process had been prejudiced by Mr Brewerton having told his work mates of the conversation he had had with Mr Watson.

*The findings of Mr Johns did not constitute misconduct*

[69] Mr Goldstein asserts that Mr Watson was found by Mr Johns to have committed serious misconduct by having said that he would watch Mr Brewerton's hours, having used a certain tone and having spoken loudly, but that these actions did not constitute misconduct at all.

[70] I believe that this is an overly literal and narrow reading of the dismissal letter. Whilst it could have benefitted from a clearer and more elegant expression, when read overall against the context of the allegations, and taking into account Mr Johns' evidence, which I accept as credible, it is clear to me that Mr Johns made a finding that Mr Watson had sought to threaten retribution against Mr Brewerton for having encouraged staff members to lodge an incident report about Mr Watson opening an electrical cabinet. That is not only misconduct but is capable of constituting serious misconduct, as I have found above. Therefore, I do not accept, as has been submitted, that the decision to dismiss Mr Watson was substantively unjustified on the basis of the respondent's findings.

[71] I do accept, however, that had Mr Johns carried out a fair process, he may have been availed of information which may have changed his view on what had transpired between the men and so whether serious misconduct had been committed. On balance, however, I do not believe that Mr Johns' is likely to have reached a different conclusion. In particular, despite Mr Watson's protestations to the contrary, I believe that Mr Watson is likely to have spoken to Mr Brewerton about the incident (and not the loss of licence issue) as Mr Watson did not have the information from the EWRB he was relying on to reassure Mr Brewerton until after the conversation. I also believe that Mr Brewerton was genuinely upset by the conversation.

**Did the giving of the final written warning to Mr Watson on 5 October create an unjustifiable disadvantage?**

[72] Mr Johns accepts that he did not hold a meeting with Mr Watson before he issued the final written warning, that he did not give him copies of relevant documents gathered in the course of its investigation and did not warn him that he was at risk of dismissal. These failures clearly create a basic procedural flaw.

[73] However, I accept Ms Brook's, the respondent's counsel, submission that Mr Watson was well aware of the company's concerns, and that he explained the incident on 23 September by way of a memo, which was taken into account by the company. Furthermore, Mr Watson signed the written warning to acknowledge that he had read and understood the implications of the warning and that he was committed to the agreed action plan set out in it. In view of this acknowledgment, I am not convinced that Mr Watson was disadvantaged by the procedural flaw, as if he had been given all the relevant information, and been told that he faced dismissal, it is highly likely that he would still have been given the warning and that he would have accepted it.

[74] If I am wrong in that analysis, and if Mr Watson had been unjustifiably disadvantaged by the procedural flaw, Mr Watson's blameworthy action in opening the electrical cabinet on 23 September 2011 in contradiction of the respondent's clear instructions contributed entirely to the situation that gave rise to his personal grievance in this respect and so I would reduce to nil any remedies that would otherwise have been awarded pursuant to s. 124 of the Act.

**Remedies for unjustified dismissal**

[75] Having found that Mr Watson's dismissal was unjustified, I must now turn to the appropriate remedies. Mr Watson does not seek reinstatement and so I turn to the question of sections 123 (b) and 128 of the Act.

[76] Mr Goldstein seeks lost wages from the date of dismissal until the date of the investigation meeting, together with an award for future loss for three years, until 11 September 2015.

[77] S 128 (3) provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that provided in

subsection 128 (2), namely the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[78] Bearing in mind the principles set out in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, as applied in a string of cases, the latest of note being the Court of Appeal case of *Sam's Fukuyama Food Services Ltd v Jian Zhang* [2011] NZCA 608, the discretionary nature of the remedy under s 128 is inconsistent with any principle requiring *full* compensation to be awarded. Amongst the factors to be considered features the consideration of whether other contingencies may have resulted in termination of the employee's employment, but for the unjustifiable dismissal.

[79] Mr Watson's gross annual salary prior to dismissal was \$120,000 gross. He was dismissed summarily on 31 October 2011, without payment in lieu of notice. He obtained employment with effect from 7 November 2011, in a significantly lower paid, and lower skilled role. Medical evidence before the Authority suggested that Mr Watson's health suffered after the dismissal and that he was not capable of doing a more responsible job. Mr Watson explained that he had looked into qualifying in New Zealand as an electrician, but it involved getting information from his previous employers, including from a mine in Zimbabwe that has since closed. He may also have to take examinations. He also said that he has been seeking roles, including in Australia.

[80] I accept that Mr Watson has tried to mitigate his losses and that his health, and age (late fifties) have prevented him, at least initially, from finding more responsible and higher paid work. However, in deciding on the length of time in respect of which Mr Watson should be awarded reimbursement of lost wages, applying the principles of *Nutter*, I must take into account the possibility that Mr Watson would have been dismissed in any event within a relatively short period of time.

[81] In particular, I am cognisant of his final written warning (which although issued in a procedurally flawed way, was entirely justified) and which was live for a year from 23 September 2011. I also note the after discovered misconduct of Mr Watson when he opened an electrical cabinet to take a photograph of it for the safety alert he had been instructed to prepare and circulate.

[82] In light of this, and the evidence I heard overall, I believe that Mr Watson demonstrated a notable propensity in the months leading to his dismissal to wilfully disobey reasonable instructions which he felt were less important than getting the job done in the way that he felt best. In the environment of a mine, where safety is paramount, this propensity is likely to have led to a fair dismissal within a relatively short period of time in my view.

[83] I therefore believe that it would not be just for the Authority to exercise its discretion and award Mr Watson reimbursement of loss of wages for any more than the period of three months from dismissal. Three months' gross loss of earnings is therefore the starting point for an award of compensation for lost remuneration under s 123, taking into account s. 128 (3). Taking into account Mr Watson's earnings between 1 November 2011 and 30 January 2012, this loss amounts to the gross sum of \$18,907.33.

[84] I will briefly address Ms Brook's submission that no loss of wages should be reimbursed in accordance with the principles of *Waitakere City Council v Ioane* [2005] ERNZ 1043, as Mr Watson would have been fairly dismissed if the correct procedure had been followed. Whilst I do believe that, on the basis of the information it had before it, dismissal by the respondent had been substantively justified, I cannot say with certainty that Mr Johns would still have decided to have dismissed Mr Watson had he explored the allegation by Mr Watson that he had been subject to bullying by Mr Brewerton and that Mr Brewerton's motivation in raising the complaint was tainted by malice. Due to this uncertainty, I believe that it would not be safe to conclude that, had the procedural flaws I have identified not taken place, Mr Watson's dismissal would still have occurred. Accordingly, I believe that it is just to reimburse a proportion of Mr Watson's lost wages.

[85] I do not, however, believe that it would be just to award interest on the sum awarded for lost wages as the justice of the case does not support it.

[86] Turning to compensation under s. 123(1)(c)(i), Mr Watson, his wife and his doctor gave evidence of the effect upon Mr Watson of being dismissed. Mr Watson had suffered mental health issues in the past and, as late as February 2012, he suffered *deep depression* and *anxiety* according to his doctor, which were seemingly connected to the dismissal but exacerbated by the ensuing legal process. Mr Goldstein suggests

that Mr Watson should be awarded the sum of \$30,000 in respect of the humiliation, loss of dignity and injury to the feelings of Mr Watson.

[87] I accept the submissions of Ms Brook for the respondent that the respondent cannot be responsible for adverse feelings suffered which cannot be attributed to its actions. When I take into account Mr Watson's medical history which was revealed in evidence (but which I shall not detail in accordance with the non publication order) I believe that there is significant uncertainty as to what exactly has caused Mr Watson's latest depression and anxiety. Whilst I accept that the dismissal has played a material part in that process of deterioration of Mr Watson's health, it appears that the legal process has also contributed for example. I see no fault in the way that the respondent or its counsel have handled the legal process and so do not believe that the respondent should be responsible for any distress caused by that element of Mr Watson's distress.

[88] Accordingly, I cannot accept that \$30,000 is an appropriate sum to award to Mr Watson. I believe that the sum of \$10,000 is more likely to justly reflect Mr Watson's humiliation, loss of dignity and injury to feelings in being dismissed unjustifiedly.

[89] S 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[90] Mr Watson, has been, in my view, a significant author of his own misfortunes. I am mindful in particular of:

- a. Mr Watson's opening the electrical cabinet on 23 September 2011 in flagrant disregard of a clear instruction, which was the catalyst for the events leading to Mr Brewerton's complaint;
- b. Mr Watson telling a junior member of staff (Ms Swaine) not to tell Mr Brewerton (one of the mine's electricians) that he had opened the cabinet;
- c. His speaking to Mr Brewerton about the incident when advised not to without a third person present;

- d. His doing so at least twice more, despite him knowing that Mr Brewerton was upset; and
- e. The fact that Mr Watson spoke to Mr Brewerton in such a way as to lead Mr Brewerton to believe that he was being subjected to retributory action.

[91] Despite Mr Watson's assertions that his intentions were innocent and well meant, the most charitable light that can be shone on them is that they were extremely ill judged. In my view, the actions were patently blameworthy and did contribute significantly towards the situation that gave rise to the personal grievance. Furthermore, I believe that it is appropriate to reduce the remedies that would otherwise be awarded. I believe that it is appropriate to reduce those remedies by 75%.

[92] Accordingly, I award to Mr Watson the gross sum of \$4,726.83 in respect of his loss of wages, and the further sum of \$2,500 as compensation for humiliation, loss of dignity and injury to feelings.

### **Costs**

[93] Costs are reserved. The parties are invited to attempt to agree amongst themselves how costs should be dealt with. However, if no agreement can be reached within 28 days of the date of this determination, Mr Watson' counsel may serve and lodge a memorandum to which the respondent shall have a further 14 days within which to serve and lodge a response.

David Appleton

Member of the Employment Relations Authority