

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 506
5340283**

BETWEEN MARK ALLEN
 Applicant

AND C3 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Bill Nabney, Counsel for Applicant
 Michael Sharp, Counsel for Respondent

Investigation Meeting: 3 & 4 October 2011 at Tauranga

Submissions received: 4 October 2011 from Applicant and Respondent

Determination: 30 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Mark Allen, claims that he has a personal grievance under s103(1)(a) of the Employment Relations Act (“the Act”) in that he was unjustifiably dismissed by the Respondent, C3 Limited (“C3”) on 16 March 2011.

[2] C3 deny that Mr Allen was unjustifiably dismissed and claim the dismissal of Mr Allen was substantively and procedurally justifiable, and that the dismissal decision was a decision which a fair and reasonable employer would have reached in all the circumstances at the relevant time.

Issues

[3] The issue for determination is whether the decision that the actions of Mr Allen constituted serious misconduct was a decision which a fair and reasonable employer would have reached in all the circumstances at the relevant time.

Background Facts

[4] C3 is a provider of product handling solutions offering warehousing, marshalling and stevedoring services, and works in conjunction with exporters, importers and shipping lines.

[5] Mr Allen was employed by C3 as a Forklift Driver and worked as part of a team based at Mount Manganui wharf which was responsible for marshalling and stevedoring. Mr Allen's duties were to operate the forklift, and transport cargo to and from shipside on the wharf.

[6] At the time of his dismissal Mr Allen had been employed for approximately 15.5 years, 13 years as a permanent employee, and prior to that, 2.5 years as a casual employee.

[7] Mr Allen at the time of Auckland Anniversary Day on 31 January 2011 which was a statutory holiday ("the Statutory Holiday"), was a member of the Maritime Union of New Zealand ("MUNZ") with whom C3 did not have a collective agreement. Previously Mr Allen had been a member of the Rail and Maritime Trade Union ("RMTU") and his employment with C3 during that period was covered by the collective agreement between RMTU and C3.

[8] On Sunday 30 January 2011 Mr Colbert, Mr Allen's Supervisor, sent Mr Allen a text message asking whether Mr Allen would be available and prepared to work the following day, which was the Statutory Holiday.

[9] Mr Colbert said that Mr Allen had sent him a text message in reply that confirming he would be available to work, as a result of which Mr Colbert said he had expected Mr Allen to be at work the following morning at 7.00 a.m. It was agreed that Mr Colbert would then have added Mr Allen's name to a list which was posted daily in the smoko room.

[10] Mr Thompson, a work colleague of Mr Allen's, who had been rostered to start at 3 a.m. on 31 January 2011, said that whilst he had been working, it appeared to him that progress on the outstanding work was being made faster than expected. Mr Thompson said he had been concerned because he knew Mr Allen was rostered to join him at 7 a.m., and that Mr Allen might have been asked to leave as soon as he arrived for work, due to a lack of work for him to do.

[11] Mr Thompson explained that in this situation it would have been usual for Mr Colbert to have contacted Mr Allen to tell him not to come into work. However as Mr Colbert was not due into work until 8.00 a.m. which was after Mr Allen's expected start time, Mr

Thompson had contacted the foreman of the stevedores working the ship, Mr Dennis Matheson.

[12] Mr Thompson said he had explained the situation to Mr Matheson who had agreed with him that it was not necessary for Mr Allen to attend work. Accordingly Mr Thompson said he had sent Mr Allen a text message saying “*Sleep in if you want, the ship’s finished*”.

[13] Mr Allen said that he arrived for work on 31 January 2011 at 6.45 a.m. and met Mr Thompson in the smoko room. Mr Allen said that Mr Thompson referred to the text message which he had sent Mr Allen. Mr Allen said he had taken out his mobile telephone which was switched off, and turned it on, whereupon he discovered the text message which had been sent by Mr Thompson.

[14] Mr Allen said that he did not retain the message, but that he recalled it as saying “*come in if you want*”.

[15] Mr Thompson said that he had suggested that Mr Allen finish off the outstanding work in order that he could go home and Mr Allen could claim for having carried out some work on the Statutory Holiday, however Mr Allen had turned down the offer. Mr Allen said that because it was a smoko break when he had arrived at work, he had stayed at work until he was due to start at 7.00 a.m. and had then left.

[16] Mr Colbert stated that prior to his arriving at work at 8.00 a.m. to check on progress, he had received a text message from Mr Thompson explaining that progress on the ship had been faster than expected and that the teams of stevedores had been reduced to one team. Mr Thompson had also explained that he had earlier sent a text message to Mr Allen advising him not to attend work, but that Mr Allen had turned up and then gone home.

[17] Mr Allen said he had subsequently applied for half an hour’s pay in respect of working on the statutory holiday, and he had expected to see his entitlement to a lieu day for the statutory holiday appear on his pay slip. When it did not do so, Mr Allen had telephoned the administrator responsible for the pay slips, who had advised him that she had not been informed that he had worked the day in question, and for Mr Allen to take the matter up with his manager.

[18] Mr Allen said he had spoken initially to Mr Colbert concerning his complaint about not having been awarded a lieu day in respect of his having worked on the Statutory Holiday. Mr Colbert said he had explained to Mr Allen that he understood Mr Thompson had sent him

a text message advising him he was no longer required to attend work. Mr Colbert said he had told Mr Allen that he regarded it as his (Mr Allen's) responsibility to check for messages before he left for work, and consequently it was his belief that Mr Allen was not entitled to a lieu day.

[19] Mr Allen said that he had then decided to raise the matter with Mr Murray Payne, Manager of Stevedoring and General Cargo at the Mount Maunganui wharves, by sending Mr Payne a text message requesting a meeting to discuss the lieu day.

[20] Mr Payne explained that he had examined the issue concerning Mr Allen's claim for half an hour's pay for attending work on the Statutory Holiday. On the basis that Mr Allen had been contacted by Mr Thompson and advised not to attend work and then, when he had arrived, had turned down the work which he had been offered and left, Mr Payne said he had decided it was not appropriate for Mr Allen to claim for the half an hour's pay and he had instructed the pay roll administrator not to pay it.

[21] Mr Payne said that this however was not the issue that Mr Allen raised with him; it was the lieu day issue which Mr Allen wished to discuss.

[22] Mr Payne explained that his view of the situation had been that Mr Allen was not entitled to a day off in lieu in respect of the Statutory Holiday. The reason for this was that under clause 6.2 of the RMTU collective agreement, an employee who worked on a statutory holiday would be paid for the hours they worked, in addition to being paid for the whole of the Statutory Holiday and receiving a day in lieu.

[23] Mr Payne stated that in the situation in which an employee started work but was sent home because there was insufficient work for him to complete their shift, the employee would be paid for at least 4 hours work and would also be entitled to a day in lieu.

[24] However Mr Payne considered that Mr Allen did not fall into either category as he had been sent notice that he did not need to come into work, and additionally he did not actually start work on the statutory holiday.

22 February 2011 Meeting

[25] The meeting between Mr Payne and Mr Allen was scheduled for 3.00 p.m. on 22 February 2011. This was at the end of Mr Allen's shift for the day. However Mr Payne said that Mr Allen had arrived early, at 2.30 p.m., accompanied by Mr Thompson, and that Mr Colbert had also attended the meeting.

[26] Mr Payne said that he had explained to Mr Allen that, as he understood, Mr Thompson had sent Mr Allen a text message telling him not to attend work, and that as it was Mr Allen's responsibility to be contactable, he was not entitled to a day off in lieu for the Statutory Holiday.

[27] Mr Allen stated that he had already explained that he had been contactable via his landline and that Mr Colbert had this number, further that it was his belief that Mr Thompson had no authority to instruct him not to attend work when he had in fact been rostered on.

[28] Mr Allen said that Mr Payne had then advised him that Mr Thompson had been asked to contact him, which Mr Allen said he considered was contrary to what Mr Thompson had previously told him, this being that Mr Thompson had acted off his own initiative in contacting him.

[29] Mr Allen said that he had taken Mr Thompson with him to the meeting with Mr Payne in order for Mr Thompson to confirm that he had sent Mr Allen a text message. However Mr Thompson had not spoken at all during the meeting.

