

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 73
5399568

BETWEEN BEN WILLIAMS
 Applicant

AND BIG IMAGE PRINT 2009
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Tessie von Dadelszen, for the Applicant
 Grant Muir, for the Respondent

Investigation Meeting: 7 March 2013

Submissions Received: 7 & 20 March and 12 April 2013 from the Applicant
 9 April 2013 from the Respondent

Determination: 27 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ben Williams was employed by Big Image Print 2009 Limited (Big Image Print) between 8 November 2010 and 14 November 2011, initially as a part time employee. He moved to full time employment from 2 February 2011. This was Mr Williams' first employment since completing studies at Natcoll School of Design.

[2] Mr Williams' employment was without incident until 17 October 2011 when he was suspended from his employment for two days, and received 7 written warnings two weeks later. He was dismissed without notice on 14 November 2011.

[3] Mr Williams claims his suspension was unjustifiable and he was disadvantaged by it and by the written warnings he received. He says his dismissal

was unjustifiable. He received no indication from his employer that disciplinary action against him was being considered. Nor was he informed at any stage that he had the right to be represented in disciplinary meetings. Mr Williams also claims he was not paid the correct holiday pay on the termination of his employment.

[4] Mr Williams was unable to obtain alternative employment for 8 months following his dismissal. He seeks lost remuneration for that time, compensation for hurt and humiliation, outstanding holiday pay as well as interest and costs.

[5] Grant Muir has been a director of Big Image Print Limited for approximately 4 years. Mr Muir, who represented Big Image Print at the investigation meeting, carried out the actions which formed the basis of Mr Williams' claims before the Authority. Mr Muir denies all of those claims and says Mr Williams' actions contributed entirely to his dismissal.

[6] He says the suspension was justifiable because serious matters had to be investigated concerning Mr Williams' employment. He thought it was fair to Mr Williams that he not be at work while that investigation was carried out. Mr Muir maintains the written warnings were justified as 3 prior meetings had taken place with Mr Williams over concerns about his conduct and performance. The dismissal was justified because Mr Williams continued to disregard previous warnings and did not follow instructions. Mr Muir says that holiday pay was calculated appropriately and Mr Williams was paid correctly.

Issues

[7] The issues for the Authority to determine are whether Mr Williams:

- (a) Was unjustifiably disadvantaged by his suspension on 17 October 2011;
- (b) Was unjustifiably disadvantaged by the written warnings he received on 28 October 2011;
- (c) Was unjustifiably dismissed; and
- (d) Received the correct holiday pay owing to him at the time of dismissal.

Background and Evidence

[8] During his employment with Big Image Print, Mr Williams' duties combined customer service and digital printing. He reported to the shop manager, Joseph Muir, who is the son of the Managing Director, Grant Muir. Mr Williams says he found the relationship with Mr Joseph Muir quite difficult. However, he enjoyed his work and was pleased to be offered full time employment from 2 February 2011. Mr Williams says he began to feel more stable in his employment from that time and believed he was doing a good job. He says he had no reason to believe his employer held any different view.

[9] On Monday 17 October 2011, Mr Muir took Mr Williams aside and told him he had some concerns to discuss relating to Mr Williams' performance and his undercharging of clients. Mr Williams says Mr Muir refused to give him any specific information and told him to go home and not come back for two days. He says Mr Muir used the word "*suspension*", and "*at no stage did Mr Muir seek my agreement to being off work for 2 days*". Mr Williams was upset and shocked.

[10] Mr Muir says he had met with Joseph Muir, on Friday 14 October 2011, a day on which Mr Williams was on sick leave. Mr Joseph Muir had raised with his father a number of concerns about Mr Williams' performance, including his use of the internet for personal purposes, his undercharging of clients, and his undertaking design work for personal gain on work computers in work time.

[11] Mr Muir says he raised these matters with Mr Williams during the 17 October 2011 meeting. His diary note for the day records that he also raised concerns about Mr Williams' slack attitude that had been raised by a co-worker, and the fact that Mr Williams had been applying for other jobs. Mr Muir thought it would be in Mr Williams' best interests not to be at work while he investigated these concerns. He denies telling Mr Williams he was suspended but acknowledged that he referred to Mr Williams having been "*suspended on full pay for two days*" in his letter to Mr Williams of 28 October 2011.

[12] Ben Williams returned to work on the afternoon of 19 October 2011 and met again with Mr Muir. Mr Williams recorded the meeting on his cellphone and a transcript of the meeting was provided in the bundle of documents. Additionally, the

original recording was made available in the investigation meeting, with the technical assistance of Mr Muir.

[13] Towards the beginning of the meeting Mr Muir referred to matters being “*very serious*” and there being “*possibly a substantial amount of income lost*”. It was clear from Mr Williams’ response that he did not know what Mr Muir’s specific concerns were. A number of issues were raised with Mr Williams in that meeting. These covered quotations allegedly given by Mr Williams, charging of work he had been responsible for, work he had undertaken privately for a Big Image Print client, and internet usage.

[14] Mr Muir gave Mr Williams insufficient detail about many of these matters for Mr Williams to identify what piece of work he was referring to. This led to Mr Williams having to guess which piece of his work it might have been. An example is when Mr Muir stated in the meeting “*...there was a guy that came in here with a \$28 receipt, \$48 worth of actual print work that was off the price list and had been given that by you, he paid for that and expected to pay the \$28 the next time and Joseph said oh that’s not right. And started looking at the price list.*”

[15] From Mr William’s response, it was clear he had no real idea which client Mr Muir was referring to, and was forced to speculate about who it could have been and what situation might have led him to charge the amount quoted by his employer. It was also clear that Mr Muir was raising examples of undercharging that had been given to him by Joseph Muir. Mr Muir, too, had difficulty at times in identifying which piece of work, or which customer, he was referring to in the examples he raised. Mr Muir said he thought that Joseph had raised these issues with Mr Williams, although Mr Williams denied that Joseph had done so.

[16] Mr Williams provided explanations as best he could on the information available to him. One of the issues raised by Mr Muir on 17 October 2011 had been that Mr Williams was undertaking private work for a Big Image Print client identified as Yasmin. Mr Williams had reminded Mr Muir that he had approved the work which involved an illustration Big Image Print was unable to undertake. Mr Muir had made a diary entry on 17 October 2011, noting Mr Williams’ explanation, and recording that he had not approved the work. Nonetheless, the transcript and recording of the 19 October 2011 meeting clearly show that Mr Muir accepted he had approved Mr

Williams doing that work in his own time. No other instances of private work for the company's clients were raised with Mr Williams.

[17] The meeting was not acrimonious and Mr Muir appeared to accept Mr Williams' explanations for many of the issues he had raised. Mr Williams apologised for one matter raised by his employer relating to a job application. This was raised by Mr Muir in the context of the "*huge amount of time*" Mr Williams spent "*surfing the net*". Mr Muir noted from the computer logs he had accessed that Mr Williams had been clearing personal emails; had gone onto the *Trade Me* site; and had also applied for jobs on the work computer. He expressed particular disappointment at the last item. Mr Williams denied accessing the internet for personal use, and explained that he would often go onto the internet for design work he undertook as part of his employment. He apologised for a job application being on his computer and said that it had been a one-off situation.

[18] There was considerable discussion about pricing of print jobs with Mr Muir informing Mr Williams clearly that when quotes were given to clients they should be out of the company's price book. If they were not, then the quotes had to be cleared by either himself or Mr Joseph Muir. Towards the end of the meeting Mr Muir asked Mr Williams if he wished to return to work immediately and Mr Williams said he had been sick with worry for the last couple of days and agreed with his employer to start again next morning, Thursday, 20 October 2011.

[19] Mr Muir said he was "*happy to continue and move on from this*" if Mr Williams was happy to do so. Mr Muir noted that he would put Mr Williams' pay increase through the following week. He would also record the outcome of their discussions so that Mr Williams had a summary of what they'd spoken about and the conclusions they had reached. Mr Muir informed Mr Williams that he would not be coming in to work the following day but would have the letter ready on Friday, 21 October 2011 when he returned.

[20] Mr Muir gave no indication that he considered any of the matters they had discussed warranted disciplinary action. The meeting went on to more positive matters with a discussion about opportunities for Mr Williams to advance and do more interesting work, and also increase his skills in his employment with Big Image Print.

[21] Mr Williams returned to work the following morning, Thursday 20 October 2011. Mr Muir says he was also at work that day, despite having said the previous day that he would not be there. He claims to have had a meeting with Mr Williams, at Mr Williams' request. Mr Williams disputes this and is adamant Mr Muir was not at work as he had indicated the previous day. Mr Williams says he continued to work as normal but felt stressed and worried that he was being watched all the time. He says he received no training or guidance after the meeting of 19 October 2011 and was given no indication that there would be any repercussions from that meeting.

[22] Evidence was also given in the investigation meeting by Joseph Muir to whom Mr Williams reported on a day to day basis. He asserted in his written evidence that he had talked to Mr Williams a number of times about his internet usage and had shown him internet logs showing that usage. Mr Williams denied that had occurred and Mr Joseph Muir agreed under questioning in the investigation meeting that he had not raised the computer logs with Mr Williams. He said that once a month he would tell employees that they should use their computers for personal use only in their breaks. He acknowledged he had only raised this informally.

[23] On 28 October 2011, Mr Williams says Mr Muir again pulled him aside without warning and gave him a letter. The letter referred to the meeting Mr Muir claimed to have had with him on 20 October 2011. It outlined the issues that were discussed on 19 October, particularly the charging issues. A number of new issues were raised in the letter, none of which, according to Mr Williams, had previously been raised with him. The letter noted that:

Each of these seven matters I have outline [sic] constitutes a written warning and is to be read as such.

[24] The letter went on to note that the losses to Big Image Print from these issues far exceeded \$600 and that if, for any reason, Mr Muir had to issue Mr Williams another written warning, then his employment would terminate.

[25] Mr Muir says that between the meeting he insists took place on 20 October 2011 and the date of issuing the written warnings, he had had numerous reports from Mr Joseph Muir about Mr Williams, relating to undercharging issues and excessive internet usage. He claimed to have talked to 2 of Mr Williams' colleagues in the Big Image Print shop who had said Mr Williams was not using the price book. Mr Muir acknowledged he had not, however, spoken with Mr Williams about these matters.

[26] Mr Muir explained that he did not think Mr Williams was taking seriously the discussions they had recently had. For that reason he decided to issue written warnings to Mr Williams. He says he asked Mr Williams on 28 October 2011 why he was still undercharging clients and showed him job sheets in his, Mr Williams', handwriting. He says Mr Williams could offer no explanation other than to say he had made a simple mistake, upon which Mr Muir informed Mr Williams he was going to issue him written warnings about his recent non-performance.

[27] Mr Williams says he was not given details about the alleged overcharging which made it difficult for him to respond. He says he apologised for making any mistakes because he thought it possible he had innocently made errors.

[28] The third and final occasion on which Mr Muir called Mr Williams aside without prior notice occurred on the morning of 14 November 2011. Mr Muir took him to a room next to his office because another of his sons, James, was using Mr Muir's office at the time. Mr Williams says the door was left open during the conversation while Mr Muir and Mr James Muir say that it was shut. Mr Williams also says that Mr James Muir walked through the room he and Mr Muir were meeting in part way through and that was humiliating and inappropriate.

[29] Mr Muir raised two issues with Mr Williams in this meeting, both of which concerned major errors he had allegedly made. Mr Williams says that at no point did Mr Muir inform him that he was considering dismissal, and that he simply launched into the issues and then went on to dismiss him without warning.

[30] One issue concerned a menu for a pizza shop on which Mr Williams had worked, and which the client had signed off but later complained about, and had cancelled his cheque for the work. Mr Williams says he was not shown the menu or the alleged mistakes. He could not spellcheck the work as much of it was in Italian, and he had relied on the client's sign-off of the work.

[31] The other matter raised by Mr Muir on 14 November 2011 was a job Mr Williams had worked on and sent back to the client, apparently with a number of components missing. At the investigation meeting, it became clear there was confusion over which job this was, with Mr Williams thinking it had been another menu job for a different restaurant, while Mr Muir claimed it was work for a different client altogether and nothing to do with menus.

[32] Mr Muir says Mr Williams became very agitated during the discussion and raised his voice a number of times. He says Mr Williams became aggressive and swore at Mr Muir. Mr Williams denies that happened. He says he was upset over the allegations and not being given enough information to defend himself in the meeting. Mr James Muir, who did not attend the investigation meeting but whose evidence was provided by way of a written statement and telephone, says he heard raised voices in the office next to him. Although he could not hear what was being said, he could hear Mr Williams becoming “*angry, threatening and abusive*”. In his evidence to the Authority, Mr Muir said that part of the reason for dismissing Mr Williams was Mr Williams’ abusive reaction and failure to give any reasonable explanation to the matters he was attempting to discuss with him.

[33] Mr Williams says Mr Muir dismissed him and told him to leave immediately, which he did. He says he left in a state of shock. He was not given notice, or payment in lieu of notice, and nor did he receive pay for his final day of work on 14 November 2011. Despite looking for work immediately, Mr Williams was not able to obtain permanent employment until June 2012. He received 6 day’s holiday pay in his final payment.

[34] Evidence of the effect on Mr Williams of his dismissal was given by Dr John Fanning, GP, who is Mr Williams’ family doctor. Dr Fanning’s professional view was that Mr Williams “*was suffering from a severe case of acute stress reaction*” when he consulted him in late December 2011. Dr Fanning defined this condition as “*a disorder characterised by a cluster of dissociative and anxiety symptoms occurring within one month of a traumatic event.*” Dr Fanning, whose evidence was given by way of affidavit and telephone participation in the investigation meeting, considered Mr Williams to be unfit to search for new employment between 28 December 2011 and 28 March 2012.

[35] Eleanor Harris-Brouwer, a counsellor, also gave evidence by way of affidavit and telephone participation in the investigation meeting. She had 2 appointments in March 2012 with Mr Williams, who had been referred to her by Dr Fanning. She also gave evidence of her professional view, based on her discussions with Mr Williams, that he was unfit to be seeking new employment from the date of his dismissal.

The law

[36] Whether or not an action is justifiable is determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[37] The Act requires the Authority to apply the test to Big Image Print's actions in suspending Mr Williams from his employment; in issuing him with written warnings; and in dismissing him. In addition to any other factors it considers appropriate, the Authority is required to consider, in relation to each of these actions:

- Whether the employer investigated the allegations against Mr Williams sufficiently, taking into account the resources available to it; and
- Whether it raised its concerns with Mr Williams before taking the actions it did; and
- Whether it gave Mr Williams a reasonable opportunity to respond to its concerns before taking those actions; and
- Whether it genuinely considered Mr Williams' explanations in relation to the allegations against him before proceeding with each of those actions.¹

[38] The Act precludes the Authority from finding a dismissal or action to be unjustifiable solely because of defects in the employer's process if the defects were minor, and if they did not result in the employee being treated unfairly.²

[39] The obligations of an employer with regard to the payment of holiday pay are set out in the Holidays Act 2003.

Was Mr Williams' suspension unjustifiable and was he disadvantaged by it?

[40] Mr Muir's act of sending Mr Williams home for 2 days was a suspension whether or not he used that word at the time. He clearly acknowledged that he had suspended Mr Williams for 2 days in the letter he wrote to him eleven days later conveying 7 written warnings.

¹ Section 103A (3) (a) to (d)

² Section 103A(5)

[41] For a suspension to be justifiable the general rule is that there must be an express provision in the employment agreement sanctioning suspension. Mr Williams was not ever provided with an employment agreement. It follows that there was no contractual sanction for the suspension.

[42] It has been recognised that there is “*no immutable rule requiring that an employee must be told of the employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so*”³ In that decision, the court noted that:

*Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many cases that will call for advice and discussion before determining to suspend; in others, it may not.*⁴

[43] Mr Williams’ situation is not one that fits into the category of cases where the normal requirements of natural justice may be inappropriate. Mr Muir put forward no compelling reason for removing Mr Williams from the workplace while he investigated his concerns. He claimed to have asked Mr Williams if he agreed to take a couple of days off while he (Mr Muir) investigated the concerns he had raised, and said Mr Williams had agreed. Mr Williams denied this.

[44] I prefer Mr Williams’ evidence on that matter and find it more likely that Mr Muir had made up his mind to suspend Mr Williams before their meeting, and that he gave him no opportunity to persuade him otherwise. Nor did Mr Muir properly inform Mr Williams of the specific nature of his concerns, which would at least have allowed his employee to use the time on suspension to prepare a response to those concerns.

[45] There was a complete absence of fair procedure about Mr Williams’ suspension, that made it unjustifiable. The Employment Court has confirmed that “*(i)t is well-established that a suspension of an employee from employment is a disadvantageous action as far as the employee is concerned*”⁵.

³ *Graham v Airways Corporation of New Zealand* [2005] ERNZ 587 at 613

⁴ *Ibid* at 614

⁵ *Sefo v Sealord Shellfish Ltd* [2008] 178 at 188 (paragraph 40)

[46] Mr Williams was paid for the period of suspension so was not disadvantaged financially. However, he referred to the 2 days as “*probably some of the most stressful days I have ever had*”. He was anxious about his job, and the meeting his employer wanted to have with him on 19 October 2011, yet had too little detail of the matters raised by his employer to be able to prepare his responses to Mr Muir’s concerns. I accept his evidence and find that his unjustifiable suspension disadvantaged Mr Williams in his employment.

Was Mr Williams disadvantaged by the warnings of 28 October 2011?

[47] The 7 written warnings conveyed in Mr Muir’s letter of 28 October were not issued following a full and fair investigation, in which Mr Williams had the opportunity to explain the matters put to him and have his explanations genuinely considered. Mr Williams says 3 of the warnings related to matters that had been discussed and resolved at the 19 October 2011 meeting. He says Mr Muir had given him to understand that they were moving forward, and that no disciplinary action would ensue.

[48] Mr Muir submitted that all 7 warnings related to new matters that had arisen on or after 20 October 2011. I am not persuaded he is correct but, if he is, that does not assist his claim that the warnings were justified. This is because Mr Muir acknowledged he had not raised a number of the issues with Mr Williams before issuing him with written warnings. Mr Williams clearly had no opportunity to respond to those concerns.

[49] In any event, I am satisfied from the transcript and recording of the meeting on 19 October 2011 that the warnings relating to 3 of the matters had been discussed and resolved on that day. Those matters related to sick leave, undercharging, and high internet usage.

[50] The sick leave was an issue raised at the conclusion of the meeting by Mr Williams, not his employer. He expressed his unhappiness about Mr Muir querying his vegetarian diet 2 days earlier. Mr Muir responded that he had meant it in a caring way and had raised it because of his concern that Mr Williams was looking after himself. He put it in the context of sick days Mr Williams had taken. Mr Williams had noted that he had not exceeded his sick day limits and had never had an extended period of leave. That part of the discussion ended with Mr Muir saying he had no

concerns as Mr Williams had answered his questions. He reiterated that he “*just wanted to make sure that you were feeling ok. No worries*”.

[51] Mr Muir and Mr Williams had discussed undercharging issues during the 19 October 2011 meeting, although there were frequent occasions when there was too little information for Mr Williams to identify precisely which client or piece of work was the subject of the undercharging concern. Mr Muir made it clear he wanted Mr Williams to stick to the pricing book but gave no indication there would be any repercussions from their discussions.

[52] The issue of Mr Williams’ internet usage was another area that had been discussed, with each expressing different views of what use Mr Williams made of the internet for non-work purposes during work time. The matter that most concerned Mr Muir appeared to be a job application made by Mr Williams that was on his computer. Mr Williams apologised for that and said it was a one-off.

[53] Mr Muir clearly indicated towards the end of the meeting that, on the basis of their discussion, he was happy to move on and he noted that, while he had not put through Mr Williams’ pay rise that week “*for obvious reasons*”, he was happy to do so the following week. Mr Williams said Mr Muir had offered him the pay rise in the week beginning 10 October 2011, telling him he had done a good job. Despite this, Mr Muir’s letter of 28 October 2011 asserts, in relation to the 19 October 2011 meeting, that:

“Also we spoke about the large amount of sick leave you had taken and that I was not going to give you an anticipated pay rise until you showed greater application to your work.”

[54] The kindest interpretation I can attribute to this is that Mr Muir genuinely forgot what he had agreed with Mr Williams in that meeting. Whether that is correct or not, it does not excuse the issuing of warnings for matters from which he had agreed to move on in the course of the 19 October 2011 meeting. All 3 of those warnings were unjustified.

[55] Of the 4 new matters for which Mr Muir issued written warnings in the 28 October 2011 letter, 3 concerned specific instances of undercharging. One concerned Mr Williams’ alleged ignoring of an instruction given to him by Mr Muir on 26 October 2011. Mr Muir acknowledged that he had not previously raised these issues

with Mr Williams. He did not give Mr Williams any forewarning of disciplinary action or inform him of his right to have a support person present at their meeting.

[56] The warnings for those new matters fail to meet minimum standards of fairness and I find them to be unjustifiable. The letter conveying the 7 warnings informed Mr Williams that, if for any reason Mr Muir had to issue him with another written warning, his employment with Big Image Print would terminate. That constituted a disadvantage to Mr Williams in his employment.

Was Mr Williams' dismissal unjustifiable?

[57] Undoubtedly it was. Mr Muir failed to apply even the rudiments of a fair procedure. He gave Mr Williams no forewarning that he wished to discuss matters that could lead to disciplinary action. He offered no opportunity for Mr Williams to have a support person or representative at the meeting. He did not specify the issues of concern clearly enough for Mr Williams to respond properly and, in such circumstances, could not have genuinely considered his explanations before dismissing him.

[58] Mr Muir told the Authority he needed to talk with Mr Williams urgently because he had received information 2 days earlier from Mr Joseph Muir about a printing job Mr Williams had handled involving a restaurant. He also wanted to discuss another print job with Mr Williams, and "*the concerns I had about the significant losses his non-performance had created for my business*".

[59] The inadequacy of the information Mr Muir provided about the 2 issues for which he required explanations meant that Mr Williams had to guess what one of the printing jobs was. From the limited information he was given, Mr Williams was under the impression that both of the printing jobs he was asked to explain on 14 November 2011 concerned restaurant menus. It emerged during the investigation meeting that one of the jobs related to work for a billsticker company. Mr Williams said that work had never been raised with him. I accept his evidence.

[60] There was different evidence from Mr Muir, his son Mr James Muir, and Mr Williams over Mr Williams' behaviour during the 14 November 2011 meeting. I find it unlikely that Mr Williams was as speechless as he claimed to be in the meeting. However, I find it likely that Mr Muir's description of Mr William's aggressive response is an exaggeration. It is more likely than not that Mr Williams was upset

and angry after his dismissal and may have raised his voice. He may have also said he would be taking legal action over his dismissal. While Mr Muir interpreted this as threatening and an attempt to intimidate him, it was no more than a statement of fact that Mr Williams was entitled to make. It did not provide grounds for his dismissal as suggested in evidence by Mr Muir. If it had been, as Mr Muir claimed, a reason for Mr Williams' dismissal, it could be expected that Mr Muir would refer to it in his letter of the same day confirming the dismissal. There was no such reference in the letter.

[61] It was not the action of a fair and reasonable employer to put Mr Williams in the situation of defending his alleged performance failures without ensuring he had sufficient information to do so. Mr Muir failed to do that. I find that his dismissal of Mr Williams, and how he went about the dismissal, was not the action a fair and reasonable employer could have taken in all the circumstances at the time the dismissal took place.

[62] In coming to the findings I have made about the unjustifiability of Big Image Print's actions relating to Mr Williams' suspension, written warnings and dismissal, I have considered the resources available to Big Image Print. Mr Muir did not provide any detailed evidence of the company's financial position but he did refer to the difficulties caused by the international credit crisis and recession. This resulted in a significant downturn in business and substantial losses in the 2009/2010 financial year. However, Mr Muir also informed the Authority that the company had grown from employing 2 employees at the outset of Mr Williams' employment, to 6 employees at the time of his dismissal.

[63] Mr Muir told the Authority he had not been an employer before becoming a Director of Big Image Print. While that, and the size of the business, are factors I have considered in relation to the company's resources, they do not excuse the employer from ascertaining its legal obligations towards employees and treating employees in accordance with the law. The failure to follow a fair procedure in all 3 disciplinary actions taken against Mr Williams was significant, rather than minor, and resulted in Mr Williams being treated unfairly.

[64] In submissions Mr Muir suggested that Mr Williams had been suffering from an undiagnosed acute stress reaction from 13 October 2011 and this made him unfit for work up to the date of his dismissal. Mr Muir quoted from Dr Fanning's 28

December 2011 diagnosis of Mr Williams, and posited that Mr Williams had displayed those symptoms from mid-October 2011. Mr Muir submitted that Mr Williams' refusal to seek medical advice, despite his employer's expressions of concern for his health, "*significantly contributed towards his grievance claim, the suspension and his dismissal on the 14th November*".

[65] This is a creative submission but one that I reject completely. Dr Fanning's evidence was that acute stress reaction results from a traumatic event. In Mr William's case, it resulted from his dismissal. There was no evidence that Mr Williams had suffered any traumatic event on or before 13 October 2011, at which time, by his evidence, he was happy and secure in his employment.

[66] Mr Muir also submitted that Mr Williams did not act in good faith towards him by being communicative. One example of this was that Mr Williams took no constructive action to raise concerns over the 7 warnings he was given on 28 October 2011. Again, this is an interesting spin on Mr Williams' actions, but one that has no merit or credibility. I have carefully read all of Mr Muir's submissions but have not found them to be persuasive.

Was Mr Williams paid the correct amount of holiday pay?

[67] Mr Williams worked for Big Image Print for 1 year and 4 days. He was paid out 6 days of holiday pay at the termination of his employment. The employer asserts this is all the holiday pay to which he was entitled. Mr Muir's evidence was that he kept records of Mr Williams' leave in his diary. They appear to be the only holiday and leave records kept in relation to Mr Williams. I find these to be an unreliable record of events and one that does not comply with the requirements of s. 81 of the Holidays Act 2003.

[68] One instance of that unreliability is an entry of sick leave supposedly taken by Mr Williams on Friday 22 April 2011. Mr Muir acknowledged that was wrong, as that day was Good Friday. He attributed it to the fact that his "*system of recording was not 100% accurate as a documented diary..*" and that some entries were entered in retrospect. He also referred to his diary as "*..a visual manner of writing rather than verbatim evidence*" which further confirms the doubts I have about the veracity of the leave entries.

[69] Mr Muir claimed that Mr Williams had taken unpaid leave from 4 January to 9 February 2011 and, because of that, he had worked less than a full year for holiday pay purposes. No evidence of Mr Williams taking that unpaid leave was provided to the Authority. Mr Muir's own written evidence to the Authority undermines his claim as it refers to Mr Williams being at work in mid-January 2011. Email correspondence between Mr Williams and Mr Muir was presented in evidence to the effect that Mr Williams would not be at work on 18 January 2011 because of illness, but would attend the following day.

[70] Mr Muir also referred more than once in his written evidence to Mr Williams having changed from part-time to full-time employment from 2 February 2011. I note that Mr Muir's diary contains notes purportedly made on 4 February and 2 March 2011, suggesting that Mr Williams started full time from the latter date. I find the fact that Mr Muir presented evidence contradicting himself in this matter to be a further indication that his diary entries are, to say the least, unreliable.

[71] In the absence of evidence that Mr Williams took any period of unpaid leave, I cannot give credence to Mr Muir's claim. It is an employer's obligation to maintain accurate holiday and leave records. In oral evidence, Mr Williams' told the Authority he had taken 9 days' annual leave during his employment. In submissions on his behalf that referred to the employer's records of his annual leave, it was claimed he had taken 8 days.

[72] I find that Big Image Print's failure to maintain holiday and leave records has prevented Mr Williams from bringing an accurate claim for holiday pay owing on termination of his employment. Accordingly, I accept as proved, in accordance with s. 83 (4)(b) of the Holidays Act, Mr Williams' statement to the Authority about the 9 days' annual holidays he took during his employment. As he received payment for 6 days in his final pay, he is entitled to payment for an additional 5 days' holiday pay, in accordance with s. 24 of the Holidays Act. By my reckoning, that amounts to \$618.75 (gross), based on a 37.5 hour week at \$16.50 per hour. He is also entitled to 8% of his gross earnings for the 4 days in excess of one year he worked, in accordance with s. 25 of the Holidays Act, totalling \$39.60 (gross).

Remedies and contribution

[73] Mr Williams has succeeded in all his claims. In deciding upon the remedies that are appropriate, I am required by s. 124 of the Act to consider the extent to which his actions contributed to the situation that gave rise to his personal grievances.

[74] I find that the situation giving rise to Mr Williams' grievances was caused entirely by failures on the part of the employer. That does not mean that Mr Williams was necessarily a faultless employee who made no mistakes in the course of his work. It is to be expected that he did make mistakes, and he readily acknowledged as much to the Authority. It was not the mistakes he made, but the actions of his employer that led to Mr Williams' unjustifiable suspension, warnings and dismissal. There is to be no reduction of remedies for contribution.

[75] Mr Williams provided evidence of the job applications he had made following his dismissal. The difficulty of obtaining new employment was heightened by the circumstances of his leaving Big Image Print and the effect on him of his dismissal. I accept that he made reasonable efforts to obtain alternative employment, including undertaking unpaid jobs to help build his design portfolio.

[76] Mr Williams was unemployed for 29 weeks in total. He seeks reimbursement of lost wages for that period. The Act provides that he is entitled to 3 months' reimbursement of lost wages under s. 124(2), and that the Authority has the discretion to award more than that under s. 124(3). I consider the award of an additional 4 weeks' wages to be appropriate.

[77] Mr Williams also seeks compensation for humiliation, loss of dignity and injury to feelings under s. 123 (1)(c)(i) of the Act. I am satisfied from the evidence that he suffered significantly and find a global award of \$10,000 to be appropriate for the unjustifiable suspension, unjustifiable written warnings and unjustifiable dismissal.

[78] Interest has been sought on any sums awarded. Mr Williams has been deprived of the use of the holiday pay to which he was entitled at the termination of his employment. I consider the award of interest on that sum at the rate of 5% to be appropriate.

Determination

[79] Big Image Print (2009) Limited is to pay Mr Williams:

- (i) Holiday pay owing at the date of termination of employment in the sum of \$658.35 gross;
- (ii) Interest on the sum at (i) above, calculated at 5% per annum from 14 November 2011 to the date of payment;
- (iii) Reimbursement of lost wages (17 weeks) in the sum of \$10,518.75 gross;
- (iv) Compensation for humiliation, loss of dignity and injury to feelings in the sum of \$10,000 without deduction.

Costs

The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority