IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 93
CRC 45/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PRIME RANGE MEATS LIMITED Plaintiff
AND	KEN McNAUGHT Defendant

Hearing:	18, 19 and 20 March 2014 (heard at Invercargill)
Appearances:	R Chapman, counsel for the plaintiff A J Lodge, counsel for the defendant
Judgment:	16 June 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The defendant, Mr Ken McNaught, worked in what is known as the tripe room at the plaintiff's meat processing plant on the outskirts of Invercargill. On 10 May 2011 he was involved in an unsavoury incident with another labourer, Mr Lyall Spencer, which was investigated by the company and treated as a case of serious misconduct. On 18 May 2011, Mr McNaught travelled to Australia on two months pre-arranged special leave without pay to visit his son. When he returned to work on 19 July 2011, he was given a final warning letter in relation to his involvement in the incident on 10 May 2011 and was told that he would be deployed in the chillers. Mr McNaught responded to the deployment proposal by saying that he would "go home and think about it". He then left the premises and never returned.

[2] Mr McNaught subsequently raised two personal grievances in the Employment Relations Authority (the Authority). He alleged that he had been disadvantaged in his employment by the actions of the plaintiff in requiring him to work in the chillers and he also claimed that he had been constructively dismissed. Mr McNaught maintained that the re-deployment proposal was disciplinary in nature and that it resulted from his involvement in the altercation on 10 May 2011.

[3] In a determination dated 26 October 2012, the Authority found against Mr McNaught on both counts.[1] In other words, it concluded that he had not been constructively dismissed nor had he been disadvantaged by the proposal to transfer him to work in the chillers. The Authority did, however, find that Mr McNaught had been disadvantaged in his employment by the inclusion of "historical matters" in the final warning letter he had received in relation to the incident on 10 May 2011.[2] It awarded him $1,250 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings.[3]

[4] The plaintiff then filed a statement of claim in this Court challenging the Authority's determination on the basis that the defendant had not complained, either in his statement of problem or in his evidence before the Authority that he had been disadvantaged by the reference to historical matters in the written warning letter he had received on 19 July 2011. Although the statement of claim specified that the challenge related only to that part of the determination dealing with the reference to historical matters in the written warning, the plaintiff elected a full hearing de novo.

[5] In his statement of defence, Mr McNaught admitted that in his statement of problem he had not claimed any unjustified disadvantage resulting from the reference to historical matters in the warning letter but he alleged that his counsel at the time, Mr Damian Pine, had raised that issue during the Authority's investigation. He also, by way of cross-challenge, repeated his claims that he had been constructively dismissed and unjustifiably disadvantaged by the plaintiff's conduct. The disadvantage grievances allegedly arose not only through the plaintiff wrongly including historical matters in the warning letter but also by its unilateral decision,

[1] *McNaught v Prime Range Meats Ltd* [2012] NZERA Christchurch 233 [Authority determination].
[2] At [62].
[3] At [77].

described as "disciplinary in nature", to deploy him in the chillers and by its alleged disparity of treatment of Mr McNaught and Mr Spencer.

[6] Another point raised in the statement of defence, which assumed some significance as the hearing progressed, was a claim by Mr McNaught that the plaintiff had not offered him the right to have a support person present at the investigation meeting following the incident on 10 May 2011. That procedural defect was said to be not only in breach of the plaintiff's duty of good faith but of a specific provision in the plaintiff's staff handbook.

[7] The plaintiff filed a statement of defence to the defendant's cross-challenge denying all of these allegations. The plaintiff pleaded that there had been no constructive dismissal or disparity of treatment as alleged. It also denied that the defendant had been unjustifiably disadvantaged by the inclusion of the reference to historical matters in the written warning and that the decision to deploy Mr McNaught in the chillers had been disciplinary in nature. It claimed that the re-deployment decision was made to meet the operational requirements of the company in accordance with a provision in the employment agreement. All of these issues were canvassed in some detail in the hearing before me and I will need to deal with them.

Background

[8] Mr McNaught was employed by the plaintiff (Prime) in February 2008 as a labourer. Although in his early 60s, Mr McNaught is still a well-built man with a commanding physical presence. His counsel, Ms Lodge, described him as "a gentle giant" with a "straight forward way of communicating". When asked in cross-examination about his height, Mr McNaught told the Court with some precision that he was "six foot one and three quarters". At another point in his evidence he said: "I spent time in the army and you must be able to defend yourself." It is not clear how Mr McNaught came to be employed by Prime. He told the Court that he was a qualified fitter and welder and he described some of the positions he had held with other companies, including a concrete business in Ashburton and a

workshop in Winton. He said that, "between these jobs I have also worked in the meat industry for approximately 16 seasons over the past 30 years."

[9] None of the witnesses called on behalf of Prime spoke particularly highly of Mr McNaught. It emerged that his nickname at the plant was "grump" or "grumpy". A number of incidents allegedly involving Mr McNaught were described to the Court. He admitted his role in some of them and denied his involvement in others. In her closing submissions Ms Lodge said that Mr McNaught's evidence was that "he is not the abusive, intimidating, scary man the plaintiff has made him out to be." The historical incidents referred to dominated much of the evidence. Their relevance, however, is confined principally to the claim made by Prime in its challenge that the reference to historical matters in the written warning did not disadvantage Mr McNaught in his employment. For other purposes, in particular the various grounds of Mr McNaught's cross-challenge, I put the evidence about the historical incidents to one side.

[10] Initially, Mr McNaught worked in the chillers but on occasions he also worked in the offal room, the gamble room and the butcher shop. In August 2009 the plaintiff expanded into tripe production and a new work area was set up known as the tripe room. Mr McNaught was assigned to work in the tripe room. He was reluctant to transfer to the tripe room but he did so and told the Court that he quickly found that he enjoyed the work. In 2010 he requested additional work in the chillers to add to the hours he worked in the tripe room. However, from August 2009 until he went on special leave in May 2011, he worked principally in the tripe room with two other men one of whom was Mr Spencer.

The incident in May 2011

[11] Mr Spencer did not give evidence before me and Mr McNaught's account of the incident on 10 May 2011 may not be entirely accurate. He told the Court that the argument with Mr Spencer (who had previously worked in management at Briscoes) began in the smoko room and it related to the correct rate of pay for working on statutory holidays. An incident report completed at the time, however, recorded that both men said that the argument was over sick pay entitlements. In all events, the

argument continued as the two men walked back to the tripe room. It resulted in a verbal and physical confrontation with provocative action being taken by both parties. In the course of the incident Mr McNaught allegedly grabbed Mr Spencer around the throat and raised his fist in a threatening and aggressive manner.

[12] Mr Spencer made a formal complaint about the altercation to his supervisor and the matter was investigated. No exception was taken by either counsel to the Authority's succinct summary of the investigation process and so I repeat part of what was said about the matter in the Authority's determination:

> [9] On 10 May 2011 Mr McNaught met with Trevor Hourston, the Production Manager, Shane Jones, the Foreman, Tim Garrett, the Slaughterboard Supervisor and Terry Cope, the Leading Hand. Mr McNaught gave his explanation and view of the incident between him and Mr Spencer. Mr McNaught was told that the management of Prime viewed the incident as severe. The meeting was adjourned to consider Mr McNaught's explanations.
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> [10] On 10 May 2011 the same members of Prime's management team also met with Mr Spencer to hear his view of the incidents. The notes of that meeting record *Lyall said he was sick of the constant personal attacks and will refuse to work with him again.*
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> [11] On 11 May Mr McNaught met again with Mr Hourston, Mr Jones, Mr Garrett and Mr Cope. Mr Hourston told Mr McNaught that aggression or violence in the workplace was unacceptable and that he could suspend Mr McNaught but he would not do so. Mr McNaught offered to resign. However, Prime did not accept his resignation. Instead Mr Hourston opted to issue Mr McNaught with a final written warning. Mr McNaught accepted that a final written warning was an appropriate outcome. Mr McNaught was told that *we would adjourn meeting with him and get him back later to discuss the issuing of a final warning.*
>
> [12] However, there was no further meeting and he did not receive the written warning before he finished work on 17 May 2011; the day before he went to Australia for a period of two months pre-arranged special unpaid leave. I note that the warning letter later received is dated 12 May 2011. However, Mr Hourston said that would have been the date he drafted it but he did not get it back until sometime later when he signed it.
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> . . .
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> [16] In the immediate aftermath of the altercation between Mr McNaught and Mr Spencer on 10 May, Mr Spencer was removed from his duties in the Tripe Room and Mr McNaught returned to work in the Tripe Room. In the period between 10 May and 17 May 2011 Mr McNaught worked in the Tripe Room while Mr Spencer did not.

> [17] On 19 May 2011, the day after Mr McNaught went to Australia, a further disciplinary meeting was held with Mr Spencer. …

[13] Mr McNaught told the the Court that before he went to Australia Mr Hourston made a remark which he (Mr McNaught) took to be confirmation that he would be returning to work in the tripe room. In reference to this particular evidence, the Authority said:

> [65] … However, I do not find that Mr Hourston told Mr McNaught he would retain his duties in the Tripe Room on his return from leave. Mr McNaught assumed that, partly because Mr Spencer and not him, had initially been moved from the Tripe Room.

[14] I agree with those conclusions. Before me, Mr Hourston was asked about the matter but he could not recall the alleged conversation and I did not find Mr McNaught's evidence on the topic particularly convincing.

Mr McNaught's return and departure

[15] There was a sharp conflict in much of the evidence relating to what happened when Mr McNaught returned from Australia in July 2011 and turned up for work again. In his written brief of evidence, Mr McNaught simply said that he returned to work on Tuesday, 19 July 2011 and was handed a final written warning dated 12 May 2011 which he accepted because it had been discussed with him at the meeting of 11 May 2011. He said that he was then told that he no longer held a position in the tripe room and had been moved to a position in the chillers. He claimed that he was also told that the move to the chillers was a result of the incident with Mr Spencer on 10 May 2011 and if he did not accept the work in the chillers then there was no job for him at Prime.

[16] When Mr McNaught, in the course of his examination-in-chief, was invited by his counsel to expand on his written evidence, he mentioned a conversation he claimed to have had with his leading hand Mr Terry Cope on the evening prior to his return to work in which Mr Cope allegedly said, "You'd better get ready for the calves". Mr McNaught said that he took this comment to mean, "That I was doing the calves, that I was back in the tripe room unconditionally." That specific conversation was never put to Mr Cope in cross-examination and Mr Cope denied

meeting with Mr McNaught on the evening of the 18 July and so I put that evidence to one side.

[17] In his oral evidence, Mr McNaught also elaborated on what happened when he returned to work on the morning of Tuesday 19 July. He said that he arrived at work at 7.00 am, got changed into his whites and went to the tripe room and started sharpening his knife. He said that Mr Spencer and "the other boys" then came in and started work and so he walked out. Mr Hourston then saw him and told him to go and wait in his office. Mr McNaught said that when Mr Hourston arrived back at his office he threw the written warning down on the table and then said, "No work for you in the tripe room any more, we're going to put you in the chillers and that." Mr McNaught said that when he remonstrated and told Mr Hourston that he could not do that without discussing it with him first Mr Hourston responded, "No, I run this place. I run it the way I want to or see fit." Mr McNaught said that he then asked for time to think about it and Mr Hourston relented and said, "Yes, you can have the day off to think about it but if you're not here in the morning, you're, you're finished. No work for you, no job for you."

[18] Mr Hourston was asked in examination-in-chief by counsel for Prime, Mr Chapman, about his recollection of Mr McNaught's return to work on the morning of 19 July. He told the Court that he first saw Mr McNaught out in front of the main office at about 7.20 am and he was certain that he was dressed in civilian clothes, not in his whites. Mr Hourston had been at work since 6.30 am and he had just left the boning room and was heading back to his office when he noticed Mr McNaught. He asked him to go to his office. Mr Hourston was not challenged on this evidence. Mr Hourston now works for another meat company but he explained that, as Production Manager at Prime, virtually every morning he would follow the same routine. The steps he followed involved passing through the plant beginning with the yards, where he would check that the livestock were ready for presentation for slaughter, he would then move to the slaughter rooms and other departments such as the chillers, the offal room and the boning rooms to ensure that they were all properly manned.

[19] Mr Hourston said that when he saw Mr McNaught in his office he issued him with the written notice of final warning arising out of the incident on 10 May 2011 and informed him that he was to be deployed in the chillers. He told the Court that when Mr McNaught heard that he was being assigned to the chillers he cut short any further discussion by saying he would "go home and think about it" and he left the premises at 7.30 am. Mr Hourston said that Mr McNaught did not express to him why he was dissatisfied with his placement in the chillers. Mr Hourston denied making the other remarks attributed to him by Mr McNaught.[4]

Discussion

[20] Mr Hourston was asked a number of questions about the decision to assign Mr McNaught to work in the chillers and he was specifically asked about when the decision was made. There was some inconsistency in his evidence on the matter and, in hindsight, I do not think the situation was necessarily clarified when the Court asked additional questions on the topic at the end of his evidence. In general, however, I found Mr Hourston to be a credible witness and I suspect that he would have been a conscientious and sensible Production Manager. On balance, having considered all of the evidence carefully, the most probable scenario in my view is that when Mr Hourston completed his investigation into the 10 May incident, he made the decision, after consulting with the managing director of Prime, Mr Anthony Forde, that a written warning would be issued to both Mr McNaught and Mr Spencer. In Mr McNaught's case it was to be a final written warning. That was the extent of the punishment arising out of the disciplinary process. But in addition a more informal and unwritten decision was made by Mr Hourston and Mr Forde that in future, Mr McNaught and Mr Lyall Spencer would not be permitted to work together. That was not a disciplinary step but it was a commonsense decision which was consistent with Prime's health and safety obligations as a good employer. Even Mr McNaught accepted the inevitability of that decision. In cross-examination, he agreed that if he was in management he also would have separated the two men.

[21] I accept Mr Hourston's evidence that on the morning of 19 July he had already carried out his inspection of each department before he met with

[4] See [17] above.

Mr McNaught and he had found that there was an available position that day in the chillers. As the witness put it:

> On the morning of the 19th. As I say, I passed through the plant, all the roles were [filled] at that stage. The production was happening. The vacancy or the requirement for labour was in the chillers.

[22] I accept Mr Hourston's account of his meeting with Mr McNaught that morning. Mr Forde, in evidence which I also accept, said that the instruction to Mr McNaught to work in the chillers was an operational requirement authorised under cl 7 of Mr McNaught's employment agreement which provided: "Transfer of Duties. From time to time the Employee may be required to change duties to meet the operational requirements of the Employer." In cross-examination, Mr Forde explained the position in these terms:

> By the time Ken McNaught came back to work from Australia, the Lyall incident was done and dusted, they both are - been issued with final warnings, Ken was still to physically receive his, and that was done. It was finished with. He was then going to be assigned to work where work was needed. He could've been back in the tripe room a week later, because somebody could have been away and Lyall could've been needed in the offal. And I think that's one thing that missing here, we've got this idea that the chillers was it for life. I keep saying that he would be deployed where he is most needed. He could've ended up back in the tripe room for all I know, depending on - …

[23] The tripe room issue was taken up again later in Mr Forde's cross-examination and he was asked whether he accepted that Mr McNaught would have been embarrassed by his move to the tripe room and whether he accepted that Mr McNaught's workmates would have viewed the move as a direct consequence of the incident with Mr Spencer. Mr Forde replied:

> I would say that would be the least of his worries. The people that had issues with Ken McNaught [with] his demeanour and his bullying and there was nothing to do with his status in the tripe room. I should explain. The chillers, by contrast, is what we call an edible area, um, it's all edible product, it's clean and its pristine and, ah, presentation of the place has to be high. It has to be audited for food quality standards at all time. The tripe room is basically full of shit. That's what it does. Now, to suggest that you've got more status in there, it defies belief.

The constructive dismissal claim

[24] My acceptance of the evidence given by Mr Forde and Mr Hourston as to the reasons for Mr McNaught's assignment to duties in the chillers on the day of his return to work effectively disposes of the principal issues raised in Mr McNaught's cross-challenge. Ms Lodge submitted that Mr McNaught's alleged constructive dismissal claim fell into the third category of conduct described by the Court of Appeal in *Auckland etc Shop Employees Union v Woolworths (NZ) Ltd*, namely, conduct involving a breach of duty by the employer which leads an employee to resign.[5] In counsel's words:

> 10. We submit the procedural failings of the plaintiff's investigation into the incident between Mr McNaught and Mr Spencer, and the disciplinary action taken as a result of that investigation, when viewed in totality, are conduct that breached the plaintiff's duties to Mr McNaught.
>
> 11. Further, we submit that those breaches were sufficiently serious so as to make it reasonably foreseeable that there would be a substantial risk of Mr McNaught resigning.

[25] In its determination, the Authority correctly noted and applied the test of justification prescribed in s 103A of the Act.[6] It concluded:

> [51] Prime considered the Tripe Room was running well. It had a complete complement of staff. Prime did not want Mr Spencer and Mr McNaught to work together with minimal supervision. Those were reasonable considerations. Prime was entitled under Mr McNaught's contract terms to reassign him to areas of need within the plant. Prime was not bound to reassign Mr McNaught to the Tripe Room.
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> [52] In all the circumstances that applied at the time, including what I accept as operational considerations, I consider that a fair and reasonable employer could have made the decision to allocate Mr McNaught to work in the Chillers.

[26] I respectfully agree with those conclusions. In my view, there is no substance to Mr McNaught's constructive dismissal claim.

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[5] Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372 (CA) at 375.
[6] Authority determination, above n 1, at [31]-[33].

The disadvantage grievance claims

(a) The reference to historical matters

[27] Prime's challenge was against the finding by the Authority that Prime had unjustifiably disadvantaged Mr McNaught by wrongly including historical matters in the written warning that he had received.[7] It pleaded that the written warning was issued because of Mr McNaught's altercation with Mr Spencer on 10 May 2011 and not because of any historical behaviour and it denied that Mr McNaught had been disadvantaged in any way as a result of the reference to the historical matters in the written warning.

[28] The written warning, on Prime letterhead was in these terms:

> **Notice of Final Warning**
>
> Ken McNaught
>
> This is notice of a Final Written Warning for gross misconduct in the workplace on Tuesday 10th of May 2011.
>
> Investigations following a complaint reveal that your behaviour towards another employee was verbally abusive and physically threatening and cannot be tolerated in the workplace.
>
> Further investigations reveal that you have demonstrated a history of harassment and intimidating behaviour towards other employees and this must cease.
>
> Any further incidents of misconduct could result in dismissal.
>
> Trevor Hourston
> Production Manager
> 12th May 2011"

[29] Ms Lodge submitted on behalf of Mr McNaught that:

> 2.e. Mr McNaught was led to believe that he would be receiving a final written warning solely for his involvement in the altercation with Mr Spencer, however it is clear from the final written warning that historical and performance related matters were also taken into consideration when determining what disciplinary action should be taken.

[7] At [62].

[30] In reference to the statutory test of justification, Ms Lodge submitted that Prime had failed to meet the procedural standards set out in s 103A(3) of the Act in, relevantly, failing to raise with Mr McNaught the historical matters and to allow him the opportunity to comment on them, and in failing to provide him with an opportunity to comment on the proposal that he receive a final written warning. Counsel further submitted:

> 15. The disadvantage to Mr McNaught does not need to be a material one, and the wrongful issuing of a warning has been held to constitute a disadvantage in *Alliance Freezing Co (Southland) Ltd v New Zealand Amalgamated Engineering and Related Trades IUOW* because it renders the employees' employment less secure.

[31] In his submissions on behalf of Prime, Mr Chapman repeated the point made in his pleadings that this alleged disadvantage grievance had not been included in the claims made in Mr McNaught's statement of problem before the Authority. As noted above, Ms Lodge alleged in her submissions that the issue had been raised on behalf of Mr McNaught by his counsel at the Authority investigation. No evidence was given on this particular topic but neither was any objection taken to the submission made by Ms Lodge. In any event, it would seem that the Authority had jurisdiction under s 122 to find a different type of personal grievance from that alleged in the statement of problem. There are other reasons, however, for upholding Prime's challenge in relation to the contents of the warning letter.

[32] Mr Chapman submitted:

> 53.0 It is difficult to understand how an employee could have cause to complain about comments in a written warning when the warning was not based on or reliant on those comments and the employee agreed that the issuing of the written warning was a fair and reasonable response by the employer.

[33] Prime produced evidence of several warnings it alleged Mr McNaught had received prior to the incident with Mr Spencer. Ms Lodge submitted that one was not relevant because it related to absenteeism and Mr McNaught denied receiving another. Counsel acknowledged that Mr McNaught received a verbal warning in March 2011 for an issue arising out of his cleanup and attitude towards another worker but counsel claimed that Prime did not follow the correct procedural process on that occasion. In reference to other incidents alleged to have occurred in April,

May and June 2008, Ms Lodge said that Mr McNaught denied acting in an intimidating and verbally abusive manner on those occasions.

[34] The incident in June 2008 involved Mr Terry Cope. Mr Cope told the Court that he was a Leading Hand and he had been employed at Prime since October 2005. He had worked in the chillers, offal, and the tripe room. He described Mr McNaught in these terms:

> 4. I found Ken McNaught the most difficult person I have ever experienced in the workplace. Wherever he was placed there were issues with other people or non-compliance issues. I would receive complaints from other workers who did not want to work with him due to his abusive and intimidating attitude. This made it difficult to place people where they were needed.
>
> . . .
>
> 6. Ken McNaught's confrontational behaviour made working in the area a real challenge. The level of this abuse towards myself and other(s) was "*over the top"*. He was completely intimidating and threatening. I normally take work in my stride but after putting in a rough day with Ken I would lose sleep at night and dread fronting to work next morning.

[35] Mr Cope said that the incident in question happened on 9 June 2008. He continued:

> I was seated at a desk when he arrived waving a large metal bar. He slammed the bar against the filing cabinet and continued to wave it in my direction shouting and abusing me at the same time. I felt threatened and shaken by this.

[36] Mr Cope produced a photograph of the metal bar he said that Mr McNaught threatened him with. Mr McNaught denied that the bar shown in the photograph was the one that he had been holding. He stated that the bar he confronted Mr Cope with was a smaller metal bar out of the chillers. Either way, I accept Mr Cope's evidence that he felt threatened and shaken by the incident.

[37] Under s 103(1)(b) of the Act a disadvantage grievance arises when one or more conditions of the employee's employment "is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer." Against the background of the

historical incidents the Court heard about, I do not consider that the reference to them in the warning letter, even had they not been discussed with Mr McNaught following the incident on 10 May 2011, constituted an "unjustifiable action" by the employer. They simply reflected the reality of the situation. Moreover, as Mr Chapman emphasised, Mr McNaught acknowledged that following the incident on 10 May, the issuing of the final written warning to him was fair. Indeed he accepted in cross-examination that both men perhaps deserved to be dismissed. In those circumstances, it is difficult to see how he could subsequently claim that he was disadvantaged in his employment by the contents of the warning letter.

[38] For the above reasons, I uphold Prime's challenge and find, contrary to the conclusions in the Authority's determination, that Mr McNaught was not unjustifiably disadvantaged in his employment by the inclusion of historical matters in the final written warning he received following the incident on 10 May 2011.

(b) The relocation

[39] The first disadvantage claim raised in Mr McNaught's cross-challenge related to the issue of the inclusion of historical matters in the warning letter he received dated 12 May 2011 which I have dealt with above in the context of Prime's challenge.

[40] The second disadvantage grievance was said to be the relocation of Mr McNaught from the tripe room to the chillers allegedly for disciplinary or performance reasons. I have concluded above that there is no substance to this allegation. The relocation in question was made for legitimate operational reasons given Prime's sensible conclusion, following the incident on 10 May 2011, that Mr McNaught and Mr Spencer should not be permitted to work together. I find that there was no material difference in the conditions of employment relating to the two areas. If anything, for the reasons mentioned by Mr Forde, the evidence indicated that working in the chillers may have been the more attractive option.

(c) Disparity of treatment

[41] Mr McNaught's third alleged disadvantage grievance was said to be the disparity of treatment by Prime of himself and Mr Spencer. Under this head Ms Lodge submitted:

> 58. We submit that the plaintiff has failed to treat Mr McNaught and Mr Spencer in the same way throughout the investigation and displinary process. Mr Spencer was given the opportunity to have a support person present with him, Mr McNaught was not. In addition, Mr Spencer's explanation of the incident with Mr McNaught was accepted by the plaintiff, despite witness statements to the contrary. Except for a brief absence, Mr Spencer retained his job in the tripe room, Mr McNaught did not."

[42] Mr McNaught's first allegation of disparity of treatment was that Prime had never given him the opportunity to have a support person present during the disciplinary investigation following the incident on 10 May 2011. This was one of the principal complaints Mr McNaught made about the procedure Prime had followed.

[43] As noted above, Mr Hourston no longer works at Prime but shortly before he was called to give evidence on the second day of the hearing, Prime discovered at the plant Mr Hourston's work diary which contained handwritten entries relating to, and made at the time of, the investigation. Of particular relevance was a handwritten entry for 10 May 2011 which stated:

> Informed by Terry that Ken McNaught and Lyall Spencer had an altercation at smoko time. Spoke with Lyall and Kerry which Lyall explained. Adjourned to further processing smoko room where Tim, Shane, Terry, Lyall and TH were present. Lyall gave explanation of episode and Tim recorded it. *Ken brought to smoko room and explained severity of allegation and did he require representation which he declined as he agreed to what had happened but stated he did not hold Lyall around the throat but his hands were on top of his shoulders.*
>
> (emphasis added)

[44] I found this diary entry compelling evidence that Mr McNaught had indeed been offered the opportunity to have a support person present. The disclosure of the diary and the evidence relating to the representation issue did nothing to assist Mr McNaught's credibility.

[45] The second complaint Mr McNaught made about disparity of treatment was that Prime accepted Mr Spencer's explanation of the incident despite witness statements to the contrary. It is not the function of the Court, however, to second-guess the conclusions of an employer once it is established that the employer has investigated the incident in good faith and considered the other matters set out in s 103A of the Act relating to the application of the test of justification. I have concluded that Prime complied with its statutory obligations in this regard.

[46] The final submission made by Ms Lodge on the issue of disparity of treatment was that Mr Spencer retained his job in the tripe room and Mr McNaught did not. The reality was that immediately in the aftermath of the disciplinary investigation, Mr Spencer, who had no history involving disciplinary matters, was moved from the tripe room to the chillers. He was then brought back to the chillers during Mr McNaught's two-months' absence in Australia. These moves were not part of the disciplinary action but were, as Mr Chapman submitted, "a practical imperative because there had been a serious altercation between the two men and they could not work together unsupervised."

Conclusions

[47] For the reasons stated, Prime succeeds in its challenge and the defendant's cross-challenges are dismissed.

[48] Prime is entitled to costs. If costs cannot be agreed upon between the parties then Mr Chapman is to file submissions within 21 days; Ms Lodge is to have an additional 21 days in which to file submissions in response and Mr Chapman is to then have a further 10 days in which to file submissions in reply.

A D Ford
Judge

Judgment signed at 10.00 am on 16 June 2014