

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 120
3027031

BETWEEN HENRY BARNES
 Applicant

A N D THE NEW ZEALAND KING
 SALMON CO. LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Ruth Pettengell, Advocate for Applicant
 Karen Radich, Counsel for Respondent

Investigation Meeting: 15 and 16 August 2018 at Nelson

Submissions Received: 16 August 2017 from Applicant and
 from Respondent

Date of Determination: 24 August 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Mr Barnes was not unjustifiably dismissed by the respondent.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Barnes claims that he was unjustifiably dismissed from his employment with the respondent on 26 October 2017. The respondent denies that Mr Barnes was unjustifiably dismissed, asserting that his dismissal for serious misconduct was justified both substantially and procedurally.

Brief account of the events leading to dismissal

[2] The respondent owns and operates sea farms in the Marlborough Sounds and processing and production facilities in Nelson. Mr Barnes worked in the respondent's processing plant primarily in distribution for an export focussed team. He had worked for the respondent semi-continuously since 2007.

[3] The incident that led to Mr Barnes' dismissal occurred on 9 October 2017 when Mr Barnes was asked to help out in the "0 (zero) degree room" also known as "pick and pack." This was because two of the primary workers based in that room were absent on that day.

[4] The 0 degree room is a chiller room located next to another room known as the "make-up room" or the "12 degree room"¹, which itself is adjacent to a reception area. In order to get to the 0 degree room it is necessary to first pass through the reception area, and then the 12 degree room, passing through heavy doors.

[5] The 0 degree room is where packets of salmon product are "picked" (i.e. selected) to meet customer's orders and then packed into polystyrene boxes with frozen gel packs. Those packed boxes are then pushed out of the 0 degree room through a hatch in the wall, into the neighbouring 12 degree room. In the 12 degree room, the packed polystyrene boxes are sealed with tape, order and delivery forms are attached, and they are then loaded onto pallets ready for dispatch.

[6] There is a CCTV camera located in the southeast corner of the reception area which has an angle of view of around 12 degrees, according to the respondent. Essentially, this camera captures movement as individuals enter into the reception area from outside and go through the internal door between the reception area and the 12 degree room. It does not show the door between the 12 degree room and the 0 degree room, nor does it show the northeast corner of the 12 degree room in which is located a switchboard which, amongst other things, has two digital temperature readouts and two switches on it.

¹ Despite their names, the 0 degree room is usually kept at around 1 or 2 degrees centigrade and the 12 degree room operates at a temperature much lower than 12 degrees centigrade, but not so cold as the zero degree room.

[7] One switch controls the refrigeration and fans in the 0 degree room (referred to as the “chiller room” on the switchboard) and the other switch controls the refrigeration and fans in the 12 degree room (referred to as the “make up room” on the switchboard). Both these switches operate in either the on or off position only. At the material time, clear tape had been placed over the switch for the 0 degree room to prevent it being turned off accidentally, as the room had to be kept at or around 0 degrees at all times that product was in it.

[8] There are also digital readouts showing the current temperature in both of the 0 and 12 degree rooms. The camera in the reception room is not able to capture the image of anybody standing directly at the switchboard, although it is capable of capturing the image of anyone walking over to that corner.

[9] On 9 October 2017 at around 10.19 the temperature in the 0 degree room began to rise steadily until, around mid-afternoon, it peaked at around 13 degrees C. This rise in temperature was not initially noticed by anyone at the time, it seems, although a silent alarm was triggered 90 minutes after the temperature had reached around 4 degrees (around noon) alerting a monitoring company, which called a supervisor in the respondent company. That person in turn alerted the respondent’s engineers who, in turn, alerted the respondent company’s specialist refrigeration and air-conditioning engineers, Sturrock & Greenwood Limited.

[10] It so happened that an engineer from Sturrock & Greenwood was already present on site that day dealing with another issue, and he attended the 0 degree room at around 15.00 hours to find out why the temperature was rising.

[11] The Sturrock & Greenwood engineer found that the tape over the control switch in the reception area for the 0 degree room had been loosened, and the switch itself had been turned to the off position. Before turning it back on the engineer checked with the respondent’s staff whether it had been turned off for any reason, such as a fault, but no one was able to explain the reason. The engineer then turned the switch back on, and then checked the operation of the refrigerator system including the fans, the refrigerant, the compressor and the oil level, but saw that everything was operating correctly, and watched the temperature steadily fall to its set temperature, around 2 degrees.