[30] Mr Allen explained that by this stage in the meeting he was feeling annoyed so he had stood up and said "*Is that it*", to which Mr Payne had responded "*Yes, that's it*" this comment Mr Allen said he had taken to indicate that the meeting was at an end. However Mr Payne explained that what he had meant was that it was the end of the discussion about the day off in lieu, not the end of the meeting.

[31] Mr Allen said that he had then made a comment to the effect that he would not work any more statutory holidays. Mr Payne and Mr Colbert stated that this comment was accompanied by an expletive. Mr Allen said that Mr Payne had responded with a dismissive comment about Mr Allen's willingness to work statutory holidays.

[32] Mr Payne explained to the Authority that he had planned to use the meeting to speak to Mr Allen about his employment agreement because Mr Allen had become a member of MUNZ with whom there was no collective agreement. Mr Payne said that he had intended to discuss a form of interim individual employment agreement until such time as a collective agreement between MUNZ and C3 had been negotiated.

[33] Mr Payne then proceeded to ask Mr Allen to return to the meeting to discuss his employment agreement but stated that Mr Allen had turned, made an obscene gesture at him and told him to “*get fucked*”. Mr Allen had then left the meeting.

[34] Mr Payne said he considered the behaviour of Mr Allen to be of serious concern on the basis that:

- he had taken the time to investigate Mr Allen’s concerns;
- when he had met with Mr Allen and explained his view of the matter, Mr Allen had been abusive and had disregarded his direction to return to the meeting;
- the incident had taken place in front of a fellow employee of Mr Allen and Mr Allen’s supervisor.

[35] Mr Payne explained that he had then discussed what had occurred with Mr Baz Pritchard, C3’s Employee Relations Manager, as it was Mr Pritchard’s responsibility to decide what, if any, disciplinary procedures should be carried out.

[36] Mr Pritchard explained that he had considered it appropriate to carry out an investigatory meeting and had advised Mr Payne accordingly. On Mr Pritchard’s instructions, Mr Payne had sent a letter to Mr Allen dated 24 February 2011 informing him of a meeting to be held on 1 March 2011 with himself and Mr Pritchard.

[37] The letter of 24 February 2011 advised Mr Allen that the allegations to be investigated at the meeting were:

1. *Walking out of a meeting that you had requested with your manager and refusing to return when requested by your manager.*
2. *Pulling the finger and saying “fuck you” to your manager when he requested you come back into the room and continue with the meeting.*

[38] Attached to the letter were copies of the relevant C3 policies and a witness statement from Mr Colbert. The letter further advised Mr Allan that he was entitled to have a support person or representative present at the meeting to be held on 1 March 2011.

[39] The attached policies were taken from C3's Code of Conduct, and the relevant sections had been highlighted. The section 9.1 of the policy itemised examples of behaviour considered to be serious misconduct which could lead to instant dismissal, and included:

j. Violence, whether physical or verbal, towards another person, which they find offensive. This includes the use of abusive and/or offensive language and gestures.

m. The refusal to carry out a reasonable instruction from a manager or supervisor.

[40] Although the letter dated 24 February 2011 said that Mr Payne would be conducting the meeting and Mr Pritchard would take notes, both Mr Payne and Mr Pritchard confirmed that in fact Mr Pritchard led the meeting, with Mr Payne in attendance and taking the minutes, although Mr Pritchard said that he also made his own notes of the meeting.

1 March 2011 Meeting

[41] At the meeting on 1 March 2011 Mr Allen was accompanied by Mr Eddie Cook, the Branch Organiser and Secretary of the Mount Maunganui Branch of MUNZ.

[42] Mr Allen said that he had admitted making and using the inappropriate gesture and language to Mr Payne when Mr Payne had asked him to return to the meeting. Mr Pritchard explained that Mr Allen had attributed his conduct to the fact that he considered he had been "lied to and stolen from".

[43] During the meeting it was agreed that Mr Allen had explained that he had received a text message from Mr Thompson on the morning of the statutory holiday which had read: "*Come in if you want, ship down to one gang*", that he had been offered work by Mr Thompson when he had arrived at work, but that he had turned it down and gone home.

[44] Mr Allen had further explained that he had not been contacted by Mr Colbert, his supervisor. Mr Payne said that there had followed some discussion concerning the common practice of sending texts and that the text Mr Thompson had sent to Mr Allen had been to advise Mr Allen not to come in. Mr Allen had explained that his mobile telephone had been switched off and he could have been contacted via his landline telephone.

[45] At this point the meeting was brought to a conclusion. Mr Pritchard said he had discussed with Mr Payne his view, this being that Mr Allen's actions constituted serious misconduct. Mr Pritchard said that he had reached this view on the basis that abuse and insubordination to management was viewed very seriously in C3 given that co-operation by

the employees was essential in the operations on the wharf. Mr Pritchard said that he had also been concerned that Mr Allen had shown no remorse during the interview.

[46] At the Investigation Meeting Mr Allen said he had offered to apologise at the meeting on 1 March 2011, on the proviso that Mr Payne apologised to him for “*ripping me off*”. Mr Allen said that he had felt it was appropriate that he ask for an apology since he considered that C3 had stolen [the lieu day] from him.

[47] Mr Allen explained that Mr Cook had told him that he considered he (Mr Allen) had been ‘ripped off’ and that he had not suggested to Mr Allen that he apologise, since he believed that C3 was in the wrong.

[48] Mr Pritchard stated that during the meeting Mr Cook had commented that all the allegations against Mr Allen were refuted.

[49] Following the meeting Mr Payne said that he had clarified with Mr Thompson what had been written in the text which he had sent to Mr Allen, and that Mr Thompson had confirmed that it had said: “*Sleep in if you want, the ship’s finished*”.

[50] Mr Payne and Mr Pritchard had discussed what had occurred during the meeting, and Mr Pritchard had advised Mr Payne to write to Mr Allen asking him to attend a further meeting.

[51] Mr Pritchard explained that although a warning procedure could be adopted by C3 in the case of conduct falling under section 9.1 of the Code of Conduct, in cases in which the behaviour was considered serious enough, summary dismissal might be adopted as the appropriate outcome.

[52] Consequently Mr Pritchard advised Mr Payne to include this information in the letter to be written to Mr Allen. Mr Payne said he had written the letter using the template available on C3’s computer system and advised Mr Allen that:

- there would be a further meeting on 16 March 2011 to discuss the allegations;
- since the matter could affect Mr Allen’s employment he was entitled to have a support person accompany him; and

- there would be full consideration of Mr Allen's explanation before any decision was made concerning his ongoing employment.

16 March 2011 Meeting

[53] The meeting held on 16 March 2011 was attended by Mr Payne, Mr Pritchard, Mr Allen and Mr Cook. Although the letter of 8 March 2011 had once again stated that Mr Payne would be conducting the meeting and Mr Pritchard taking notes, Mr Payne and Mr Pritchard both confirmed that Mr Pritchard conducted the meeting, with Mr Payne in attendance and taking the minutes, and Mr Pritchard taking his own notes of the meeting.

[54] The meeting on 16 March 2011 commenced with a discussion about the practice of sending and receiving text messages to employees concerning work shifts, with particular reference to the text message sent by Mr Thompson to Mr Allen. Mr Allen had agreed that whilst it was common practice for labour allocators and/or supervisors to send text messages regarding work shifts, he did not however accept that it was common practice for fellow employees to send such text messages.

[55] Mr Allen had again admitted the allegations of bad language and insubordination, and at that point Mr Pritchard and Mr Payne had adjourned the meeting to discuss the situation. Mr Pritchard explained that during the adjournment he had advised Mr Payne that in his view the allegations of serious misconduct had been established.

[56] On resuming the meeting Mr Pritchard said he had informed Mr Allen that his behaviour at the meeting on 22 February 2011 was considered to be serious misconduct, that it was his responsibility to be contactable by text messages or by mobile telephone, and that he had not apologised or shown any remorse for his actions. Mr Pritchard stated that Mr Allen had responded by saying that he disagreed with everything that had been said.

[57] Mr Pritchard asked Mr Allen if he was prepared to apologise, to which Mr Allen had responded by asking if C3 was going to apologise to him for not awarding him a lieu day.

[58] The meeting had been adjourned for a second time. Mr Pritchard said that during the adjournment he had expressed his view to Mr Payne that there was a basis for dismissal but that Mr Allen should be given a further opportunity by informing him that dismissal was being considered and asking him to indicate a change of attitude.

[59] Mr Pritchard said at the Investigation Meeting that during the second break of the meeting on 16 March 2011 he had expressed his opinion to Mr Payne that Mr Allen was 'backing them into a corner'.

[60] Mr Pritchard stated that when the meeting was resumed he had explained to Mr Allen that it was essential that a relationship of trust was maintained between employees and management, and this had not been the case in the current situation. Mr Pritchard had told Mr Allen that C3 required an indication of a change of behaviour from him, otherwise dismissal would be contemplated.

[61] Mr Pritchard said that Mr Allen had responded by saying that he had just finished a 12 hour shift, and that if he had to apologise, then he supposed he would do so. Mr Pritchard said that he informed Mr Allen and Mr Cook that there would be another break in which Mr Allen could discuss the situation with Mr Cook, whom Mr Pritchard regarded as experienced in such matters. Mr Pritchard said that he had also informed Mr Allen and Mr Cook that he was contemplating dismissal, and they should take their time in contemplating a response.

[62] Mr Payne said that when the meeting was resumed some 30 minutes later, the only response from Mr Allen and Mr Cook was that they disagreed that there was any basis for taking action against Mr Allen, and that whatever the outcome, they intended to take the matter further.

[63] Mr Pritchard had responded by informing Mr Allen that his employment was being terminated with immediate effect, with his one week's notice being paid in lieu. Mr Payne subsequently confirmed the decision in writing by letter dated 18 March 2011. The letter stated:

C3 has now considered the allegations of serious misconduct against you. I have set out the allegations below together with a summary of your explanations, followed by the company's decision.

The allegations are:

- 1 Walking out of a meeting that you had requested with your manager and refusing to return when requested by your manager.*
- 2 Pulling the finger and saying "fuck you" to your manager when he requested you come back into the room and continue with the meeting.*

Your response was:

- 1. You acknowledge the alleged conduct was performed by you.*

2. *That you only behaved like that because you were lied to and stolen from.*
3. *That you walked out because you thought the meeting had finished.*
4. *That the situation would never have arisen had you been paid your day in lieu.*
5. *That you would apologise to your manager if you received an apology for stealing your day in lieu.*

The allegation of serious misconduct has been upheld against you. Therefore employment is terminated with notice. The notice period starting 16th March 2011. Your final pay will be arranged ASAP.

You are entitled to appeal this decision within three days of receiving this letter. If you wish to lodge an appeal, you must notify Chris Sutherland in writing, the specific grounds upon which you wish to appeal the decision.

[64] Mr Pritchard said that a short time after the dismissal decision had been implemented; he had received a handwritten note from Mr Allen saying that he wished to appeal the decision. The right to appeal is set out in clause 9.3 of the Code of Conduct and states:

Appeals

All employees have a right of appeal against any disciplinary action. This appeal is to be in writing to the appropriate member of the management team in the first instance and subsequently to the Human Resources Manager or if required, to the Chief Executive.

[65] Mr Pritchard said that before the appeal could be processed, Mr Allen was required to provide the grounds upon which he was basing his appeal. Accordingly, Mr Allen was sent a letter dated 23 March 2011 requesting that he forward his written submissions to Mr Pritchard as soon as possible. However Mr Pritchard said that he had heard nothing further from Mr Allen and the appeal was not progressed.

Determination

[66] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 or action occurred"

[67] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[68] Mr Pritchard was the decision maker in the matter. In determining the findings of Mr Pritchard with regard to serious misconduct, I have to consider s103A of the Act and whether the findings are those which the fair and reasonable employer would have made. In *Fuiava v Air New Zealand Limited*¹ Judge Travis stated:²

The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.

Did C3 have substantive justification for finding that Mr Allen had committed serious misconduct?

[69] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*³. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:⁴

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[70] Mr Payne considered that his request to Mr Allen to return to the February meeting had been a reasonable request. Whilst Mr Allen believed that the meeting was being held in his own time, Mr Payne held a contrary view, this being that the meeting was being held in

¹ [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)

² At para [50]

³ [1992] 3 ERNZ 483

⁴ Ibid at p.487

C3's time since it took place at 2.30 p.m., earlier than had been scheduled, and prior to the close of Mr Allen's shift time at 3.00 p.m.

[71] Mr Allen stated that the smoko break took place at 2.30 p.m. and that most employees went home at that time. As the employees were paid to the end of their shift period at 3 p.m., I find that the meeting was held not in Mr Allen's own time, but during the period of time for which he was being paid by C3.

[72] Mr Payne explained that he had wanted to discuss Mr Allen's employment situation with him, or at least to arrange a time to do so. I have considered whether or not this was a pretext on Mr Payne's part, but I can ascertain no valid view for this contention given that Mr Payne had made himself available to discuss Mr Allen's concerns regarding the lieu day, as indeed he had considered other concerns raised by Mr Allen on previous occasions. Further I can ascertain no reason for Mr Payne wishing to provoke Mr Allen into an act of repudiation given their previous good relationship as mutually agreed in evidence.

[73] Mr Allen had not only refused to return to the meeting when requested to do so by Mr Payne, but he had sworn and gesticulated at Mr Payne. Mr Allen had admitted that at the meeting on 22 February 2011 he had sworn at and made an offensive gesture to Mr Payne. This behaviour was witnessed by Mr Colbert and Mr Thompson, both of whom were subordinates of Mr Payne.

[74] Mr Allen excused his behaviour on the grounds that the meeting had taken place in his own time and at his request, and that in addition to being upset and frustrated, he had felt that Mr Payne had deliberately called him back into the meeting on a pretext, this being the discussion about his union and employment agreement status.

[75] Mr Payne considered that Mr Allen's behaviour of refusing to obey a reasonable request from his manager, and using offensive language and gesture in doing so, constituted serious misconduct. Whether the use of bad language justifies dismissal will depend on various factors including the nature of the workplace, the context in which it occurred and the relationship between the parties⁵.

[76] Whilst "*the use of abusive and/or offensive language and gestures*" is included as part of example 'j' of serious misconduct in the C3 Code of Conduct, I accept from the evidence as presented that strong language usage was not uncommon in C3 and that the wharf could be justly described as a 'robust' working environment. I consider it most unlikely that

⁵ *Canterbury Boilermakers etc IUOW v Canterbury Steel Fabricators Ltd* [1985] ACJ 422.

the use of such gestures and language to a fellow employee in the normal course of daily working and conversations would have incurred any disciplinary penalty.⁶

[77] In *NZ Baking Trades Employees IUOW v French Bakery Ltd*⁷, a case which was concerned with bad language as a grounds for dismissal, the then Chief Judge Goddard stated:

...the use of coarse language can be provocative and insulting and in such circumstances, more particularly if addressed to superior, can constitute grounds for disciplinary action, including dismissal. But there must be evidence of more than the mere use of unparliamentary language. The context, including the tone of voice and demeanour, must be supplied by the evidence before any conclusion can be reached as to the quality of the conduct involved.

[78] Mr Allen not only used the coarse language but it was accompanied by an offensive gesture on 22 February 2011. The language used and the gesture were directed at Mr Payne, his Manager, and the incident happened in front of two other employees. These factors make the behaviour more serious in nature.

[79] However the fact that Mr Allen, who had received no disciplinary warnings in a period of employment of approximately 15.5 years, was upset at the relevant time and believed that the meeting had been held in his own time and had finished, I consider that a fair and reasonable employer would have taken into consideration the fact that Mr Allen's reasoning faculties might have been impaired in the heat of the moment leading to his acting in an uncharacteristic manner, and allowed for a "cooling off period":⁸

A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[80] Mr Pritchard when consulted by Mr Payne had advised that an investigatory meeting should be held with Mr Allen. The meeting was held on 1 March 2011, 6 days following the incident on 22 February 2011, and when there had been time for Mr Allen to have cooled down and reflected on the situation.

[81] At the meeting on 1 March 2011, Mr Allen had admitted the allegations were correct, but far from showing remorse for his conduct, had in fact entered on the offensive and compounded the situation by stating that he had been 'lied to and stolen from' and 'ripped

⁶ *Macadam v Port Nelson Limited (No 1)* [1993] 1 ERNZ 279 at pg 289

⁷ [1001] 1 ERNZ 409

⁸ *Kostic v Dodd* CC 14/07, CRC 4/06 at

off' in relation to the lieu day. These were inflammatory remarks which progressed matters beyond the initial allegations, and served to engender Mr Pritchard's view that Mr Allen showed no remorse for his conduct.

[82] Although Mr Allen said he had offered to apologise at this meeting, this was on the proviso that Mr Payne also apologise to him for "ripping him off" for the lieu day, a view which Mr Cook had encouraged Mr Allen in holding on the basis that Mr Cook felt C3 was at fault.

[83] Whilst there had been time for Mr Allen to cool down between the two meetings, I consider that he had still a burning sense of injustice and that this was fuelled by Mr Cook, resulting in his adopting an intransigent position.

[84] I further consider that by accusing Mr Payne and C3 of stealing from him and lying to him, Mr Allen was behaving in a manner which further impaired the trust and confidence between the parties which was a prerequisite in the employment relationship.

[85] Following the 1 March 2011 meeting Mr Payne had carried out further investigation to ascertain exactly what Mr Thompson had written in the text which he had sent to Mr Allen. I consider this to have been an action which would have been taken by a fair and reasonable employer where there had been a contradiction in the evidence presented.

[86] Prior to the meeting on 16 March 2011 Mr Allen had been advised by the letter dated 8 March 2011 that his employment could be affected and he should therefore have been aware both through that advice and by previously being provided with a copy of the Code of Conduct with the appropriate sections highlighted, that the matter was serious.

[87] At the meeting on 16 March 2011 Mr Pritchard had made it clear that C3 regarded Mr Allen's conduct as serious misconduct. I find that this was a view 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, and ample time had passed for Mr Allen to have reappraised his improper conduct adopted in the 'heat of the moment'.

[88] At the meeting Mr Allen had agreed to give an, albeit grudging, apology. If the apology had been given at that point, I consider that the outcome would have been different in that I do not believe C3 would have dismissed Mr Allen.

[89] However Mr Allen, after discussing the situation with Mr Cook, did not offer an apology when the meeting resumed, and Mr Pritchard had thereupon terminated his employment.

[90] Mr Pritchard had considered that Mr Allen was backing himself and Mr Payne ‘into a corner’. I find that this was in fact the situation which had developed. Had Mr Allen apologised after the initial outburst, or at the investigatory meeting on 1 March 2011, or even during the second meeting on 16 March 2011, the outcome could have been different.

[91] However by maintaining and solidifying his repudiatory behaviour, I find that Mr Allen had left C3 with no alternative but to reach the conclusion that dismissal was the appropriate outcome in circumstances in which there had been a fundamental breakdown in trust and confidence between the parties.

[92] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adhere to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*⁹ stated:

“That is not to say that the employer’s conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny...”

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[93] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have representation at a meeting of a disciplinary nature.

[94] Mr Allen had been informed of the allegations against him, and was given a full opportunity to respond. From the outset Mr Allen had admitted that the allegations were correct.

⁹ [1990] 1 NZILR 35

Representation

[95] It was clear that Mr Cook had been influential in persuading Mr Allen to adopt a non-conciliatory position. Mr Cook's evidence was that MUNZ had previously raised issues with C3 concerning lieu day allocation to employees, and it is more than possible that Mr Cook allowed these considerations to adversely influence his advice to Mr Allen.

[96] Mr Pritchard said that at the time of the meetings he had understood Mr Cook to have been an experienced union official; however he had since been informed that this was not the case. I consider that Mr Pritchard's view during the investigatory and the disciplinary meetings that Mr Cook had been experienced in disciplinary matters involving union members to have been a valid one given Mr Cook's position within MUNZ.

[97] I accept that Mr Allen believed he could rely on Mr Cook's advice. However I also consider that Mr Allen had been fully informed by C3 of the serious nature of the position he was in, he had been supplied with a copy of the Code of Conduct policies, Mr Pritchard had informed him at an early stage in the meeting on 16 March 2011 that he was concerned at his lack of remorse, and it was also made clear to him at the onset of this meeting on 16 March 2011 that he could be facing dismissal unless he apologised.

[98] Mr Allen was a long serving employee who would have been fully aware of the standards set at C3, and I consider that he was in a position to appropriately balance the advice of Mr Cook against the information with which he had been provided, and to reach his own conclusion.

Decision free from bias and pre-determination

[99] Mr Payne was present at both the investigatory and the disciplinary meeting, and was the author of the letters which were sent to Mr Allen on 24 February and 8 March 2011. Mr Payne was also the author of the dismissal letter. Mr Pritchard had explained at the Investigation Meeting that he had produced template letters for the managers to use, and that he had instructed Mr Payne to write the letters to his instructions using the templates.

[100] It would have been more appropriate for these letters to have come from Mr Pritchard, however the practice as described is a common one in many companies in which there is a Human Resources or Employee Relations resource, and I do not consider it to be determinative in this instance.

[101] Mr Pritchard explained that as the Employee Relations Manager for C3, he had the sole authority to make decisions on process and on any disciplinary action outcomes.

[102] Mr Payne had viewed Mr Allen's behaviour to have been of serious concern to him and he had discussed the incident of 22 February with Mr Pritchard. Mr Pritchard's advice had been that it was appropriate to hold an investigatory meeting.

[103] Mr Pritchard had asserted that although the letters sent by Mr Payne had advised Mr Allen that Mr Payne would be conducting the meeting, it was Mr Pritchard who actually conducted the meetings. This evidence was not disputed by Mr Allen.

[104] Mr Pritchard had explained that he believed it had been appropriate to have Mr Payne present at the meetings because it would be to him that any apology by Mr Allen needed to be given.

[105] Mr Pritchard stated that it was he who had instigated the investigatory meeting. At this meeting Mr Allen had admitted the allegations against him, and it was Mr Pritchard who said he had been concerned by Mr Allen's lack of remorse.

[106] It was Mr Pritchard who had advised Mr Payne to set up the disciplinary meeting, which he (Mr Pritchard) had conducted. It had been Mr Pritchard's decision to allow Mr Allen a further chance to apologise at this meeting, and it was Mr Pritchard who came to the view that Mr Allen had left no option open to C3 other than the termination of his employment.

[107] There is an expectation that managers in disciplinary processes will act with professionalism and without bias, and in this case I find no grounds for considering that Mr Payne behaved otherwise, especially in the circumstances in which I have found that Mr Pritchard was the orchestrator of the process and the decision-maker of the outcome.

[108] Mr Michael Sydney, a C3 employee and a member of MUNZ, gave evidence that Mr Payne had discussed Mr Allen's departure with him and had inferred that as a MUNZ member Mr Allen had had no rights, which had resulted in his employment being terminated. Mr Sydney said that he had felt that his own employment was being threatened at this point.

[109] I did not find Mr Sydney's view of what occurred between him and Mr Payne to have been credible. However what is clear from Mr Sydney's evidence is that Mr Payne had spoken to him for the same reason that he had sought to further speak to Mr Allen on 22 February 2011, that being concern that the employment terms and conditions of members of MUNZ were not covered by a collective agreement between MUNZ and C3. Whether the

basis for this concern was correct on Mr Payne's part does not undermine what I find to have been a genuine concern on his part for the interests of Mr Allen and Mr Sydney.

[110] Mr Sydney referred to Mr Thompson having asked employees to sign a petition stating that they did not want Mr Allen to be reinstated, although he confirmed that he had not seen the alleged petition, nor had he been asked to sign it, nor had he spoken to Mr Thompson about it. The inference made was that Mr Payne had been the instigator of the petition.

[111] Mr Thompson stated that C3 employees had been concerned when they had become aware that Mr Allen was seeking reinstatement, and he had relayed this information to Mr Payne. Mr Thompson said Mr Payne had responded by saying him that if the employees wanted these concerns to be taken into consideration, it was incumbent on the RMTU to provide C3 with their concerns in writing. I consider that this was a professional response on the part of Mr Payne and does not indicate bias against Mr Allen.

[112] I find no evidence of bias or pre-determination on the part of either Mr Payne or C3.

[113] For the above reasons I determine that Mr Allen was not unjustifiably dismissed from his employment with C3.

Costs

[114] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority