IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 124
ARC 94/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARK ALLEN Plaintiff
AND	C3 LIMITED Defendant

Hearing:	5 and 6 June 2012 (Heard at Auckland)
Counsel:	W Nabney and R Nabney, counsel for plaintiff M Sharp, counsel for defendant
Judgment:	31 July 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Allen was dismissed by his employer, C3 Limited (C3), on 16 March 2011 for serious misconduct. He had earlier told his manager to "get fucked", while making an obscene gesture at him as he walked out of a meeting convened to discuss whether or not he was entitled to a day off in lieu. Mr Allen also ignored a request from his manager to return to the meeting. Mr Allen admitted this conduct during the disciplinary process, but did not apologise for it during the meeting on 16 March 2011. C3 considered that Mr Allen's actions constituted serious misconduct warranting dismissal.

[2] The Employment Relations Authority found[1] that, given the plaintiff's previously unblemished employment history and the fact that he was upset at the time he swore at his manager and believed the meeting was taking place during non-work time, it would have been reasonable to allow a cooling off period. The Authority concluded, however, that by the time the 16 March meeting took place, ample time had passed for the plaintiff to reflect on his improper conduct and that the lack of remorse shown at the meeting meant that the defendant's view that the plaintiff's actions amounted to serious misconduct was one that a fair and reasonable employer would have come to, given that the improper conduct had been directed towards a manager and occurred in front of other, subordinate, employees.

[3] The Authority concluded that the defendant had carried out a full and fair investigation, and that the plaintiff had been justifiably dismissed from his employment with the defendant.

[4] Mr Allen challenges the Authority's determination. He contends that his dismissal was unjustified and that he ought to be reinstated to his previous role. The challenge was heard on a de novo basis.

Factual background

[5] Mr Allen was employed by C3 as a fork lift driver, based at Mt Maunganui. He had been employed by the company for 15 years. The plaintiff was asked, and agreed, to work the statutory holiday for Auckland Anniversary Day, on 31 January 2011. He was due to commence work at 7am. Earlier that morning, a fellow employee (Mr Thompson) considered that due to progress on outstanding work being made faster than expected, the plaintiff's services would likely not be required after all. Because he knew that the plaintiff's supervisor was not due at work until 8am, Mr Thompson sent the plaintiff a text message. The wording of the text message is in dispute. According to Mr Thompson, the text message said:

> Sleep in if you want, the ship's finished.

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[1] [2011] NZERA Auckland 506.

[6] The plaintiff says that he had his cell phone switched off and did not receive the text before he arrived at work, as previously arranged.

[7] In the event, the plaintiff arrived at work at 6.45am and was informed by Mr Thompson that he was not required to work and that a text to this effect had been sent to him. The plaintiff says that it was at this point that he realised his cell phone was switched off and that he turned it on in front of Mr Thompson, finding the text message. He says that the text message said:

> Come in if you want ship down to one gang.

[8] Neither the plaintiff nor Mr Thompson retained a copy of the text message. Mr Thompson could not exclude the possibility that the text message was in the terms identified by Mr Allen, and he was unclear about the detail of what had occurred on 31 January in evidence. If Mr Allen did not check his messages prior to arriving at work then the content of the message is irrelevant. There was no requirement that he be contactable by cell phone. It was clear that the company had Mr Allen's cell phone number and his landline number. There was no dispute that Mr Allen had been contactable by landline, and that the company had not attempted to get in touch with him via this means. I am prepared to accept Mr Allen's evidence that he had not checked his cell phone before arriving in at work.

[9] Mr Thompson offered the plaintiff half an hour's work once he had arrived. This would have made him eligible for a payment and a day off in lieu. Mr Allen declined the offer, and returned home at 7am. Accordingly, he was at the workplace, and not doing any work, for 15 minutes.

[10] Mr Allen later applied for half an hour's pay and a day off in lieu, noting this on his timesheet. Unbeknownst to Mr Allen his immediate manager went to see Mr Payne (the Manager of Stevedoring and General Cargo at Mt Maunganui wharves). Mr Payne instructed the payroll officer to twink out the half hour claimed for, and to disallow the day in lieu request. None of this was discussed with Mr Allen or otherwise communicated to him. Mr Payne accepted that, in hindsight, it may have been preferable to have done so.

[11] It became apparent to Mr Allen sometime later that he was not getting paid for the half hour he had claimed and nor was he getting the claimed day in lieu. He became aware of this because the additional pay did not show up in his payslips. He went to speak to his manager, and then Mr Payne. He arranged a meeting for 3pm on 22 February. Mr Allen had started a 12 hour shift at 3.00am on that day. He was entitled, during that 12 hour shift, to three half hour breaks. Mr Allen took the third of these breaks at the end of his shift. It was accepted that he could, in accordance with usual practice, have left work at that time if he had chosen to do so. Instead he went to see Mr Payne about concerns he had about his claim. He asked Mr Thompson to attend the meeting with him. He had it in mind that Mr Thompson would be able to confirm what the text message had said. While Mr Thompson did attend the meeting, he said nothing during it. He did not confirm Mr Allen's recollection of the text message and nor did he make it known that he believed it said something different.

[12] Mr Allen explained that he had had his phone switched off and that, when he had turned it on, the message had said "come in if you want". He said that he had come in, as planned, and was entitled to half an hour's pay and a day off in lieu. Mr Payne told Mr Allen that as he had been sent a text message advising him that he did not need to come in, and as it was a requirement that he be contactable, he was not entitled to pay and a day off in lieu. Mr Allen was not drawn to what his manager had to say, and responded by advising that he understood Mr Thompson did not have authority to instruct him not to attend work and that he should, in any event, have been contacted on his landline rather than by cell phone.

[13] Mr Allen became upset, stood up and said "is that it?" to which Mr Payne said "yes, that's it". Not surprisingly, the plaintiff took this to mean that the meeting, which he had requested and which was convened to discuss his application for a day off in lieu, had come to an end. He left the office. However, Mr Payne called him back saying words to the effect that he had not finished speaking to Mr Allen. It was at this point that Mr Allen told Mr Payne to "get fucked" and made an obscene gesture with his middle finger. He did not return to the meeting. Rather, he departed from the office. There is no dispute that this occurred.

[14] Mr Payne said that he was very concerned about the plaintiff's actions, and that he had never been spoken to in such a way before. His concerns, he said, were exacerbated by the fact that Mr Allen had sworn at him in front of other employees and had refused to obey his instruction to return to the room. Mr Payne took his concerns to the Employee Relations Manager (Mr Pritchard). A decision was made to commence an investigation. Mr Payne wrote to Mr Allen on 24 February 2011, advising him that the company was going to carry out a disciplinary investigation and that he (Mr Payne) would like to meet with Mr Allen to obtain an explanation. My Payne advised that the meeting would be conducted by Mr Pritchard with himself in attendance to take notes. The letter attached extracts from the company's code of conduct, including examples of behaviour which amounted to serious misconduct and which could lead to instant dismissal. The examples included:

> The use of abusive and/or obscene language and gestures and ... the refusal to carry out a reasonable instruction from a manager or supervisor.

[15] A meeting was held on 1 March 2011. Mr Payne and Mr Pritchard were present. Notes of the meeting record that Mr Allen admitted the conduct complained of. Mr Payne wrote to Mr Allen following the meeting advising that since the earlier meeting:

> We have further investigated this matter and discussed the text sent to you by [Mr Thompson] in fact was 'sleep in it you want, ships finished'.

[16] The letter advised Mr Allen that he was required to attend a formal disciplinary meeting on 16 March 2011. The letter stated that the meeting would be conducted by Mr Payne, and that Mr Pritchard would be in attendance to "take notes." Mr Allen was invited to bring a support person or representative with him, which he did. As it transpired, his representative had very little experience in disciplinary matters, although Mr Payne did not know this at the time.

[17] Mr Allen admitted insubordination and obscene language at the meeting. He reiterated that he had not received the text message before arriving at work. Notes taken by Mr Pritchard at the meeting record that Mr Payne stated that he had never been spoken to like that before, and that he "would have difficulty working with [Mr Allen] again." This occurred during a break in the meeting. The meeting notes also

record that Mr Allen asked: "what do you want me to say?" and queried whether he was going to get an apology. He is later recorded as stating: "if I need to apologise then I will I suppose."

[18] The meeting was adjourned after Mr Allen was advised that dismissal was being considered and after he was asked to consider a change in attitude. When the parties returned to the meeting, Mr Allen's representative stated that the plaintiff disagreed that there was any basis for taking action against him and that, whatever the outcome, they intended to take the matter further. The defendant then terminated the plaintiff's employment with immediate effect, with one week's notice being paid in lieu.

Was the dismissal justified?

[19] Issues of procedural and substantive justification arose. I deal with each in turn.

Procedural issues - bias?

[20] Mr Nabney, counsel for the plaintiff, submitted that there were procedural deficiencies with the way in which C3 dealt with its concerns. In particular, it was contended that Mr Payne was biased. The basis on which this submission was advanced was that he had been involved in both the investigation and the decision to terminate Mr Allen's employment. *Walker v Boehringer Ingelheim (NZ) Ltd*[2] was cited in support. There Judge Travis accepted a submission that the dismissal was predetermined, in circumstances where the person who the employee had offended was also the person who made the decision to dismiss. The Court stated that it would have been more appropriate for the managing director to conduct the interview and decide whether the case warranted dismissal. The Court observed that it is unwise for a person directly involved in the events to be allowed to make a decision where this can be avoided.[3]

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[2] AEC 119/95, 15 November 1995.
[3] At 13.

[21] Mr Pritchard's evidence was that he was the decision-maker and that Mr Payne essentially sat in on the meetings in a note-taker role. I do not accept this. It was inconsistent with the correspondence written by Mr Payne that was sent to Mr Allen, notably the letters of 8 March 2011 and of 18 March 2011 (recording his dismissal and which concluded with the invitation to contact Mr Payne personally if Mr Allen had any issues about the matters raised in the letter). Further, it is clear that Mr Payne was actively involved from the outset in the decision to instigate a disciplinary process, the meetings that occurred, discussions during breaks in pivotal meetings, and in conducting further inquiries.

[22] I do not accept that references to Mr Payne conducting the 16 March meeting and the fact that Mr Payne sent out the final letter were simple errors. Mr Payne signed the letter and confirmed in evidence that it had been checked by Mr Pritchard prior to despatch. Revealingly, the only meeting notes in relation to the 16 March meeting produced in evidence were ones that Mr Pritchard had written. This was consistent with his role of note-taker, rather than decision-maker. While Mr Pritchard played a role in advising on various matters throughout the process, I was left in no doubt that Mr Payne was effectively the decision-maker, not Mr Pritchard.

[23] Mr Payne made it clear to Mr Pritchard that he would have difficulty working with Mr Allen if Mr Allen stayed on (despite the fact that Mr Allen had continued to work, without incident, during the disciplinary process). This comment was made during a break in the meeting of 16 March 2011, just prior to Mr Allen being advised that he was to be dismissed. There was no evidence that Mr Payne's reservations about working with Mr Allen were put to Mr Allen for comment. Mr Payne accepted in cross-examination that he thought that Mr Allen had been trying to wrought the system. The evidence relating to Mr Payne's views on what had occurred supports the concerns identified by counsel for the plaintiff in relation to predetermination and bias, and Mr Payne's involvement in the decision-making process.

[24] Mr Pritchard said that he had made the decision to dismiss rather than Mr Payne, and that Mr Payne's statement as to the difficulties he would have continuing to work with Mr Allen did not influence the decision to dismiss. I have already

found that it was Mr Payne, not Mr Pritchard, who was the decision maker. I am left with no doubt that even if that was not so, Mr Payne's strongly held and articulated views would have been influential in Mr Pritchard's consideration. In *Walker v Waiheke High School Board of Governors*[4] Blanchard J observed that:

> The mere presence of an accuser at a meeting in which a critical decision is taken may give rise to a breach of natural justice. It may influence the decision even if the accuser says nothing.

[25] There is no immutable rule that the person complained about cannot act as decision-maker, and there will be circumstances in which it is not practical to do otherwise. However, C3 is a large organisation, and it is clear that someone other than Mr Payne could have undertaken the process. It is also clear that someone other than Mr Payne should have done so, given that Mr Allen directed his obscene gesture and verbiage at Mr Payne; Mr Payne's direct involvement in the matters at issue; the steps Mr Payne took in relation to Mr Allen's work sheet; his strong personal feelings about what Mr Allen had said; and his views about whether Mr Allen's ongoing role within the company was tenable. I do not consider that the fact that it was common practice within C3 to involve the relevant manager in meetings to "provide information" materially alters the position.

[26] Mr Pritchard made the point that no issues had been raised by either Mr Allen or Mr Allen's representative during the course of the process in relation to Mr Payne's involvement. He referred to the fact that during the meeting on 16 March 2011 he had checked with Mr Allen and his representative that the process was fair and that they had confirmed that they thought it was. However, as Mr Nabney observed, neither Mr Allen nor his representative could have been expected to raise concerns about aspects of the process they were unaware of.

[27] Mr Payne's roles as complainant, witness, and decision-maker were incompatible. An objective observer would not conclude that he had brought an unbiased mind to the decision to dismiss. The multi-dimensional role he assumed

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[4] HC Auckland A2550/88, 9 September 1994 at 9.

was not how a fair and reasonable employer would have acted, and fell short of the standard in s 103A.

[28] I pause to note the evidence of Mr Sydney, who is currently employed by C3. He says that Mr Payne discussed Mr Allen's position with him in November 2010, advising that having left the Rail and Maritime Transport Union and joining the Maritime Union of New Zealand he had no collective agreement, no rights and had left himself "wide open". Mr Sydney's evidence was that Mr Payne told him that if Mr Allen stepped out of line, he was "gone". He says that a further conversation occurred after Mr Allen's dismissal, in March 2011, and that Mr Payne told him that:

> …being a MUNZ member you also have no rights and the same could happen to you as happened to Mark Allen.

[29] Mr Payne could not recall making these comments, and rejected the suggestion that he would have said anything like: "if he steps out of line [Mr Allen's] gone." Rather, he said that he was concerned that Mr Allen have the protection of an employment agreement. The conversations occurred some time ago, and there is the possibility that Mr Sydney was mistaken about what Mr Payne said, and the import of it. In these circumstances, I put this evidence to one side.

[30] I conclude that the process followed by the defendant company was procedurally flawed. I do not accept the submission advanced on behalf of the defendant that it would have made no difference having a different decision-maker. A different decision-maker would have been able to approach the issue objectively, and weighed the seriousness of the admitted conduct, and Mr Allen's response, against the other relevant considerations – including his work history and the circumstances surrounding the 22 February meeting.

Substantive justification?

[31] Section 103A of the Employment Relations Act 2000 (the Act) has been amended relatively recently.[5] The amendment came into force on 1 April 2011. Mr

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[5] Employment Relations Amendment Act 2010.

Allen was dismissed on 18 March 2011. The dismissal accordingly pre-dated the commencement of the 2011 amendments.

[32] The amending legislation did not include any transitional provisions relating to s 103A. However, it is well established that legislation is presumed not to have retrospective effect. Both counsel were agreed that the relevant statutory test is the one that was in force at the time of Mr Allen's dismissal. I return to the issue of retrospectivity in relation to s 125 in greater detail below.

[33] Section 103A relevantly provided that the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[34] As the full Court of the Employment Court observed in *Air New Zealand Ltd v V*:[6]

> ... s 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

[35] A two stage approach is required. First, whether the conduct in question is capable of amounting to serious misconduct. If the answer is "no" then the dismissal cannot be justified. If the answer is "yes", consideration must be given to whether dismissal was warranted in all of the circumstances.[7]

[36] The defendant submits that the plaintiff's conduct at the meeting constituted serious misconduct, and that it fell within the examples of serious misconduct set out in the code of conduct. In this regard it is submitted that the plaintiff not only

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[6] [2009] ERNZ 185 at [33].
[7] *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board* [1991] 2 ERNZ 215 at 222.

directed obscene language, and an accompanying gesture, at his manager but that he also failed to comply with a direction from his manager (namely to return to the meeting) and did so in the presence of another employee and supervisor. While it is conceded that, when taken in isolation, the plaintiff's conduct at the meeting may not have warranted dismissal, it is submitted that his subsequent conduct (in conjunction with his earlier conduct) did. Particular reliance was placed on Mr Allen's lack of remorse (reflected in his failure to apologise) and his assertion that he had been lied to and cheated out of a day off in lieu.

[37] The plaintiff submits that there was no basis for the conclusion that there had been misconduct sufficient to justify dismissal. Effectively this submission was advanced on the grounds that Mr Allen's behaviour can best be characterised as a "flash of anger", which occurred in the context of a robust working environment and against the backdrop of a blemish free and lengthy history with the company. These submissions really amount to an alleged failure by the company to take into account mitigating factors prior to reaching the decision to dismiss.

[38] The defendant placed considerable weight on the plaintiff's failure to comply with an instruction from Mr Payne to return to the meeting, as reflective of insubordination which could not be tolerated within the organisation. In this regard, Mr Payne's evidence was that it constituted a blatant undermining of managerial authority.

[39] I do not consider that Mr Allen's actions in failing to return to the meeting are properly regarded as amounting to serious misconduct in the circumstances. Mr Allen had requested the meeting for a particular purpose, namely to discuss the day off in lieu entitlement issue. The meeting took place at the end of a long (12 hour) day, which had been interspersed with two half hour breaks. While it occurred during work time, it was held during the last half hour break during which Mr Allen would otherwise have been able to leave work. Mr Allen was tired. He was advised by Mr Payne that a decision had been made that he was not entitled to a day in lieu. Mr Allen was upset and frustrated by this, and Mr Payne knew that this was so. Mr Allen then asked if "is that it?" and Mr Payne confirmed that it was. Mr Allen then (sensibly in the circumstances) got up and left the room.

[40] Mr Allen reasonably believed that the meeting was over and that there was nothing further to discuss. Mr Payne's evidence was that he wanted to take the opportunity to discuss an entirely unrelated issue, namely Mr Allen's contractual arrangements, and was simply calling Mr Allen back into the room to arrange a convenient time to meet. I do not accept Mr Payne's evidence on this point. Mr Payne knew that Mr Allen was upset and frustrated about the advice he had received from him at the meeting. That was confirmed not only by Mr Payne himself, but also others who were in attendance. When the question was put to him, Mr Payne was unable to explain why he had asked Mr Allen to return, knowing him to be upset, simply to organise a time to meet. It was a provocative step, and one which predictably sparked an angry reaction from Mr Allen.

[41] There was evidence from a number of witnesses that swearing is not uncommon in the workplace. That is relevant to a determination of whether the words directed at Mr Payne ("fuck you") amounted to serious misconduct in the circumstances. There was, however, nothing to suggest that directing obscenities at managers or supervisors was commonplace within C3. Indeed the evidence from a number of witnesses (including Mr Payne) was that they had never heard such abuse before. Nor was there any evidence that obscene gestures were commonplace within the working environment.

[42] While I accept that there was an element of robustness about the language used amongst C3 employees, I do not accept that the sort of language Mr Allen directed at Mr Payne, coupled with an obscene hand gesture, fell within any generally accepted, usual, or common practice. It undoubtedly fell within the category of misconduct and, as Mr Allen himself acknowledged during the course of evidence, may well have amounted to serious misconduct too.

[43] Counsel for the defendant referred to *Coffey v The Christchurch Press, a Division of Fairfax New Zealand Ltd.*[8] There the Court found that, despite swearing and bad language being relatively prevalent in the workplace, it was still justifiable to dismiss the plaintiff for bad language. However, in that case Mr Coffey had

[8] [2008] ERNZ 385.

received two written warnings and a final warning about the use of his bad language before he was dismissed. In the present case no such warnings existed. Reference was made to one previous incident, when Mr Allen had written a message on a staff whiteboard. However, no formal action was taken and Mr Allen was acting in his capacity as union representative at the time.

[44] Whether dismissal was justified depends on a number of factors. Mr Allen undoubtedly compounded his position by his failure to voluntarily offer a full and unequivocal apology at the meeting of 16 March 2011. This appears to have fallen short of both Mr Payne's and Mr Pritchard's expectations. Mr Allen did however say that he would apologise if he had to, and accepted from the outset and throughout the process that his behaviour had been wrong. In cross examination, Mr Pritchard accepted that Mr Allen had been up-front during the meetings and had accepted that he was at fault. This is not reflective of a completely intransigent attitude towards management, as Mr Pritchard suggested Mr Allen's position to be. It appears that Mr Allen asked the union president (Mr Harvey) to make arrangements so that he could apologise, although he was unclear as to the date on which this occurred, and whether it pre-dated his dismissal.

[45] It is evident that the defendant saw the lack of an apology as the final straw. Mr Pritchard's evidence was that if Mr Allen had apologised at the 16 March meeting he would not have been dismissed. Mr Nabney made two salient points in relation to this. Firstly, he observed that Mr Allen was not told that an apology was required in order to avoid a dismissal. Mr Payne confirmed this in cross-examination. Secondly, that the company's position that an apology would have sufficed reflects a fundamental inconsistency in its approach. Mr Payne emphasised that dismissal was necessary to send a strong message to staff that insubordination was not tolerated within the company. However, Mr Pritchard's evidence was that if an apology had been forthcoming the company would not have made it known to staff. As Mr Nabney said, that undermines the rationale for the company's decision to dismiss.

[46] The Authority member found that Mr Allen had effectively backed the defendant into a corner with his unbending attitude, and that dismissal became the

only realistic option.[9] That conclusion needs to be viewed in the context of what actually occurred.

[47] It is clear that Mr Payne had taken steps to alter Mr Allen's handwritten time record, directing another employee to twink out reference to half an hour of work. He had not discussed this course of action with Mr Allen in advance, or alerted him to what had been done. He accepted in cross examination that, with the benefit of hindsight, it may have been preferable to have adopted a different approach. That is plainly so.

[48] Mr Payne acted in a provocative manner at the meeting of 22 February, in summonsing Mr Allen back into the room when he knew that Mr Allen was upset, and in the absence of any good reason why a discussion about scheduling a meeting in relation to Mr Allen's contract could not wait until a more appropriate time.

[49] Mr Allen had been with the company for some 15 years. He had not been the subject of any formal disciplinary process during his time there. While the defendant's witnesses referred to previous occasions on which steps had had to be taken to deal with issues relating to the plaintiff's attitude, in the event only one occasion was referred to, and that involved Mr Allen acting in the capacity of a union representative in the context of a dispute about work hours. There was no evidence that the company considered Mr Allen's work history before reaching the decision to dismiss. The company's code of conduct makes it clear that this is a factor to be considered prior to any disciplinary action being taken.

[50] I have already referred to issues relating to Mr Payne's involvement in the decision-making process. His involvement was problematic, given that he was the person who made the complaint to Mr Pritchard because he had been so concerned about the way in which Mr Allen had spoken to him. He had also indicated to Mr Pritchard just prior to Mr Allen's dismissal that he would need to reconsider his position with the company if Mr Allen was not dismissed, and had given his view that Mr Allen had been trying to wrought the system.

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[9] Determination at [90].

[51] Evidence was given from Mr Farmer. He worked for C3 for a period of five years. Mr Farmer suffers from a hearing impediment. He said that he left because he was the recipient of constant taunts from a supervisor about his hearing loss. His evidence (which I accept) was that he complained about this several times to Mr Payne but that Mr Payne failed to take any formal action until Mr Farmer physically pushed his supervisor after being taunted one day, and was threatened with a charge of assault. Mr Payne accepted that the supervisor had been abusive and derogatory towards Mr Farmer, on an ongoing basis. He said that he had dealt with it by writing to the supervisor and reinforcing that he needed to treat his colleagues "in a more amiable manner".

[52] While I accept Mr Sharp's submission that there are a number of distinguishing features between Mr Farmer's situation and the circumstances involving Mr Allen's case, Mr Payne's low key approach to dealing with a supervisor's offensive and repeated taunts, directed at an employee with a hearing impediment, contrasts sharply with the way in which he responded to Mr Allen's unacceptable, but one-off, outburst directed at him.

[53] I accept that some disciplinary response by the employer was justified. Mr Nabney did not seek to argue otherwise. As he said, the plaintiff had accepted from the outset that what he had done, and how he had acted, was wrong. It is clear that if he had apologised he would not have been dismissed. I do not consider that a fair and reasonable employer would have concluded that the lack of an apology, in circumstances in which Mr Allen said that he would apologise if he had to (and it was not made explicit that he would be dismissed if he did not), justified dismissal, having particular regard to the surrounding circumstances and mitigating factors involved.

[54] In terms of substantive justification, standing back and considering the evidence objectively, I do not consider that the dismissal and how the defendant acted were what a fair and reasonable employer would have done in all of the circumstances. The dismissal was both procedurally and substantively unjustified.

Reinstatement

Which test applies? Do the 2010 amendments to s 125 have retrospective effect?

[55] Counsel were at odds as to whether the current, or former, s 125 test for reinstatement applies in the circumstances of this case, given the date on which the events complained of occurred. Mr Sharp pointed out that several Authority determinations[10] and at least one Employment Court decision (*Gwilt v Briggs & Stratton New Zealand Ltd*[11]) have adopted the former test but that this has not been the invariable approach. In *Gwilt* the Court adopted the previous test for reinstatement, although without analysis.[12] It does not appear, however, that it would have made any difference whether the current or previous test had applied on the facts of that case.[13]

[56] Counsel for the plaintiff submits that s 125, as it stood at the time of the dismissal, applies. Counsel for the defendant submits otherwise. Both agreed that the issue is not without difficulty.

[57] Support for the position advanced on behalf of the defendant is found in the commentary to *Brookers Employment Law*.[14] The authors express the view that the approach adopted in *Gwilt* is in error and that the approach in two Authority determinations (*Lamb v Burnside Dairy Farms 2008 Ltd*[15] and *Khan v Oracle New Zealand Ltd*[16]) should be preferred. They conclude that the presumption against retrospectivity does not operate in relation to s 125, and that "any assessment of remedies – as with the application of any adjectival, procedural, or evidential law – after 1 April 2011 should be made pursuant to 'new' s 125 and subject to the evidence of the situation 'on the ground' at the time of the determination, not at the time of the dismissal."[17]

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[10] See, for example, *Thomas v AssureQuality Ltd* [2012] NZERA Christchurch 4.
[11] [2011] NZEmpC 140.
[12] At [96].
[13] At [98].
[14] (online loose-leaf ed, Brookers) at ER125.01.
[15] [2011] NZERA Christchurch 53.
[16] [2011] NZERA Auckland 177.
[17] At ER125.01.

[58] Mr Sharp submitted that whether or not the 2010 amendments had retrospective effect depended on their nature, and whether they were procedural or substantive. He submitted that amendments to the test for justification under s 103A had the effect of altering substantive rights and accordingly did not have retrospective effect. However, he characterised the amendments to the remedy of reinstatement as being simply procedural in nature and having retrospective application.

[59] Legislation is retrospective if it has effect in relation to a matter arising before it was enacted or made.[18] However, as Asher J observed in *Art Deco Society (Auckland) Incorporated v Auckland City Council*:[19]

> Acts of Parliament, insofar as they change the law, almost always change existing rights. If people have ordered their lives on the basis of the previous law, they may be disadvantaged by the change… There is a distinction between this sort of change, and a change which makes a new law which applies and changes rights and obligations at a past date.

[60] There is a presumption against retrospective legislation. The presumption is based on concepts of fairness and legal certainty, and the principle that accrued legal rights and the legal status of past acts should not be altered by subsequent litigation. In *Lauri v Renad* it was said that:[20]

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction; and the same rules involve another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.[21]

[61] The common law presumption is statutorily reflected in s 7 of the Interpretation Act 1999,[22] which provides that:

> An enactment does not have retrospective effect.

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[18] Daniel Greenberg (ed) *Craies on Legislation* (8th ed, Sweet & Maxwell, London, 2004) at 10.3.1.
[19] [2006] NZRMA 49 (HC) at [53].
[20] [1892] 3 Ch. 402 at 421.
[21] See too *R v Field* [2002] EWCA Crim 2913, [2003] 3 All ER 769 at [60], holding that a disqualification order did not offend against the presumption against retrospectivity, as the effect of disqualification was entirely prospective (given that it only affected future conduct).
[22] See too the Explanatory Note to the Interpretation Bill 1997, as to the intended effect of s 7, which was to re-state the common law principle.

[62] It is reinforced by ss 17 and 18. Section 17(1) states:

> The repeal of an enactment does not affect –
>
> (a) the validity, invalidity, effect, or consequences of anything done or suffered:
>
> (b) an existing right, interest, title, immunity, or duty:
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> (c) an existing status or capacity:
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> (d) an amendment made by the enactment to another enactment:
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> (e) the previous operation of the enactment or anything done or suffered under it.

[63] Section 18 is entitled "Effect of repeal on enforcement of existing rights". It provides that:

> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

[64] Did the plaintiff have an existing right to have his remedies assessed and awarded (if appropriate) under the repealed provision of the Act or are his remedies to be determined under the new provision? Neither counsel suggested that the new s 103A applied to a determination of whether or not Mr Allen's dismissal had been justified. Notably, the wording of both the repealed and current s 103A focuses on the actions of the employer *at the time* of the dismissal. The effect of ss 17 and 18 is to preserve Mr Allen's entitlement to have his dismissal, and the justification for it, assessed pursuant to the previous s 103A. If ss 17 and 18 also apply to s 125 of the Act, then the plaintiff's application for reinstatement as a remedy must be considered under the terms of the repealed section.

[65] Sections 18(1) and (2) relevantly refer to the "*bringing* or completing" of proceedings that relate to an existing right. This suggests that an "existing right" can accrue before the commencement of legal proceedings, consistently with s 17(1)(b), which provides that the repeal of an enactment does not affect an existing right. The

evident focus of s 18 is the existence or otherwise of an existing right, rather than whether proceedings relating to that right have been commenced or completed.

[66] In *Chaplin v Holden and NIMU Insurance Association*[23] the Court of Appeal held, in relation to s 20 of the Acts Interpretation Act 1924,[24] that a party had an accrued right to damages as at the date the action complained of (a road traffic accident) occurred. The Court rejected a suggestion that those rights did not accrue until judgment was given, finding that:[25]

> As from 17 December 1966 [the date of the accident], therefore, events which had already occurred had vested in the appellant an accrued right to damages against the first respondent. The first respondent acquired as at the same time a vested right to be indemnified by the second respondent for such damages as he might in the event be ordered to pay; and reciprocally the second respondent acquired the right to a limit of $10,000 in respect of his liability under the indemnity.
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> We think that all this happened as at 17 December 1966, and that these parties had thereafter inter se "rights already acquired." They also had remedies in respect thereof, and if there were as yet no "proceedings" in respect thereof, such as are referred to in s 20(e)(iii) of the Acts Interpretation Act, such proceedings were commenced at least on 13 December 1968, and were in being before the passing of the Transport Amendment Act 1968. *We do not accept the argument that because the liability of the parties inter se was not yet quantified with certainty they could not be said to have acquired accrued rights inter se as to the consequences of the accident.* Certainly it could not be said that the plaintiff had no right against the defendant until the judgment was given; he had a right of action before judgment, which by the act of the Court in giving that judgment was extinguished and merged in the judgment given. *But his right to damages was an accrued right before the case was heard.* And we think that the same argument applies to the right and obligation as to indemnity between the first respondent and the second respondent.

[67] The Court in *Chaplin* relied on a decision of the Privy Council in *Free Lanka Insurance Co Ltd v Ranasinghe*.[26] That case involved the repeal of an ordinance requiring drivers to have third party insurance, and permitting persons to recover from the insurer by suing the insurer directly. An accident occurred before the ordinance was repealed. Following repeal, the respondent commenced an action to recover damages from the insurer. The appellant argued that the respondent could

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[23] [1971] NZLR 374 (CA).
[24] Which was in similar terms to ss 17 and 18 of the Interpretation Act 1999.
[25] At 377-378. Emphasis added.
[26] [1964] AC 541 (PC).

only advance his claim under the new Act. The Privy Council rejected that argument holding that:[27]

> … their Lordships agree with Gunasekara J in thinking that on September 1, 1951 [the date of the new enactment coming into force], the respondent had as against the appellants something more than a mere hope or expectation - that he had in truth a right, … although that right might fairly be called inchoate or contingent. … In the present case, as it seems to the Board, the appellants cannot now be heard to say that the respondent was not immediately after the accident an injured third party entitled to recover damages against [the truck owner] and, as they think, his service upon the appellants of the notice of his claim (together with a copy of his plaint) pursuant to section 134 of the 1938 Ordinance was an assertion by him of his statutory right against the appellants; and nonetheless effectively so because the quantum of his claim was dependent upon the finding of the court in a decree made in his favour in his action against [the truck owner].

[68] *Ranasinghe* in turn relied on another Privy Council decision, *Director of Public Works v Ho Po Sang*.[28] There a lessee negotiated to renew his lease of land from the Crown and the terms of the new lease required him to erect new buildings on the site. In order to do so the lessee needed his current tenants to vacate the existing buildings. The lessee applied under the relevant Hong Kong ordinance for a rebuilding certificate one of the effects of which would be to enable him to give notice to the tenants to quit. While the application was in train, the ordinance was repealed. The Privy Council found that, while the appellant had given notice of his intention to issue the certificate under the ordinance, there were still steps mandated by the ordinance to be completed, namely that the lessee give notice to the affected tenants and the tenants could then appeal to the Governor in Council. That decision would then have been final. Their Lordships held that before the repeal:[29]

> the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and until the petitions and cross-petition were taken into consideration by the Governor in Council no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.

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[27] At 552.
[28] [1961] AC 901 (PC).
[29] At 921-922.

[69] Their Lordships also held, in the passage relied upon by the Privy Council in *Ranasinghe*, that:[30]

> It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. *It will be preserved even if a process of quantification is necessary.* But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon repeal the former is preserved by the Interpretation Act. The latter is not.

[70] *Ho Po Sang* is distinguishable from the present case, as it involved an application to the Crown for the exercise of discretion rather than a court proceeding as in *Chaplin* and *Ranasinghe*. The Privy Council in *Ho Po Sang* was concerned not to turn procedural steps taken in a case where the applicant was applying for the grant of a privilege to be turned into a substantive right. Similarly, this case is also distinguishable from *Foodstuffs (Auckland) Ltd v Commerce Commission*,[31] which involved an application for pre-clearance from the Commerce Commission unresolved at the time of the law change.

[71] An instructive case is *Hamilton Gell v White.*[32] There the English Court of Appeal held that a tenant's statutory right to claim compensation against a landlord existed not because the tenant had given notice but because the *landlord* had given the tenant notice to quit. As Atkin LJ held:[33]

> It is obvious that that provision [of the Interpretation Act] was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the [repealed Act], for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation.

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[30] At 922. Emphasis added.
[31] [2002] 1 NZLR 353 (CA). This decision was reversed on other grounds by the Privy Council: *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC).
[32] [1922] 2 KB 422.
[33] At 431.

[72] Particular issues arise in relation to the challenge process provided for in the Act. Depending on the timeframes involved, an employee could be dismissed and have his/her dismissal and request for reinstatement dealt with in the Authority prior to the amendment coming into force and the justification for the dismissal and reinstatement considered on a de novo basis on a challenge (appeal) to the Employment Court. It would be illogical and contrary to broader principles of justice to apply different tests, in relation to the same matter, simply as a consequence of the effluxion of time.[34]

[73] A relatively recent judgment of the Court of Appeal draws several strands of the case law together. In *Löwer v Traveller*[35] the Court considered a case where liquidators wanted to hold the sole director of a company personally liable for reckless trading under s 320 of the Companies Act 1955. The liquidators did not begin their proceeding until 1998. The Companies Act 1955 had been repealed with effect from 1 July 1994[36] and the company was not wound up until after that date. The appellant director argued that, although all the relevant events relied on under s 320 had taken place by 1 April 1994, the cause of action in reckless trading could not accrue until the winding up of the company commenced. The Court rejected that proposition.

[74] The Court considered that the question was whether the company had an existing right to compensation under s 320 even though a further event, namely its liquidation, had to take place before the right could be enforced.[37] McGrath J found:[38]

> Under s 20(e)(iii) of the Acts Interpretation Act 1924 (the equivalent in that Act of s 17(1)(b)) the requirement was that a right be "acquired". The term used in the 1999 Act is "existing", but the change is only one of modern expression without difference in meaning. In *Dental Council of New Zealand v Bell* [1992] 1 NZLR 438 Tipping J said of this requirement at p 443:
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> > The essence of an accrued right in this context is that something must have happened to give the person claiming the right the ability to prosecute the

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[34] *Re A Debtor; Ex parte Debtor* [1936] Ch 237 (EWCA).
[35] [2005] 3 NZLR 479.
[36] Section 320 was re-enacted in a modified form in the Companies Act 1993. As with s 125 of the Employment Relations Act it was a statutory provision not founded on common law principles.
[37] At [56].
[38] At [57].

> same to judgment. Although the right need not have matured into formal legal relief the facts entitling the person concerned to relief must have happened before the repeal in such a form that the right, although not having matured into judgment or relief, can nevertheless be described as inchoate or contingent.

[75] The Court went to note that a purposive approach to the legislation confirmed this conclusion[39] and that there was little prospect of an avalanche of historic claims under the provision.[40]

[76] I am satisfied that having regard to the circumstances of the case the plaintiff had an existing right to have the issue of his possible reinstatement determined under the repealed s 125. As *Löwer* makes clear,[41] neither the fact that the right had not been claimed nor determined by a judicial body, nor the fact that the right was unquantified or contingent, is decisive. The right to reinstatement under old s 125 could only exist if the Authority or Court found that there was a personal grievance and that reinstatement was practicable. The fact that other events would have to occur before the right could be exercised does not prevent there being an existing right. That is especially so in this case where the contingency is a decision of a judicial body, beyond the control of the plaintiff.

[77] Nor is this the sort of case where an application is to be determined at the absolute discretion of the decision-maker as in *Ho Po Sang*. Rather, this is a case where a right arose on dismissal but, in respect of that right, some investigation or legal proceeding was necessary. In *Chaplin*, the Court of Appeal found that the fact that damages were yet to be quantified did not mean that no right existed. The Court defined the right in question as a right to damages, that is, a right to a remedy. Similarly, in *Hamilton Gell*, Atkin LJ emphasised that the right which arose was a statutory right to compensation. In the present case, the plaintiff had more than a hope or expectation; he had a right to have his claim for unjustified dismissal determined judicially and remedied according to the statutory scheme.

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[39] At [60].
[40] At [61].
[41] At [57]-[59].

[78] It is well accepted that the presumption against retrospectivity does not generally apply to legislation concerned merely with procedure. Provisions of this nature are to be construed as retrospective unless the enactment clearly indicates a contrary intention.[42] This is because no person has a vested right in a particular procedure.[43]

[79] Provisions introducing new remedies that do not affect the substantive rights of parties to proceedings have sometimes been classed alongside procedural provisions for the purposes of the rules as to retrospective effect, so that those provisions are prima facie applicable both to proceedings subsequently begun in respect of existing causes of action and to existing proceedings.[44]

[80] While it is true that reinstatement is a remedy, a simplistic approach to categorisation is to be avoided. In *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd*[45] the House of Lords warned that the distinction between what is procedural and what is substantive can be misleading because it ignores the fact that some procedural rights are more valuable than some substantive rights. Lord Mustill observed that it may be doubtful whether any right can unequivocally be assigned to one category or another.[46] His Lordship added that whilst keeping the distinction between procedural and substantive rights well in view, it was preferable "to look to the practical value and nature of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event."[47]

[81] That note of caution is particularly apt when considering the remedy of reinstatement. The importance of reinstatement as a remedy has been emphasised in

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[42] *Laws of New Zealand* Statutes at [59].
[43] *Yew Bon Tew Alias Yong Boon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 558.
[44] *Laws of New Zealand* Statutes at [59].
[45] [1994] 1 AC 486.
[46] At 528. See too J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 595 where the authors observe that provisions that are apparently of a procedural nature can sometimes have the effect of depriving a person of a vested right. Such provisions will not be construed retrospectively if that would be their effect.
[47] *L'Office Cherifien* at 528. See also *Crown Health Financing Agency v P* [2009] 2 NZLR 149 (CA) at [195].

a plethora of cases.[48] It entitles a person to their job back. Under repealed s 125, reinstatement was the primary remedy. It required the Court or Authority to order reinstatement, regardless of what other remedies were awarded in their favour, if they established two things. Firstly, that they had a personal grievance. Secondly, that reinstatement was practicable. It was, in this sense, a substantive right. Reinstatement is now simply one of a number of available remedies, and is to be assessed having regard to whether it is practicable *and* reasonable. It has lost its primary status, which conferred significant benefits on an employee who had been unjustifiably dismissed (particularly in difficult economic times).

[82] Mr Sharp, for the defendant, observed that the actions of an employer, and whether they were justified or not in dismissing an employee, are to be assessed at the time they occurred. He contrasted this to the assessment the Court is required to make in determining an application for reinstatement. As he pointed out, the Court will have regard to issues arising post-termination in considering whether or not to grant reinstatement. This, it was submitted, reflected a contemporaneous enquiry, which was said to support an argument that the new s 125 should be applied. I agree that the assessment under s 125 must be made contemporaneously. But it does not follow that the current s 125 test must be used to make the assessment. What is decisive is whether ss 17 and 18 of the Interpretation Act apply and I do not consider that the contemporaneous nature of the test in s 125 (both old and new) displaces that application.

[83] I am fortified in my view by consideration of the purpose of the Act.[49] Although Parliament has altered the test for reinstatement, it has not abolished the remedy. It is evidently Parliament's purpose that reinstatement remain a remedy which can be awarded should the circumstances allow. In both the repealed and current sections, such reinstatement was/is conditional. What has changed is the scope of that condition. As in *Löwer*, treating the saving provisions of the

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[48] For example *NZ (except Canterbury & Westland) Electrical etc IUOW v Bay of Plenty Electric Power Board* [1989] 1 NZILR 815 at 823; *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436-437; *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [71]-[74]; *Creedy v Commissioner of Police* [2011] NZEmpC 104 at [8]-[9].

[49] See Burrows and Carter *Statute Law in New Zealand* at 591; *Prouse v Commissioner of Inland Revenue* (1994) 16 NZTC 11,249 at 11,252 (CA) per Richardson J.

Interpretation Act as applicable would not be inconsistent with the common purpose of both the original section and its amendment to provide the conditional remedy of reinstatement.

[84] Nor would such an approach generate a wave of claims. Claims for reinstatement under the old section are necessarily limited by the date of the disadvantageous action or dismissal. All such actions occurring after 1 April 2011 will be considered under the new section.

[85] As the Court of Appeal noted in *Foodstuffs*:[50]

> ... the broader statements of the policies underlying the principle of non-retrospectivity support the conclusion based on the wording of the Interpretation Act. The principle is about fairness and justice, and about not depriving persons of rights and interests already recognised by the law.

[86] I do not consider that reading s 125 as having retrospective application accords with fairness. The reality is that the repealed s 125 conferred an important right on employees, namely that they were to be reinstated to their previous position regardless of whether or not other relief was granted, as a primary remedy wherever it was practicable. The remedy of reinstatement is an existing right or interest for the purposes of s 17. Accordingly, s 18(2) applies, and repealed s 125 continues to have effect as if it were not repealed for the purposes of completing the matter or thing that relates to the existing right or interest.

[87] The test for reinstatement that applies is the one that applied at the time Mr Allen's dismissal occurred. That means that reinstatement is the primary remedy.

Is reinstatement practicable in the circumstances?

[88] I turn to consider the parties' submissions in relation to reinstatement.

[89] The defendant submits that even if the dismissal is found to be unjustified, reinstatement is not practical. Two key issues were relied on in this regard. Firstly, that a return to the workplace would involve interaction with Mr Payne – the person

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[50] At [41].

that Mr Allen had abused. I pause to note that this submission, and the potential effect on Mr Payne, highlights why it was inappropriate for Mr Payne to be involved to the extent he was in the investigative and decision-making process.

[90] Secondly, it is said that Mr Allen is currently facing criminal charges relating to alleged possession of cannabis, found at his home. It is submitted that the nature of this alleged offending would raise considerable issues for the defendant in terms of workplace safety and that this is relevant to an assessment of whether reinstatement is an appropriate remedy.

[91] Mr Nabney submitted that reinstatement was the primary remedy and that it was practical. He pointed out that Mr Allen was defending the criminal charges against him, and that the charges were brought approximately seven months after he was dismissed. He also referred to the evidence that made it clear that there was available work within the company, located some distance away from Mr Payne's office. He said that Mr Allen had been permitted to continue to work during the course of the investigative process, despite the company's apparently strong views about his actions and concerns about the effect on other staff members, and that he had done so without incident. Mr Payne accepted that he had had no issues with Mr Allen in the period following the incident and prior to his dismissal, and that no other concerns had arisen.

[92] Because, in determining this case, the former s 125 applies and reinstatement is the primary remedy, the onus is on C3 to prove on the balance of probabilities that reinstatement should not be granted.[51] C3 has not discharged that onus. It is evident that there are current vacancies within the company, for work which Mr Allen is qualified to do. While Mr Allen's conduct towards Mr Payne was reprehensible, and it was evident at hearing that he continued to hold strong views about the events leading up to the meeting of 16 March 2011, I am satisfied that this will not pose a stumbling block to the re-establishment of a productive working relationship, including having regard to the size of the business and the fact that Mr Allen will not be working in close proximity to Mr Payne. There was some limited evidence that

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[51] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 417.

some of Mr Allen's co-workers would prefer it if he did not return, but that evidence does not persuade me that those issues cannot otherwise be satisfactorily managed to ensure a smooth transition.

[93] I do not regard the criminal charges against Mr Allen as weighing against reinstatement. The charges were laid following his dismissal. He is defending them, and is entitled to the presumption of innocence.

[94] I am satisfied that the parties will be able to successfully re-engage in their employment relationship, and discharge their respective responsibilities in that regard.[52] Reinstatement is, in my view, practical and is an appropriate remedy in the circumstances, even having regard to Mr Allen's contributory conduct. Mr Allen is to be reinstated to his former position or to a position no less advantageous to him. I return to the issue of contribution in further detail below, with reference to other relief sought on his behalf.

Compensation for lost remuneration/benefits

[95] Mr Allen claims lost wages, from the date of his dismissal to the date of reinstatement. Under the terms of his employment agreement he had a guaranteed entitlement of 40 hours work per week, for which he was paid $25.00 gross per hour. Mr Allen has also claimed a loss of the benefit of the defendant's contribution to his superannuation scheme, which is said to comprise some $25,000. He seeks reinstatement of the defendant's contribution to his superannuation scheme.

[96] Mr Allen gave evidence that he has had some casual work since his dismissal, and appears to have been paid $8,423.46 in relation to that work.

[97] Mr Allen unsuccessfully applied for interim reinstatement. He gave evidence, which I accept, that he made numerous attempts to find alternative work shortly after his application for interim reinstatement was declined. I accept that

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[52] *Board of Trustees of Auckland Normal Intermediate School* at 416; *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2].

these steps, taken with the casual work he has been able to secure, represent reasonable attempts in the circumstances to mitigate his losses.

[98] Counsel for the defendant submitted that it is not an appropriate case for the plaintiff to be awarded more than three month's remuneration, having regard to s 128(2) and the fact that the plaintiff appears to have transferable skills in a high demand industry.

[99] Reimbursement of lost remuneration is provided for under s 128 of the Act. Section 128 provides that:

> (1) This section applies where the Authority or the court determines, in respect of any employee,-
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.
>
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
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> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[100] The plaintiff has lost a considerable amount by way of remuneration as a result of his unjustifiable dismissal (although not quantified before the Court). Section 124 requires the Court to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded. Mr Sharp referred to *Dodd v D E & L M Spence Ltd, (t/a Pak 'N' Save)*[53] by way of analogy to the present case. There the Court declined to grant any relief given the employee's contributory conduct.

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[53] [2002] 2 ERNZ 572 at [25].

[101] There is no doubt that Mr Allen substantially contributed to the situation in which he found himself. However, I do not consider that his contributory conduct warrants with-holding reinstatement as a remedy, or some compensation for lost remuneration. I consider that this would have been an appropriate case to exercise my discretion under s 128(3) to increase the amount of reimbursement awarded, particularly given that I find it was probable that if he had not been dismissed unjustifiably, Mr Allen would have continued to work as a permanent full time employee on a long-term basis.[54] However, given Mr Allen's contributory conduct any such increased award should be reduced to three month's remuneration

[102] Mr Allen sought compensation in relation to lost superannuation entitlements. The company accepted that if Mr Allen was reinstated the company's superannuation contributions would be payable, although there was no evidence as to what those contributions amounted to. In these circumstances, and given the company's position, I do not propose to make any additional orders.

Compensation of hurt and humiliation?

[103] While seeking compensation under s 123 of the Act, Mr Nabney readily conceded that there was a lack of evidence about any stress or humiliation that Mr Allen may have suffered, and that any award would appropriately be at the lower end of the scale.

[104] I decline to make any award of compensation under s 123(1)(c)(i). I am not satisfied, on the evidence, that Mr Allen suffered any compensatable hurt or humiliation.

Result

[105] I am obliged under s 103A to consider whether the actions of C3 were what a fair and reasonable employer would have taken in all of the circumstances at the time the dismissal occurred. I conclude that they were not and that Mr Allen's dismissal was not justifiable. It was both procedurally and substantively flawed.

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[54] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36]-[39].

[106] Mr Allen is to be reinstated to his former position or to a position no less advantageous to him. He is also entitled to the equivalent of three months' lost wages.

Costs

[107] The plaintiff is entitled to costs. If they cannot be agreed they may be the subject of an exchange of memoranda, the first of which is to be filed and served within 60 days of the date of this judgment. The memorandum in response is to be filed and served within a further 30 days.

Christina Inglis
Judge

Judgment signed at 4.45pm on 31 July 2012