[12] This temperature failure in the 0 degree room was initially informally investigated the same day by the respondent's general manager of supply chain, Shaun Young, but it was formally reported to the respondent's service delivery manager, Craig Smith, the next day as a "Corrective Action Required" ("CAR") issue. The company's CAR programme required Mr Smith to immediately investigate the reasons for the issue and then to put in place actions to resolve it and prevent it happening again.

[13] Mr Smith reviewed the micro-scan temperature logs for the 0 degree room and also the camera footage showing the reception and 12 degree areas. Mr Smith was aware that the time recorded by the micro-scan log and the time recorded by the camera were out of sync by one hour, but made an adjustment for that difference. Mr Smith says in evidence that he reviewed the footage for the entire day, from 06.00 until 16.30, with the dispatch team leader, Kurt Katene. It is worth noting that the door between the reception area and the 12 degree room had come off its rollers earlier in the day, and was jammed open, prior to the temperature starting to rise, and so the camera was able to capture anyone approaching the corner with the switches all day.

[14] Mr Smith and Mr Katene saw on the footage that Mr Barnes was the only employee all day who had gone right into the corner where the chiller switch was located. The footage showed that he did this on two occasions.

[15] Furthermore, the times when Mr Barnes did this coincided roughly with the point when the temperature appeared to rise according to the micro-scan log. The first occasion he went into the corner was at 10.27, for 14 seconds, and the second occasion was at 10.50, for five seconds. The temperature logs show that the temperature in the 0 degree room normally cycles between a low point of around 2 degrees to a degree or so higher roughly three times each hour. The temperature graph curves are not identical from cycle to cycle nor are they exactly regular within each cycle, as the temperature can be slightly affected as the door to the 0 degree room is opened and closed and people move in and out of the space.

[16] The temperature started to rise abnormally on 9 October from between 10.19 and 10.30, depending on whether it is taken to have risen due to the switch being turned off from the lowest point in the usual cooling cycle, the highest point in its usual cycle, or somewhere in between the two.

[17] Having observed that Mr Barnes was the only employee all day who had gone right into the corner where the chiller switch was located, Mr Smith asked Mr Barnes what he remembered had happened on that day and Mr Barnes replied that he had already told Mr Young the day before that he had not noticed anything.

[18] Mr Smith also spoke to two other co-workers, one of whom said he had not seen anything and had not noticed that anything was wrong whilst the other said that the internal door between the reception area and the 12 degree room had come off at the rollers and had become stuck open. That worker said that he had not been aware of any changes in temperature that day and had not noticed that the chiller was off. Two other members of staff who had visited the chiller that day were also spoken to and neither of them had noticed anything wrong either.

[19] As a result of his initial investigation, Mr Smith concluded that it seemed likely that the temperature failure in the 0 degree room had been caused by the switch being turned to the off position and that CCTV footage showed only Mr Barnes going over to the area where the switch was located shortly before the temperature started to rise.

[20] Mr Barnes was given a letter on 16 October 2017 by Mr Smith inviting him to attend a disciplinary meeting on 18 October. The letter set out Mr Smith's initial findings, attached still images of the video footage and the micro-scan data and stated that Mr Smith wished to meet with Mr Barnes to discuss the allegation that he may have turned off the control of the unit. He said that the allegations were contrary to the company's acceptable standards of conduct and referred to two examples of misconduct and serious misconduct listed in the respondent's code of conduct:

- Deliberate actions affecting quality, safety or hygiene
- Serious poor performance where the impact is potentially significant

[21] Mr Barnes was invited to bring along a representative or a support person. He also advised Mr Barnes that one outcome of the process could be his dismissal.

[22] Mr Barnes attended the disciplinary investigation meeting on 18 October accompanied by his mother, Tanya Boyd, who works as a supervisor for the respondent. During the disciplinary investigation meeting Mr Barnes said that he had not turned the switch off and

Mr Smith agreed to check whether other factors could have contributed to the temperature rise.

[23] Mr Smith says that he then contacted Sturrock & Greenwood to check what the visiting engineer had noticed, and was told that the engineer was clear that the issue was due to the switch being off. This was later confirmed in an email by Sturrock & Greenwood.

[24] A further meeting was held on 20 October where Mr Smith's further findings were discussed, and further possible causes for the temperature event explored, including that the refrigeration units may have iced up. Mr Smith says in his evidence that none of the ideas or explanations that Ms Boyd gave explained how the switch had been turned off. The meeting was then adjourned for Mr Smith to consider the responses and explanations he had heard and the possible outcome.

[25] Mr Smith said that he considered that the temperature event had been caused by the switch to the 0 degree room having been turned off, and that it was Mr Barnes who had turned it off because this conclusion was supported by the camera footage at the time that the temperature had started to rise.

[26] Mr Smith then considered the food safety issues and the amount and value of the product that was put at risk, which was of the order of \$250,000. Mr Smith concluded that dismissal was justified due to the amount of product put at risk and because Mr Barnes had knowledge of the business and the procedures that they have in place, and therefore understood the "cold chain requirement," and why it is important. If the cold chain process fails, there can be serious health risks for consumers, or a significant amount of stock would need to be destroyed.

[27] Mr Barnes met again with Mr Smith on 26 October 2017, this time with Ms Pettengell as well as his mother, and Mr Barnes was given the chance to raise any new points prior to the decision being made. Mr Barnes mentioned a conversation he had had with another employee about the fans being off on the day in question and Mr Smith went away and checked with that employee, who said that he could not recall what had happened that day. After an adjournment, Mr Smith confirmed to Mr Barnes that the respondent was dismissing him.

[28] This decision was confirmed in writing on 30 October 2017. A personal grievance was raised on behalf of Mr Barnes by way of a letter from Ms Pettengell dated 11 January 2018.

[29] According to the evidence of Mr Barnes, when he arrived at the 0 degree room on 9 October his initial thought was that it was very cold in there and he made his way to the switchboard area to look at the temperature gauge, which had read 1.7 degrees C. He said he “stood there for a minute observing the gauge, and also taking note of product left in the corner and taking note of dates questioning how long and why they were there in the first place”.

[30] Mr Barnes said that he told the investigators this, and that he did not touch the switch. He says that he returned to the corner of the 0 degree room (presumably, he means the 12 degree room) the second time at 12.50 a.m. to follow up on the product in the corner but found out the product there was a much later date. The respondent says that Mr Barnes did not say anything in his disciplinary meetings about checking product when he went over to the switch, and denies that any product was in the corner at the time, as no pallet can be seen on the footage, and product always sits on a pallet.

[31] Mr Barnes says that it was a shock to him when he was told by Mr Young that the switch was not in the on position as it had been in the on position when he had looked at it earlier.

[32] Mr Barnes says that, later on in the day, he had noticed that the fans were not working and that he had mentioned this to a co-worker, who stated that they had been off all day. Mr Barnes said that he had rejected that suggestion, but that his colleague assured him that they had been off all day. He says that he then told Mr Young that he thought the fans were off and Mr Young started his own investigation. He says that he was later asked by Mr Young whether he had turned the fans off and that he had denied it.

[33] The thrust of Mr Barnes’ argument before the Authority, apart from the fact that he denies that he turned the switch off, is that the temperature event must have been caused by other issues, such as the condensers becoming iced up, and that the switch could have been turned off at any time after the failure.

[34] Mr Barnes called a refrigeration specialist, Graeme Brass, to give evidence. Mr Brass, who has over forty years' experience in refrigeration, suggested that the temperature chart shows the temperature rising at 10.20 more steeply than the rise that occurred in the previous cycle, and that this indicates that something went wrong at the low point. However, he also said in evidence that this rise could be consistent with the fans being turned off, which would have occurred if the switch had been turned off.

[35] In addition, the respondent called the owner of Sturrock & Greenwood, Paul Sturrock, to give evidence and his view is that the evaporators had not iced up and refers to the technician's findings on the day. Mr Smith's evidence is that the graph showing the temperature increase would have looked different if the unit had gone into an electric defrost mode and de-iced the coil. He referred to the "blips" on the temperature chart where the temperature rises between around 1 to 2 degrees in a regular cycle and said that the steady rise from around 10.20 am until around 4.00 p.m. was quite different.

The issues

[36] In determining whether Mr Barnes was unjustifiably dismissed, the Authority must consider both the procedural and substantive fairness of the dismissal.

[37] The Authority must consider the test of justification set out in s.103A of the Employment Relations Act 2000 ("the Act") which provides as follows:

103A Test of justification

- (1) 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 applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
- (a) minor; and
 - (b) did not result in the employee being treated unfairly.

[38] It is important to note that the Authority must not put itself into the shoes of the employer and substitute its own view of what occurred, and it is not conducting the disciplinary process afresh. The Authority must restrict itself to considering whether the employee's actions, including the dismissal, were actions that a fair and reasonable employer could have taken in all the circumstances. In making that assessment it is necessary to consider the circumstances known to the employer at the time and those it ought reasonably to have known.

[39] Mr Barnes alleges that the respondent's position to dismiss him was unjustified both procedurally and substantively. Mr Barnes argues as follows:

- (a) Mr Barnes had no prior history of abuse of the sections of the Company Code of Conduct that the respondent says he offended against.
- (b) The respondent failed to recognise that Mr Barnes' work behaviour on 9 October protected company product rather than put it at risk.
- (c) There was a disparity of treatment between Mr Barnes and other workers who had turned switches off in other rooms.
- (d) No product was destroyed as a result of the 9 October incident.
- (e) The respondent relied on circumstantial evidence, and cannot prove that he turned off the coolers.

- (f) There were delays in the disciplinary process which prejudiced Mr Barnes.
- (g) The decision was predetermined.
- (h) Not all data relied upon by the respondent were made available to Mr Barnes and his support person, such as notes of statements made by other staff.

Mr Barnes had no prior history of abuse of the relevant sections of the Company Code of Conduct

[40] This was not denied by the respondent, although it said that he did not have a completely clean disciplinary history. However, the Code of Conduct makes clear that a single instance of serious misconduct “would make an employee liable for a severe penalty” and that this could include “instant dismissal, without the need for any further warning to be given”. The two examples relied upon by the respondent (“deliberate actions affecting quality, safety or hygiene”, and “serious poor performance where the impact is potentially significant”) both appear in the list of examples of possible serious misconduct.

[41] In other words, there was no requirement that Mr Barnes needed to have previously committed an act of serious misconduct falling within the two examples for the respondent to have relied upon them in its decision to dismiss Mr Barnes.

The respondent failed to recognise that Mr Barnes’ work behaviour on 9 October protected company product rather than put it at risk.

[42] Mr Barnes relies on the video footage on 9 October showing him taking actions to protect product on the day in question by shutting the outside door. However, I do not find that the respondent concluded that Mr Barnes had deliberately tried to sabotage the product in the 0 degree room. If they had done so, this observation of Mr Barnes’ actions would have been relevant as it would have been at odds with a conclusion of attempted sabotage.

[43] However, the respondent found that Mr Barnes had taken a deliberate action in turning off the switch. That conclusion is not at odds with Mr Barnes shutting the outside door, and the respondent did not act unjustifiably in not being persuaded that dismissal was not appropriate because of him shutting the outside door.

Disparity of treatment

[44] Upon questioning Mr Barnes and Ms Boyd, there were two specific instances of other staff who they say had been treated more favourably than Mr Barnes under similar circumstances.

[45] The first was an employee who had placed product in an area overnight (not the 0 degree room) and had failed to turn the chillers on, so that it spoiled and had to be destroyed. The respondent said in evidence that this individual had been relatively new and that the respondent could not be certain that he had been properly trained and knew what he was supposed to do. Therefore he was not dismissed. I accept that this is not a true comparison, in particular as Mr Barnes knew very well that the 0 degree room chillers must never be turned off with product in it.

[46] The second example related to an incident in a room (not the 0 degree room) where a chiller had been switched off. However, that incident had occurred after Mr Barnes' dismissal, and where it was not clear to the respondent who the culprit had been. This is not an example of disparity of treatment either therefore.

[47] Mr Barnes also admitted that all the other incidents he knew of (but did not give details of) related to rooms other than the 0 degree room. My understanding is that most, if not all of the other rooms contain product that has already been packed in protective packaging which protects its temperature, unlike in the 0 degree room. However, even if that is wrong, as no details of these other incidents have been given, I cannot consider them further.

No product was destroyed as a result of the 9 October incident

[48] Ms Pettengell says that no product was destroyed after the temperature incident on 9 October. However, the respondent dismissed Mr Barnes because it had concluded that he had carried out a deliberate act of turning the switch off despite knowing the importance of the cold chain process in the 0 degree room, and that that action destroyed the trust and confidence that it had in him. Such a conclusion does not require the actual spoilage of product. It was good fortune that no product had to be destroyed, but that does not render the decision to dismiss unjustified.

The respondent relied on circumstantial evidence

[49] Ms Pettengell says that the respondent relied on circumstantial evidence to argue that Mr Barnes turned the switch off, and did not listen to the other “reasonable possibilities” for the temperature event. However, I do not accept that the respondent did not consider these other possibilities.

[50] First, Mr Smith is an experienced manager who had worked for the respondent since 2013, but who had previously worked in the meat industry which has similar cold chain requirements as the respondent. He was therefore able to assess the likelihood of these other possibilities against his own knowledge and experience.

[51] Second, Mr Smith gave evidence that, after Ms Boyd had raised her theory about other possible causes of the temperature event, he telephoned the operations manager of Sturrock & Greenwood, Mr Cowman, and asked him an open question as to what had occurred, not directly referring to the switch. It was Mr Cowman who said that the plant had been switched off. In a follow up email from Mr Cowman to Mr Smith Mr Cowman repeated this, characterising it as “human error”. He also said that the engineer had checked over the plant and that it operated correctly as it should.

[52] Mr Smith was entitled to rely upon the definitive response he got from Mr Cowman in reply to his open question to discount the other possibilities, when one considers the other evidence provided by the footage. I will say more about that below.

[53] Ms Boyd said in evidence that she had asked Mr Smith to speak to her manager, Daniel Marston, about possible causes of the temperature event, but that he did not do so. Mr Smith agreed that he had not spoken to Mr Marston but that this was because he did not believe that Mr Marston would have any expertise in the chiller in question, as he did not work in that area, and had no direct knowledge of the event. I believe that this was a reasonable decision for Mr Smith to have made.

[54] Ms Pettengell also raises the possibility that the temperature rise started before Mr Barnes walked over to the corner at 10.27. However, first, the rise that started at 10.20 could have been simply the normal rise which occurs as part of the normal cycle. Second, the switch was found turned off, and there was no other employee who could have turned it off,

as no other employee was captured on camera going right into the corner where the switch is located at any time during the working day.

[55] During the Authority's investigation, both parties called evidence from refrigeration experts. However, this evidence did not convincingly suggest that there was a plausible alternative explanation for the temperature event, other than the switch being turned off by Mr Barnes at between around 10.20 and 10.30, given that:

- a. The temperature started to rise uninterruptedly between those times;
- b. The switch had been found turned off; and
- c. The camera footage showed no other employee other than Mr Barnes going right into the corner where the switch was located for several hours, either side of the point when the temperature started to rise.

[56] I agree that the evidence was circumstantial, in that there was no direct eye witness or camera footage showing Mr Barnes turn the switch off. However, the two most important pieces of evidence relied on by the respondent are the coincidence between the time Mr Barnes went into the corner and the start of the temperature rising, and the lack of any footage showing any person other than Mr Barnes going right into the corner at any other time that day prior to the switch being turned back on². These two pieces of evidence when combined are very powerful, especially in the absence of any other evidence that could have shown an alternative cause. The other explanations put forward by Ms Boyd were all speculative, and unsupported by any cogent evidence.

[57] In light of this, I believe that a fair and reasonable employer could have relied upon the evidence described above to have concluded in all the circumstances that Mr Barnes had turned off the switch.

There were delays in the disciplinary process

[58] The event took place on 9 October, and an initial investigation was started by Mr Young the same day, during which he spoke to staff directly working in the area,

² So, I do not agree as suggested by Ms Pettengell that the respondent was selective in what parts of the footage it relied on. It actively relied on the entire footage.

including Mr Barnes. Then the formal CAR started a day or so later headed by Mr Smith. During that process, Mr Smith spoke to staff and reviewed the footage with a supervisor.

[59] The letter that was sent to Mr Barnes requiring him to attend a disciplinary meeting was dated 16 October, a week after the event. The first disciplinary meeting was two days later, which was then followed up with a further meeting two days after that, on 20 October. The respondent explained that, after that meeting, the preliminary view was that Mr Barnes should be dismissed, but that Mr Smith wanted to check this with the CEO first, who was away. The final meeting was 26 October, when the dismissal was confirmed.

[60] Mr Barnes says that he was asked at the 26 October meeting whether he wanted to put any further information forward, and he said that he had spoken to other workers about the apparent failure of equipment. However, when Mr Smith checked, the workers could not recall that conversation. Mr Barnes says this is because of the passage of time. However, there was nothing to have prevented Mr Barnes from having raised this conversation in the 18 October meeting. That is not information that the respondent could have known before it was told.

[61] When I stand back and review the timeline, a total of 17 days from the temperature event to the final disciplinary meeting is not excessive or unreasonable, especially given that an informal investigation started the same day as the event, and that a total of three formal meetings were held.

The decision was predetermined

[62] Ms Pettengell submits that the respondent came to a view early on that Mr Barnes had turned off the switch and operated with this predetermined view throughout the investigation. However, I agree with Ms Radich that an employer can come to a preliminary conclusion, based on evidence it first becomes aware of, without its view being predetermined. Predetermination requires a closed mind.

[63] The actions of the respondent do not suggest it had a closed mind. This is particularly proven in my view by the fact that Mr Smith asked Mr Cowman for the Sturrock & Greenwood engineer's findings in an open question. The fact that no equipment fault was found, but that the control switch was off supported the respondent's preliminary conclusion.

Furthermore, as I have said above, that preliminary conclusion was based on two interlocking pieces of powerful evidence.

Not all data relied upon by the respondent were made available to Mr Barnes and his support person, such as notes of statements made by other staff

[64] It is not clear to me that there were notes of statements made by other staff. However, I agree that, if any information of relevance had been forthcoming from the staff, it would have had to have been shared with Mr Barnes and Ms Boyd. However, it is the respondent's evidence that there was nothing of relevance to share, because no staff member could shed any light of how the switch had been turned off. I do not accept that the respondent was obliged to tell Mr Barnes that the staff had nothing relevant to say. If they were, it was a minor error which did not result in Mr Barnes being treated unfairly.

Not showing Mr Barnes the footage

[65] Although this was not raised by Ms Pettengell as an issue, it was disclosed during the Authority's investigation that the footage was not shown to Mr Barnes during the investigation, although stills from it were, showing the times when Mr Barnes went into the corner and left it. However, Mr Barnes said in evidence that he would not have looked at the footage anyway.

[66] Furthermore, Mr Barnes' mother, as a supervisor, herself had access to the footage and the micro-scan temperature records, and did avail herself of them. She could, therefore, have shown them to Mr Barnes, or have asked the respondent to do so if she had believed that they were relevant. Therefore, this failure to show Mr Barnes the footage was, in the circumstances, a minor one, and it did not result in Mr Barnes being treated unfairly.

Conclusion

[67] The task of the Authority is not to determine whether Mr Barnes did actually turn the switch off, but to determine whether the respondent's decision that he did, and should be dismissed as a result, were decisions that a fair and reasonable employer could have taken in all the circumstances.

[68] When I consider the evidence available to the respondent at the material time, and the lack of any cogent evidence suggesting a plausible alternative explanation, I am satisfied that the respondent's decisions fell within the range of reasonable decisions open to a fair and reasonable employer faced with the evidence it had.

[69] Therefore, I am unable to conclude that Mr Barnes was unjustifiably dismissed.

Costs

[70] I reserve costs. The parties are to try to agree between them how costs should be dealt with. However, if agreement cannot be reached within 14 days of the date of this determination, then the respondent may, within a further 14 days, serve and lodge a memorandum of counsel seeking a contribution towards its costs, explaining how much it seeks, and the basis for that request, and the applicant may serve and lodge a memorandum via Ms Pettengell in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority