IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 157
CRC 5/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DEAN HOWARD Plaintiff
AND	CARTER HOLT HARVEY PACKAGING LIMITED Defendant

Hearing:	28 - 30 July 2014 (heard at Christchurch)
Appearances:	D Beck, R Boulton and D Mills-Godinet, counsel for the plaintiff D France and J Greenleaf, counsel for the defendant
Judgment:	29 August 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Dean Howard has challenged a determination of the Employment Relations Authority (the Authority), which found that his employer, Carter Holt Harvey Packaging Limited (CHH), was justified in its dismissal of him on 16 August 2012 because his actions amounted to serious misconduct.[1] He sought a full hearing of the matter and sought reinstatement, reimbursement and compensation.

[2] The issues which led to the dismissal followed Mr Howard being hit in the eye by a rubber-band. He says he threw a punch at an employee, Mr A Lal; this was

[1] *Howard v Carter Holt Harvey Packaging Ltd* [2013] NZERA Christchurch 186.

because he believed Mr Lal had deliberately fired the band at him. He accepted this constituted serious misconduct, but asserted that his dismissal was not warranted. CHH asserts that it conducted a full and fair process to investigate the matter, and that there were insufficient mitigating factors to justify any course other than dismissal; it says that it in all respects it took actions which were open to a fair and reasonable employer.

Factual background

[3] On 2 March 1987, Mr Howard commenced employment with CHH. By 2012 he was a Speciality Gluer Assistant with CHH's Case Division at its Christchurch Case Plant. Mr Howard was covered by the CHH Employees' Collective Employment Agreement entered into between CHH, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (of which Mr Howard was a member) and the National Distribution Union.

[4] CHH has induction processes and refresher courses which are designed to ensure that all employees are kept up-to-date with company policies. Mr Howard was refreshed on the company's induction processes on 7 February 2011 when he participated in a refresher course. On that date he acknowledged in writing that his employment conditions were detailed in the CHH collective agreement and the site induction booklet. The CHH policy manual contained serious misconduct provisions, which all employees were required to read and understand, so that all in the workplace could "move forward with a common understanding of what is not acceptable in the workplace". Examples of serious misconduct included:

> Fighting or physically assaulting another person on company premises…

[5] On 17 July 2012, Mr Howard was working on one side of a take-off table which is 730 millimetres in width. He was required to count 25 kiwifruit end pieces for bundling and hand them across to another employee, Mr G Patterson who was stationed opposite him. This was to enable Mr Patterson to place a band over one end of the bundled pieces; Mr Patterson would then turn to his right to allow Mr Lal (who was diagonally opposite Mr Howard) to place a band on the other end of the bundled pieces. The bands were pre-stretched in groups of about ten prior to

bundling. Sometimes bands would "ping off" – that is break and fly in an unpredictable direction.

[6] In the late morning, the gluing machine which was being used broke down; production stopped for a time and bundling was suspended. During this interval, Mr Howard looked away at other employees conducting another process; Mr Patterson did too, because he did not see the event which is about to be described.

[7] Suddenly, Mr Howard was hit in the eye with a band. He immediately assumed Mr Lal had fired it at him. At that point, Mr Howard was standing at the end of the take-off table. He stepped forward and took a swing with a closed right fist; he told the Court that Mr Lal turned his head away and put his arm around his face with the result that Mr Howard's fist connected on the side of Mr Lal's head with a glancing blow. He said it was not a very strong connection.

[8] Mr Howard stated that he had been having problems with Mr Lal who had been riling him for the previous hour or so; this included touching his hand five times, at which point Mr Howard asked Mr Lal to desist. Mr Howard said four or five elastic bands then hit him on the chest. A key issue which will be discussed later is whether Mr Lal deliberately fired the bands which hit Mr Howard's chest and eye.

[9] Mr Howard proceeded to the locker-room to check the extent of harm to his eye, which was painful and red. He was then taken to the first aid room by an Operator, Mr M Dale, and Floor Manager, Mr S McCarthy. Mr Howard told them he had been hit in the eye with a band. In the first aid room Mr McCarthy assisted him to administer saline solution. He did not disclose that Mr Lal had riled him or that he had punched Mr Lal. He said this was because he did not want the matter to go any further as "we both knew we had done wrong things and I admit I had just badly over-reacted."

[10] Mr Howard returned to his workstation to find that another employee had replaced him at the take-off table because the gluing machine had restarted.

Unsurprisingly, staff were now wearing goggles. Mr Howard said he did not speak to Mr Lal again that day, and did not apologise to him. Over the next two days they were working in different areas and they did not speak again. Mr Lal who was a temporary employee for approximately three months, then ceased working for CHH.

[11] Nothing further happened until 25 July 2012 when Ms L Jones returned to work that day, and was told by an employee (who could not now be identified) that Mr Howard had punched Mr Lal in the face after a band had hit him in the eye. She lodged a complaint against Mr Howard on 26 July 2012.

[12] As a result, on 26 July 2012, Mr McCarthy and the Production Manager, Mr G Burgess, commenced interviewing staff. The object of the interviews was only to confirm whether an assault had actually occurred, not why it had occurred. This step was taken following the provision of advice by the Human Resources Manager, Ms J Bockett, who was based in Auckland. Mr Howard was advised on that day that a complaint had been made.

[13] Over the next two days a series of interviews were undertaken. A rudimentary record was made of each interview. In summary:

a) Mr Patterson stated that he saw Mr Howard "go around the take-off mumbling something and then struck [Mr Lal] with a fist to the face then [Mr Howard] walked off." He said that "he saw blood coming from the inside of [Mr Lal's] mouth."

b) Mr W Tulega (who was working nearby) said that he saw Mr Howard holding his eye and then saw him "walk around the take-off and punch [Mr Lal] in the face with his fist. [Mr Howard] then walked off."

c) Mr Lal stated that he was pre-stretching bands when one flicked off and hit Mr Howard in the eye. He was then recorded as saying that Mr Howard "came around the side of the machine and hit [him] in the head, [Mr Howard] didn't give any warnings. [He] had a sore jaw and had some blood in his mouth from the punch. [He] went home at the

end of his shift and put an ice pack on his face and was sore for two days but is okay now."

d) Mr D Walker was recorded as saying that he did not see anything, but went from the feed unit after Mr Howard was seen walking away holding his eye. He asked Mr Lal what had happened and he said a band had hit Mr Howard from the pre-stretching of bands.

e) A further employee was interviewed, but he had nothing material to report.

[14] On 27 July 2012, Mr McCarthy met with Mr Howard and a support person to provide Mr Howard with an opportunity of commenting on the possibility that he be suspended from employment. Mr Howard declined to comment. He was suspended. The letter which confirmed the suspension stated that the company was in the process of investigating an allegation that he had physically hit a temporary member of staff. He was advised that he would be contacted at the completion of the investigation process. Later that day Mr Howard telephoned Ms J McLean of the Engineering, Printing and Manufacturing Union.

[15] On 30 July 2012, Mr Howard was advised by phone that an investigation meeting would be held on 1 August 2012. This was confirmed by a letter dated 31 July 2012. He was informed of his right to bring a representative to the meeting.

[16] The meeting was convened by Mr M Guy, then General Manager of the CHH Paper Bag Division, because the Human Resources Manager was unavailable. Mr Burgess also attended for the company. Mr Howard was accompanied by Ms McLean.

[17] At the commencement of the meeting copies of the brief statements which the company had obtained were provided to Ms McLean and Mr Howard. After an adjournment of about 20 minutes to allow this material to be considered, the meeting reconvened and Mr Howard provided an explanation of the incident. This description of what had occurred was recorded in this form by Mr Guy:

- He was working on bundling the kiwifruit end pieces with rubber bands
- It was common for the bands to break during the collation process
- On the day of the incident he had been hit several times in the chest
- He believed [Mr Lal] was deliberately trying to "wind him up"
- A band struck him in the eye
- He believed it was a deliberate action from [Mr Lal]
- He moved towards [Mr Lal] and punched him with a closed fist in the side of his face
- He then went to get first aid applied to his sore eye
- Shane McCarthy administered first aid
- He returned to the machine and continued working

[18] Mr Guy also recorded:

> [Mr Howard] was asked whether the bands were being "flicked deliberately". He replied that they weren't being flicked with fingers but he did believe that it was deliberate.
>
> There was some discussion over the fact that blood had been seen on the lips of [Mr Lal] by a witness who confirmed the punch had struck the side of his face. [Ms McLean] stated that [Mr Howard] was not denying punching [Mr Lal].
>
> When [Mr Howard] was asked if there were any mitigating circumstances that should be considered, he replied "other issues had existed between [Mr Lal] and himself. There had been a previous incident with the gluing process and [Mr Lal] deliberately chipping away at him (although this had never been reported). He considered that the incident had been over-exaggerated and didn't understand why [Mr Lal] did not report it at the time of the event."

[19] At this stage the meeting adjourned to enable Mr Guy to discuss some of the points raised with his colleague, Mr Burgess. They also wished to interview Mr McCarthy, and told Ms McLean and Mr Howard they would do so.

[20] The meeting notes record that Mr McCarthy told Mr Guy and Mr Burgess:

a) He thought deliberate provocation from Mr Lal would have been totally out of character.

b) He thought Mr Lal was a quiet man who got on with the job.

c) It was highly unlikely that a band would be accurately fired towards another employee during the pre-stretching process.

d) Mr Lal had explained to Mr McCarthy that a complaint might have impacted on his own employment given that he was a temporary employee.

e) Mr McCarthy also confirmed he had administered first aid to Mr Howard by applying eye drops, and that Mr Howard did not mention punching Mr Lal at the time of the incident.

[21] Ms McLean then came into the room where Mr McCarthy was being interviewed. She asked Mr Guy whether Mr Howard should consider resigning. Mr Guy stated that he was still conducting the investigation and was not in a position to indicate a decision. Ms McLean enquired as to whether the company would withhold Mr Howard's superannuation compensation were he to resign. She was told that the company had not determined an outcome, as the investigation was still being undertaken. However, Mr Guy told Ms McLean that he himself had not previously caused the employer's contribution to superannuation to be withheld in the context of a dismissal.

[22] Ms McLean was upset and angry, although the reasons for this are unclear. Mr Howard understood from Ms McLean that his employment would be terminated. He decided to resign so as to protect his superannuation. Ms McLean prepared a letter of resignation which Mr Howard signed; it was then tendered to Mr Guy who accepted it.

[23] Mr Howard was very concerned at the way in which events had unfolded at the meeting on 1 August 2012. On the advice of family members, Mr Howard subsequently consulted a Community Law Centre, and then a lawyer, Mr D Beck.

[24] On 6 August 2012, Mr Beck wrote to CHH confirming that he had instructions to act for Mr Howard. He said that whilst Mr Howard admitted to assaulting a temporary co-worker it was clear he had been provoked by the co-worker who had fired an elastic band into his eye; this was an unfortunate one-off

incident. Mr Howard had 20 plus years service for CHH and enjoyed his job. It was stated that at the meeting he had been motivated to resign in the heat of the moment solely because he feared his company superannuation contribution was at risk if dismissed, although this was not checked at the time. Mr Beck asserted that insufficient time had been devoted to considering alternatives such as a final warning. An allegation of constructive dismissal was made. Relevant documents were requested.

[25] There then followed an email exchange which resulted in Mr Guy agreeing on 7 August 2012 that Mr Howard be reinstated for the purposes of concluding the disciplinary process. Following a second request for documents, the interview notes of 26 and 27 July 2012 were forwarded to Mr Beck on 13 August.

[26] On 14 August 2012, Mr Beck forwarded to Mr Guy an affidavit which had been obtained from Mr Walker. A concern was noted that arising from what Mr Walker had to say it was evident that much of what he had told Mr McCarthy when interviewed had not been recorded. The email went on to state that all that had been provided were "truncated-type written reports. We fear that a transparent and fair investigation has not been conducted."

[27] Mr Walker's affidavit stated in summary:

- Having worked with Mr Howard for 20 years he considered that Mr Howard was not aggressive; he was gentle and a thoughtful, private person.

- On the date of the incident, from a distance of about 25 metres he saw Mr Howard walking towards him with his hand over his left eye. He seemed to be in pain. When asked he said that Mr Lal had hit him with a large band. His eye was red.

- He approached Mr Lal and asked what had gone on. He said that Mr Lal had laughed and said that he had hit Mr Howard with a band. Mr Walker said that if Mr Lal did such a thing to him he would "knock [him] off the chair". Mr Lal said Mr Howard did hit him, but he

seemed unconcerned, and thought it was a huge joke. He saw no blood on his face or sign that he was hurt. He said that the band was a good shot and that he had got Mr Howard "right in the eye".

- He considered Mr Lal had been mocking Mr Howard aggressively for some time, such as dropping his shoulder and nudging Mr Howard when going past him. Mr Lal was quite fit, whereas Mr Howard was slight and in the past had suffered from arthritis. Mr Lal seemed to be fond of annoying and ridiculing co-workers.

- He stated that the record of the interview with him taken by Mr McCarthy did not record all he had said; in particular, his statement that Mr Lal had intentionally fired a band at Mr Howard was not recorded.

- He said he had also spoken about previous instances at CHH where warnings had been given for such altercations.

- The band was large and could have harmed Mr Howard's eye or distracted him so that there was a safety issue in the workplace. He could understand why Mr Howard reacted as he did. He was not a danger to his workmates and there had been no evidence previously of any anger management problem.

[28] As a result of this information being provided, Mr Guy decided to question Mr Lal by telephone from Auckland. Mr Lal was at the CHH premises in Christchurch; also present there were Mr Burgess and Mr McCarthy. Mr Lal stated:

- He was stretching a band and it left his hand and struck Mr Howard in the eye – noting that about 10 bands regularly "ping off" in each shift.

- Mr Howard approached him with no warning and punched him in the side of his face near his temple. Blood came from his mouth.

- Mr Walker did not talk to him on the day of the incident, but spoke to him the next morning, and suggested that he wear protective goggles.

- At no time did he state that the incident was intentional, or that he said that he had "got him in the eye".

- He said he had a good relationship with Mr Howard, with no fighting, arguments, although there was a "bit of laughter". He had never ridiculed any team member.

[29] Mr Guy then determined that further interviews of staff should be undertaken so as to obtain their views of the work environment leading up to the incident, the relationship between Mr Lal and Mr Howard and Mr Howard's relationship with other members of the team.

[30] These interviews were conducted by Ms Bockett from Auckland by phone, with assistance from Mr McCarthy in Christchurch. Summaries of each interview were made as follows:

a) Ms Jones stated Mr Howard had taken an instant dislike to Mr Lal, and had made it clear to other employees that this was the case. Mr Howard had placed racist cartoons on the walls of the factory which she removed. Mr Howard had thrown a glue bottle at Mr Lal which hit him on the back of his head. She said that when she had questioned Mr Howard about the band incident he had said "it was the best day of my life". He had demonstrated no remorse.

b) Mr Hansen stated that he knew Mr Lal and Mr Howard did not get on. He knew that Mr Lal followed Mr Howard around a bit, and that Mr Howard may not have liked this. Mr Howard got along with most people and as a team there were no issues of which he was aware.

c) Mr Patterson said that Mr Lal and Mr Howard worked together because they had to, although their relationship was "sketchy". He had noticed that Mr Howard did not like Mr Lal and that he did not think they could have a "standard conversation without one of them walking away from the other". This could have been because there was an English language difficulty, or because Mr Howard was not patient with Mr Lal.

d) Mr Tulega thought that the work environment was satisfactory, and that Mr Lal and Mr Howard got on satisfactorily. He was unaware of any issues between them.

e) Mr K Forbes (Process Manager) stated that Mr Howard was not a team person and was hard to deal with. His behaviour had deteriorated in the previous 12 months. He noticed that Mr Howard took a dislike to Mr Lal, but he was unsure why. He did not see Mr Lal do anything that would have been different to other temps learning their job. He described Mr Howard as a "really negative person".

[31] A second meeting occurred on 16 August 2012, convened by Mr Guy with Mr Burgess assisting him. Mr Howard attended with his lawyer, Mr Beck.

[32] There are two records of the meeting. Mr Guy took handwritten notes and from these prepared a summary of key points; the handwritten notes were then destroyed. Mr Beck recorded the meeting electronically, soon after the meeting commenced. A transcript was subsequently created, which is largely complete and which provides an accurate record as to what occurred.

[33] At the commencement of the meeting, copies of the further witness statements which CHH had obtained were provided to Mr Howard and Mr Beck. There then followed an adjournment which enabled them to consider this material.

[34] Upon resuming, Mr Beck queried whether a thorough investigation had been undertaken. He asked why Mr Walker and Mr Dale had been excluded from the process. Mr Guy responded that the statement by Mr Walker under oath was considered sufficient, and that Mr Dale had refused to be interviewed. However, it was eventually agreed that Mr Dale would be interviewed in the presence of Mr Beck but not Mr Howard.

[35] Mr Guy's summary of Mr Dale's interview records the following information:

- He had not seen the incident

- He had been employed for 13 years
- There had been a lot of changes in the staff
- No fighting or pranks had occurred – just a little verbal joking
- [Mr Howard] and [Mr Lal's] relationship as "not good mates"
- Didn't notice any tension leading up to the incident
- Stated that [Mr Howard] was not a violent person and he was surprised over his actions
- He was with Mr Howard for 10 to 15 minutes after the incident; he did not at that point see Mr Walker talking to Mr Lal

[36] Following a further adjournment, the meeting reconvened and Mr Beck summarised Mr Howard's position. Mr Guy recorded this summary as follows:

- It was a mixed situation
- Some of the evidence was inconsistent
- It was clear that [Mr Howard] had acted in the heat of the moment
- They believed that the rubber band was deliberately flicked
- [Mr Howard] regrets his actions, - it was a spur of the moment
- He agreed that the act was clearly serious misconduct however dismissal was not the appropriate action
- Reference was made to [*De Bruin v Canterbury Health Board*] where it was decided the offence was an "uncharacteristic act".[2]
- [Mr Howard] had a long service/association [via] his father with the company
- He was not a violent person
- He was a quiet, private person
- Some people liked him, others like [Ms Jones] did not
- [Mr Lal] had been "riling" [Mr Howard] for a while, and had joked about his sexual orientation
- Nothing serious had occurred before the rubber band incident

[37] Mr Guy then recorded that Mr Beck asked CHH to consider the likelihood of recurrence, Mr Howard's clean work record, and the fact that Mr Howard had suffered personal issues, such as property damage in the recent earthquakes, and certain family issues.

[2] *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431.

[38] Mr Beck was noted as saying that there were issues with procedural fairness initially – "although it was getting there now". Mr Beck agreed that serious misconduct had occurred but stated there were other circumstances which meant dismissal was not appropriate.

[39] Mr Guy then asked Mr Howard a series of questions, which he answered. These are set out as Mr Guy recorded them:

> *Why did you not report the punching incident to [Mr McCarthy] when he administered the first aid?* [Mr Howard] responded: "I didn't want to get [Mr Lal] in trouble. My eye wasn't that bad so I wanted to leave it at that."
>
> *Did you understand the significance of punching an employee in the workplace?* [Mr Howard] responded: "No"
>
> [Mr Guy] then presented a document that was signed by [Mr Howard] in 2011 confirming that he was re-inducted in to the Case Christchurch Induction Manual. It was clearly outlined "that fighting or physically assaulting another person on company premises" was defined as serious misconduct and not acceptable. [Mr Howard] responded: "A punch to the head is not a fight, therefore one punch is not covered"
>
> *Have you ever apologised over the incident? Do you think you need to?* [Mr Howard] responded: "No I haven't, he got what he deserved. I gave him a tap in the head for deliberately flicking the band."
>
> *Do you think it is OK to punch someone in the head?* [Mr Howard] responded: "It depends. If someone is coming at you and you are taking blows to the body. Then it is okay."
>
> *Is it true that you described the day of the incident to Linda as the best day of your life?* (as per the witness statement) [Mr Howard] responded: "That is not true"

[40] After concluding these questions Mr Guy and Mr Burgess retired to consider the matter. There was a full discussion between them as to the various points which had been raised.

[41] The meeting then resumed and Mr Guy outlined his conclusions. He subsequently recorded these as follows:

> 1) Did the alleged incident occur/ – YES
>
> 2) Did the employee understand the significance of his actions/ – YES
>
> 3) Was there sufficient provocation to consider as a significant mitigating circumstance? – NO

4) What other circumstances have been considered – personal issues, length of employment, previous record

5) Was there any remorsefulness/apology made – NO

Having considered the above points and also stressing the fact that with no remorsefulness there was a high likelihood of a similar incident occurring if he returned to the workplace, it was announced that he was dismissed from his employment effective immediately.

[42] The transcript of this part of the meeting contains this passage:

> The last part I guess is very key for me and that's about if we weren't going to dismiss and we were going to take [Mr Howard] back as an employee into the workforce we have got to make sure that that would be successful and that there would be no one at risk from a health and safety point of view and hence the whole work around remorsefulness is big and the bit that I'm missing now is one, I don't believe there is any remorsefulness here. I believe in the words that you said you know, he got a tap because you got hit. That is not what can exist in this workplace. I cannot risk putting you back in this workplace if that's the way your mind thinks [Mr Howard] …

[43] On 20 August 2012, Mr Guy wrote to Mr Howard confirming the outcome. He stated in summary that the explanation and mitigating circumstances offered did not satisfactorily explain or excuse his behaviour.

[44] On 12 September 2012, Mr Beck wrote to Mr Guy stating that Mr Howard considered the dismissal was effected in a procedurally unfair manner and that it was also substantively unfair. This was followed by the proceedings in the Authority.

Submissions

[45] Counsel for the plaintiff made the following points in summary:

a) There was an insufficient and cursory investigation having regard to the resources available to the defendant. This resulted in inaccurate record keeping, a failure to resolve conflicts, a failure to consider information that was provided, a failure to understand the positions of the parties during the incident, and a failure to ascertain the degree of force used. Diverse examples of flaws in the investigation were accepted.

b) It was accepted there was serious misconduct, but it was necessary to consider all the circumstances, so as to assess the degree and context of wrongdoing, as explained by the Court in *De Bruin*.

c) As to substantive justification, the defendant had failed adequately to take account of all the relevant circumstances. Consequently it was arguable that the range of reasonable responses could not include dismissal.

d) The defendant adopted a zero tolerance policy, and was intent only on establishing whether the conduct itself occurred and therefore whether it should be automatically considered serious misconduct justifying summary dismissal.

[46] Counsel for the defendant emphasised the following points in summary:

a) Mr Howard's explanations as to what occurred had changed since his dismissal.

b) In short, Mr Howard was now attempting to play down the distance between himself and Mr Lal, so that he could assert that there was a reflex action rather than a deliberate action.

c) Similarly, Mr Howard's evidence that his punch caught Mr Lal on the "side of the head with a glancing blow" was new evidence which was not provided in the disciplinary investigation.

d) CHH had properly considered the issue of provocation. Mr Howard had made a conscious choice to move around the table so as to punch Mr Lal, which was an unreasonable response in the circumstances.

e) This was not a situation where the only reasonable response to being struck in the eye was to punch Mr Lal in the face.

The facts of *De Bruin* could be distinguished having regard to the different circumstances that pertained in this instance. The evidence

did not support an explanation that Mr Howard engaged in a "reflex" and "spontaneous" assault as was the case in *De Bruin*.

f) When confronted with the issue of remorse and the provision of an apology, Mr Howard did not appear to appreciate the seriousness of assaulting a colleague in the workplace. Instead he sought to justify the assault by saying that because Mr Lal deliberately flicked him with the band "he got a tap on the head". It was open to Mr Guy to find that Mr Howard was not remorseful in the circumstances, and that in all the circumstances the decision to dismiss was fair and reasonable.

g) With regard to issues of procedural fairness, it was emphasised that the Court should avoid minute or pedantic scrutiny. Counsel submitted that natural justice requirements had been met, and that it was not necessary for CHH to undertake the numerous further steps outlined for Mr Howard.

h) Reference was made to *Kaipara v Carter Holt Harvey Ltd* where the Court stated that it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable.[3] If Mr Howard had issues with the accuracy of meeting minutes and interview statements he had an obligation to raise this as part of the investigation process. He had the opportunity to inform CHH of what he considered were inaccuracies in the minutes he had been provided with. The mutual obligation of good faith required him to be active, constructive and communicative, which would have included raising any concerns as to the accuracy of the information which the employer was considering.

The law

[47] Section 103A of the Employment Relations Act 2000 (the Act) provides that whether a dismissal was justifiable must be determined on an objective basis, having regard to whether the employer's actions, and how the employer acted were what a

[3] *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40, (2012) 9 NZELR 545 at [21].

fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] In applying the test the Court must consider the following non-exhaustive factors, as set out in s 103A(3):

> …
>
> (3) …
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[49] In addition to these factors, the Court may consider any other factors it thinks appropriate.[4] A dismissal must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.[5] As the Court has often observed, it must have regard to substantial procedural unfairness as opposed to examination by minute and pedantic scrutiny.[6]

[50] The Court may not substitute its view for that of the employer. Rather it must assess on an objective basis whether the decision and conduct of the employer fell within the range of what a fair and reasonable employer could have done in all the circumstances at the time.[7]

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[4] Section 103A(4).
[5] Section 103A(5).
[6] *Gregory v Chief Executive of the Department of Corrections* [2012] NZEmpC 172 at [109]; *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17 at [19]; *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 8 NZELC 98, 793 (EmpC) at [3].
[7] *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

[51] In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited*, the Court of Appeal stated:[8]

> What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

[52] Also important in this case is the dicta of the full Court in *Angus v Ports of Auckland Ltd*:[9]

> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[53] Counsel referred to dicta in *Kaipara v Carter Holt Harvey Ltd* where it was observed that it is usually necessary that procedural fairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable.[10] This observation is consistent with the statutory requirement subsequently introduced that the Authority or Court must not determine a dismissal to be unjustified solely because of defects in process if the defects were minor and did not result in the employee being treated unfairly.[11] As was noted in *Angus*, a failure to meet any of the procedural fairness tests in s 103A(3) is likely to result in a dismissal being found to be unjustified.[12] And the need for a scrupulously rigorous and fair investigation will be more critical where any failure is more likely to affect the outcome for the employee, as was the situation in the present case.[13]

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[8] *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 556; this dicta continues to be applicable in the context of s 103A, see *Gazeley v Oceania Group (NZ) Ltd* [2013] NZEmpC 234, (2013) 11 NZELR 276 at [45]-[46].
[9] *Angus v Ports of Auckland Ltd*, above n 7 at [26].
[10] *Kaipara*, above n 3, at [21].
[11] Section 103A(5).
[12] *Angus v Ports of Auckland*, above n 7 at [26].
[13] See *Henderson*, above n 6, at [58].

[54] Counsel also referred to previous decisions which have involved physical conflict. In *Housham v Juken New Zealand Ltd*, the Court observed that there is a distinction between culpable and non-culpable conduct by employees involved in physical conflict in the workplace.[14] The following passage from that decision, with which I respectfully agree, is relevant in the present context:

> [23] There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such a confrontation under any circumstances.
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> [24] An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer [no] resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.
>
> [25] While a "zero tolerance" policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation. While an employer is entitled to have a "zero tolerance" policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called "zero tolerance" approach that will see offenders dismissed.

[55] It will be necessary to discuss the assault case of *De Bruin v Canterbury District Health Board* later in this decision, but at this stage reference should be made to the observation made by Judge Couch that:[15]

> … a deliberate action must be regarded as a much more serious matter than a reflexive one.

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[14] *Housham v Juken New Zealand Ltd* [2007] ERNZ 183 (EmpC).
[15] *De Bruin*, above n 2, at [60].

Discussion

[56] The incident which occurred in the present case was straightforward. There were six individuals who could potentially provide information that could facilitate a proper understanding of the lead-up to the incident, what occurred during the incident, and as to the events that followed. These were the two participants, the two witnesses who were in the immediate vicinity, and two other staff members who interacted with the participants immediately afterwards. Contextual information was also available from other employees. Obtaining the relevant information and putting it to the employee should not have been difficult or complicated. If carried out properly, conflicts of evidence could have been confronted and resolved so as to provide an accurate understanding of the events. But this did not occur.

[57] The process became disjointed, and was in the end unsatisfactory. There were a range of factors which contributed to this:

a) No enquiries were made on the day of the incident as to what had occurred. Mr McCarthy assisted Mr Howard immediately after the incident, but did not ask what had happened and why. Although it appears there were concerns in the workplace itself, because an unknown person reported the matter to Ms Jones when she returned to work, no formal enquiries were made until nine days after the incident. The delay may well have affected recollections and/or permitted witnesses to compare their recollections.

b) The initial phase of the inquiry focused only on the question of whether Mr Howard had punched Mr Lal. The summaries did not record the relative positions of Mr Howard and Mr Lal, or the force used. These were obviously important details that needed to be recorded accurately. Also of concern when the initial statements were taken is the fact that not all the information which was conveyed was recorded; a particular example relates to the information provided by Mr Walker.

c) The next problem in the process related to the first investigation meeting held on 1 August 2012. A misunderstanding arose. Ms McLean seems to have believed and advised Mr Howard that he would be dismissed; CHH representatives have given evidence which I accept that the only indication given to Ms McLean was that an investigation was ongoing, and they were in the course of interviewing Mr McCarthy. Mr Howard's prompt resignation was unfortunate. Without criticising CHH in any way, I find that the resignation interrupted the flow of an investigative process which, had it continued that day, might well have involved the re-interviewing of some witnesses and the interviewing of other witnesses. It is more likely than not that Mr Howard would then have been offered the opportunity to respond comprehensively.

d) Subsequently, Mr Howard was reinstated to permit the disciplinary process to be concluded. Mr Guy received Mr Walker's affidavit and spoke to Mr Lal by telephone. Mr Lal was a crucial witness whose credibility needed to be carefully assessed by Mr McCarthy as the ultimate decision-maker. On the facts which he needed to investigate, this could not be undertaken satisfactorily by telephone.

e) Mr Guy's colleague, Ms Bockett, spoke to four of the five witnesses who had already been interviewed. Whilst the use of multiple interviewers can in some circumstances be appropriate, this did not enhance the information gathering process in the present case because there was a focus on background relations, rather than on obtaining crucial details as to the incident itself. Had Ms Bockett been involved throughout it is more likely than not she would have conducted interviews which were more complete.

f) The above was the background to the crucial second disciplinary meeting held on 16 August 2012, which also suffered from procedural flaws. These will be analysed more fully below.

[58] Against that background I turn to consider individual elements of the investigative process.

[59] The first relates to the question of location of the participants. Clarification of location was readily provided to the Court by a diagram which Mr Howard produced when giving evidence. The diagram showed that at the time of the incident Mr Howard was not positioned at his normal working location. Because production had temporarily ceased, he had moved to the end of the take-off table, where he was directly opposite Mr Lal. Mr Howard was standing adjacent to the corner of the take-off table and Mr Lal was seated on the opposite corner, a little over 730 millimetres from Mr Howard's position.

[60] Regrettably, this degree of precision was not obtained during the information gathering process. None of the witness statements obtained by CHH recorded the location of the participants at all. Mr Guy had visited the area in question with Mr McCarthy and Mr Burgess but not with any relevant witness. His understanding was that Mr Howard was positioned at his normal work location when carrying out the bundling of end pieces. His understanding was incorrect.

[61] Mr Guy nonetheless asserted that he had an accurate appreciation of the distance involved, because witnesses had referred to Mr Howard moving before he assaulted Mr Lal; and Mr Beck at the second disciplinary meeting stated that Mr Howard had taken "two to three steps". Mr Guy said that he was able to conclude that if Mr Howard was able to move "two to three steps" in order to hit Mr Lal, then he had time to step away, and chose not to do so. It was his estimate that the movement would have taken Mr Howard "two to three seconds".

[62] An accurate understanding of position was crucial to the issue of whether Mr Howard's reaction should have been understood as being a retaliatory action, or a reflex one. The reference to taking two or three steps was only partially helpful, because there was an erroneous understanding of the distance to which the two to three steps related. This issue should have been clarified with the participants, (Mr Howard and Mr Lal) and with Mr Patterson and Mr Tulega (who witnessed Mr Howard's reaction).

[63] Because there was a focus on the question of whether Mr Howard punched Mr Lal, limited attention was paid to the question of the nature of any punch. The consensus was that Mr Lal was hit on the side of the face. He himself stated at his first interview that he had a "sore jaw"; in his second interview he said that he was hit "near his temple". There was some attempt to explore the issue of whether there was blood on Mr Lal's lips, but once Ms McLean stated that Mr Howard did not deny "punching the victim", it was simply assumed that Mr Howard's fist impacted fully and forcefully on the side of Mr Lal's face, even though Mr Walker who knew Mr Howard well confirmed that he was "slight and in the past has suffered from arthritis".

[64] Mr Howard consistently stated in his evidence to the Court that at the first meeting he said that he "threw a punch". Yet the brief notes that were taken at the first meeting record him as stating that he had "punched" Mr Lal. The brief note-taking did not capture this distinction. It was submitted for CHH that Mr Howard changed his story over time on this point. I do not accept the submission: rather, when he had an opportunity to do so Mr Howard was able to give a more detailed account as to what occurred.

[65] The next issue relates to the adequacy of the second interview with Mr Lal. This followed the first disciplinary meeting when Mr Howard had made two important points:

a) The first was "the victim" (a word which it is doubtful Mr Howard used, although he is recorded as having referred to Mr Lal in this way) was deliberately trying to "wind him up" prior to the incident. This was a relevant contextual matter that needed to be explored. Mr Guy conceded to the Court that this was a point that he did not put to Mr Lal when he spoke to him by phone. It was an important issue because it related to the degree of provocation that had occurred.

b) The second point which Mr Howard made at the first meeting was that on the day of the incident he had been hit several times in the chest by bands; he was subsequently recorded as stating that the bands were

being “flicked deliberately”, and that “they weren’t being flicked with fingers but he did believe that it was deliberate”. From the record made, it was unclear whether this comment related to the four bands which hit Mr Howard on the chest, or whether it related to all the bands that hit him. Mr Burgess told the Court that Mr Howard also said that he did not actually witness the flicking of the bands. As Mr Burgess accepted, this explanation was confusing. Notwithstanding the confusion it was assumed that the bands hit Mr Howard in the course of Mr Lal pre-stretching them whilst production was suspended.

The probability of him being hit by accident four times in the chest whilst end pieces were being bundled, and then once in the eye when he had moved to the end of the processing table, was inherently unlikely. It was unsurprising in the circumstances that Mr Howard believed the bands were deliberately fired at him. But there was another obvious explanation which needed to be explored, namely whether the final band was fired by a manoeuvre which was different from the pre-stretching manoeuvre. As discussed in evidence, it was conceivable that Mr Lal held the band with one hand, pulled it back with the other hand and then released it, which would have permitted the band to fly in a planned trajectory. Mr McCarthy was interviewed on one basis only: was it possible to deliberately fire bands using the pre-stretching process? Unsurprisingly he said this would be “highly unlikely”.

Mr Lal’s second interview appears to have proceeded on the same basis. As Mr Guy accepted, the possibility of a band being fired as a projectile was not put to Mr Lal in the telephone interview. Thereafter, the investigation proceeded on the basis that although Mr Howard believed the band had been deliberately fired at him, this had not been proved. The issue was relevant to the nature of the apparent provocation, and it was not investigated adequately.

[66] The next concern relates to the adequacy of the issue Mr Howard raised at the first meeting that there was a yet further contextual factor of poor relations, with

Mr Lal having been "deliberately chipping away at him". The affidavit from Mr Walker corroborated this assertion. Mr Lal was accordingly asked about this issue. He said he had a good relationship with Mr Howard, there was no fighting, no arguments, but "a bit of laughter". Mr Guy then asked Ms Bockett to ask relevant witnesses about this; all but one confirmed that there was a history of less than ideal relations between the two. So did Mr Dale when interviewed on 17 August 2012.

[67] Mr Guy in his evidence stated that none of the employees who were interviewed identified any ongoing issues between Mr Lal and Mr Howard or referred to a history of antagonism between them. That was incorrect – practically all witnesses were agreed on this point. The point was relevant for two reasons. First, if established it was a contextual matter that had to be considered when assessing the issue of provocation. Secondly, since Mr Lal said there were good relations contrary to assertions made by practically all other witnesses, it was evident that Mr Lal's evidence needed to be treated with some caution. A misleading statement on this point would raise an obvious issue as to whether other aspects of his evidence – particularly whether he had deliberately fired a band at Mr Howard – were also incorrect. This conflict of evidence was not considered or resolved.

[68] A further issue relates to a significant error which arose in the course of the second disciplinary meeting. Mr Howard was asked by Mr Guy as to whether he had apologised to Mr Lal regarding the incident, and whether he thought he needed to. His answer was recorded in this way:

> [Mr Howard] responded: "No I haven't, he got what he deserved. I gave him a tap in the head for deliberately flicking the band."

The verbatim transcript (available as a result of the recording made by Mr Beck) clarifies that it was Mr Guy himself who asked whether Mr Howard was saying that Mr Lal "deserved it". After reflecting on the question, Mr Howard replied: "No. I'd just say it was a spur of the moment thing."

[69] Mr Guy told the Court that this was not a major error. The difficulty is that immediately following this exchange, there was a discussion as to whether Mr Howard apologised, and whether he expressed remorse. Mr Guy's understanding

of the situation was that Mr Howard had given Mr Lal a punch because he deserved it. I find that Mr Guy proceeded on the basis that this answer reinforced his conclusion that Mr Howard's reaction was retaliatory rather than instinctive.

[70] The final matter to which specific reference should be made is the absence of any record that consideration was given to the impact of being hit in the eye by a flying band. Mr Howard told the Court that he was shocked because he was in severe pain, and was concerned that he had lost the use of an eye. He said his eye "was dripping". Mr Walker soon after observed that the eye was red, confirming that there was indeed a physical reaction. Mr Guy accepted that being hit in the eye would have been "very painful", and that the physical reaction was a "contributing factor". Yet Mr Guy's recorded conclusions do not refer to this factor at all.

[71] There are a number of other relatively minor procedural points that were raised in evidence and in submissions (such as the nature of the template used to record witness interviews) but they fall into the category of minute and pedantic scrutiny and do not require further consideration.

[72] An assessment must be made as to the established procedural defects when considered cumulatively. Was the decision to dismiss one that a fair and reasonable employer could have undertaken in spite of these defects in process?

[73] An objective assessment of the multiple procedural defects results in a conclusion that the investigation was flawed so as to deny Mr Howard a fair opportunity of establishing that this was not a case where dismissal was an appropriate outcome, notwithstanding the concession that serious misconduct had occurred. The defects meant that CHH could not properly consider Mr Howard's explanation in relation to the allegations it was considering. Accordingly the challenge must succeed.

Remedies

[74] The main remedy sought by Mr Howard is reinstatement to his position with CHH.

[75] For Mr Howard, it was submitted in support of his application:

a) It is highly unlikely there would ever be a recurrence of an event of this nature, since there was no evidence of any such similar events in Mr Howard's previous 25 years of employment.

b) His circumstances have changed, in that particular stressors which existed at the time of the incident no longer exist, including that Mr Lal is no longer an employee of CHH.

c) There was a consensus from all witnesses that what occurred was an uncharacteristic one-off event.

d) Reinstatement is of particular importance to Mr Howard given his long record of working for CHH; his evidence was that the workplace was part of his life.

e) He regretted having lashed out at what he perceived was the source of a very painful injury to his eye. Mr Guy's conclusion that Mr Howard had not expressed remorse, needed to be seen in the context that Mr Guy had not correctly recorded what Mr Howard said at the second meeting; Mr Guy understood Mr Howard to have said that Mr Lal deserved what he got, and that he did not feel any remorse. This was erroneous.

f) Mr Howard had not irreparably damaged the relationship of trust and confidence with managers and staff of CHH.

g) Mr Howard was prepared to undertake a reinstatement support plan, such as was imposed by the Court in *De Bruin*.[16] He was also willing to participate in a gradual return to work and to undertake a course of anger management counselling so as to ensure that were a similar incident to arise in future he would handle it in a better way.

[16] At [87].

h) Reinstatement of the employee in the *De Bruin* case was ordered even though the nature and extent of Mr De Bruin's contribution to the incident which occurred in that case was substantial.[17]

[76] For CHH it was submitted on this topic:

a) According to Mr Guy's evidence, Mr Howard had admitted that he deliberately punched Mr Lal in the head; yet he offered no remorse for doing so.

b) Reinstatement would send a message to other employees that violence is tolerated.

c) CHH has no confidence Mr Howard would not be violent again. Even though he said the incident was "one off", management was justified in believing that there could be a recurrence. When giving evidence he was not prepared to accept wrong-doing on his part, and every explanation he had given was conditional.

d) Mr Howard's evidence was that he does not trust management. It is not practicable or reasonable to reinstate an employee who has no trust and confidence in management.

e) CHH cannot have a workplace where employees believe it is acceptable to take matters into their own hands, and to assault another employee.

[77] The remedy of reinstatement is provided for in ss 125 and 126 of the Act. Section 125(2) states that the Authority (or the Court) may provide for reinstatement if it is practicable and reasonable to do so.

[78] The meaning of the term "practicable" is well established. In *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*, the Court stated:[18]

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[17] At [81].

> Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. …

[79] In *Angus* the full Court explained the requirement of reasonableness as follows:[19]

> [65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.
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> [66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[80] Mr Howard has succeeded in establishing a personal grievance on procedural grounds. However, as it was put in the closing submission for Mr Howard, he reacted in a "primitive way" by lashing out when hit in the eye. On his own admission he threw a punch. CHH's Policy Manual made it clear that physically assaulting another person on company premises was regarded as professional misconduct; that is, such conduct would not be tolerated. Mr Howard was refreshed on the company's induction processes in February 2011, and acknowledged that he had read and understood the company's rules, policies and conditions, which included the obligation just referred to.

[81] In all these circumstances, Mr Howard must accept substantial responsibility for his reaction. This is a significant factor when assessing, overall, the equities of each party's case.

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[18] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 (EmpC) at 286; aff'd [1994] 2 ERNZ 414 (CA) at 416; and *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2].

[19] *Angus*, above n 7, at [65]-[66].

[82] The next issue concerns Mr Howard's attitude. In evidence he stated that what had occurred was a "technical assault", implying that it was an assault in name only, and was excusable. That description downplays the throwing of the punch – even if instinctive. It demonstrates an absence of insight. I also accept the submission made for CHH that although Mr Howard now says he regrets what occurred, many of his statements of regret were qualified.

[83] Mr Howard stated in evidence that he had taken up an offer of free counselling and that "did help". However, the medical certificate produced in support of this assertion stated that Mr Howard "needs to learn some coping mechanisms for what he perceives as [his] unfair dismissal which has impacted on his self-esteem and mental health". The Court does not have reliable evidence that counselling has been undertaken with regard to stressful physical altercations at work. Indeed, it was submitted for Mr Howard that if reinstated he would be willing to undertake an anger management course. Such a submission suggests that Mr Howard needs professional assistance.

[84] Also of significant concern is Mr Howard's attitude to management. He told the Court that he did not trust Mr Guy, Mr Burgess or Mr McCarthy. Whilst, as the Court has found, these managers did not conduct a process which could be undertaken by a fair and reasonable employer and that may colour Mr Howard's attitude towards them, an employee seeking reinstatement in such circumstances has to accept that a resumed employment relationship will involve both parties demonstrating trust and confidence in each other. Mr Howard's willingness to do so was significantly qualified. Also of concern is Mr Howard's difficult relationship with Mr Lal over some weeks, which raises a question as to whether poor relations might occur with other co-workers.

[85] Some reliance was placed on *De Bruin*. It was, in effect, submitted that the outcome in that case should apply in the present case. The assessment of whether reinstatement would be reasonable in that case was very different to the present case in one key respect. The employee immediately acknowledged in a fulsome way that he had acted incorrectly; the various subsequent processes which were reviewed by the Court persuaded it that by the time of the hearing he had a heightened awareness

of his professional obligations; it was noted that the insight shown was a persuasive factor.[20] In that instance, Judge Couch was able to conclude that what occurred was "a truly extraordinary one-off event which is extremely unlikely to occur again."[21] Having regard to the findings made by this Court when considering liability issues, it cannot be concluded that the circumstances of the present case are "truly extraordinary". Although the statutory test is not couched in those terms, I find that the circumstances considered by the Court in *De Bruin* are distinguishable from those which fall for consideration here.

[86] It is acknowledged that Mr Howard apparently obtained significant job satisfaction and positive social contact when working for CHH. Whilst I have weighed that factor, along with long service and the absence of any previous disciplinary history as an employee, I conclude that having regard to the factors assessed above it is not practicable and reasonable to order reinstatement.

[87] Reimbursement of lost wages was also sought. Regrettably very little evidence was tendered. Mr Howard said that he had obtained alternative employment making 3D computer models; although this occurred comparatively recently, no evidence was provided as to the attempts to obtain employment following the dismissal. The Court has been provided with a brief report from a general practitioner who confirms stress and depression as at April 2013. The factors referred to by Mr Howard's general practitioner may have contributed to difficulties in obtaining work, but the Court has insufficient information from which to reach any definite conclusions. This issue was raised with counsel at the conclusion of the evidence; it was confirmed there would be no application to recall Mr Howard on this topic.

[88] I consider that an approach which reflects the degree of success Mr Howard has achieved in this case but also has regard to the limited evidence before the Court leads to a conclusion that Mr Howard is entitled to an award for lost wages, but only for the statutory period of three months provided for in s 128(2) of the Act. The parties will be able to calculate this amount, since again the evidence provided to the

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[20] *De Bruin*, above n 2, at [75].
[21] At [77].

Court on this aspect was rudimentary. This award is subject to the Court's findings below as to contribution.

[89] Mr Howard also seeks compensation of $10,000 for humiliation, distress and injury to feelings.

[90] It was submitted in support of this application that Mr Howard's distress following his dismissal has been significant and exacerbated by the loss of a 25-year employment relationship, uncertainty as to the future, isolation from colleagues and depression.

[91] I have already referred to the brief medical certificate which has been provided, which states there are self-esteem and mental health issues but provides no supporting detail. However, the conclusion is consistent with the direct evidence received from Mr Howard, on which he was not challenged.

[92] Recognising that compensation must be for the impact of the dismissal on the employee (and should not represent a penalty for a flawed dismissal on the part of the employer),[22] and recognising also the principle of moderation which it is appropriate to apply, I consider that the sum sought of $10,000 is appropriate in respect of the personal grievance which has been established, subject to contribution.

[93] Turning to contributory conduct, it is appropriate to reduce any award if an employee's conduct is blameworthy and causative of his dismissal. CHH submits that the nature of Mr Howard's conduct was such as to justify a 100 per cent reduction. It was submitted that the CHH view of the incident, Mr Howard acted deliberately and such an outcome is accordingly appropriate.

[94] With respect I agree with the dicta of Judge Ford in *Costley v Waimea Nurseries Ltd* that a "reduction of remedies by 100 per cent is a significant step" but that it can occasionally be justified.[23]

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[22] *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC) at 342.
[23] *Costley v Waimea Nurseries Ltd* [2011] NZEmpC 59 at [19].

[95] It is regrettable that Mr Howard punched Mr Lal in the circumstances which occurred – particularly when it was known or should have been known that assaulting other workers in the workplace was not tolerated in the CHH workplace. As already stated in this decision, Mr Howard must take responsibility for throwing a punch, even given provocation from Mr Lal. That conclusion justifies a significant contribution finding; but the Court must also take into account the procedural failings of the employer, which have led to financial loss as well as humiliation, distress and injury to feelings. The process issues have been causative of these consequences. This is not a case where remedies should be reduced by 100 per cent for contributory conduct.

[96] Standing back, I consider that the monetary awards should be reduced by 70 per cent.

[97] A penalty was also sought on the basis of an alleged breach of good faith. However, such a remedy was not pleaded and I consider it no further.

Conclusion

[98] The procedural defects which occurred in the course of the CHH investigation were sufficiently fundamental as to deny Mr Howard a fair opportunity of establishing that he should not have been dismissed, even though he accepted serious misconduct had occurred. The conclusion reached by the employer was not one which was open to a fair and reasonable employer, given the procedural defects. Accordingly, Mr Howard's challenge to the Authority's determination succeeds.

[99] Mr Howard is entitled to payment by CHH of three months' wages, reduced by 70 per cent. The parties are to calculate this sum within 14 days; if the amount is unable to be agreed, leave is reserved to either party to apply for further directions.

[100] Mr Howard is also entitled to an award of compensation for humiliation, distress and injury to feelings in the sum of $3,000.

[101] The application for an order of reinstatement is dismissed.

[102] Costs are reserved. I express the preliminary view that Mr Howard should receive a contribution to his costs. This topic should be discussed directly between the parties. If agreement is unable to be reached, submissions and evidence, if any, should be filed for Mr Howard within 21 days; submissions and evidence if any on behalf of CHH are to be filed 21 days thereafter.

B A Corkill
Judge

Judgment signed at 2.15 pm on 29 August 2014