IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 42
5525148

	BETWEEN	RAYMOND BUCHANAN Applicant
	A N D	ALLIANCE GROUP LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Mary-Jane Thomas, Counsel for the Applicant Susan Rowe, Counsel for the Respondent
Date of Investigation Meeting:	25 and 26 February 2016 at Invercargill
Date Submissions Received:	8 March 2016 on behalf of the Applicant 8 March 2016 on behalf of the Respondent
Date of Determination:	7 April 2016

DETERMINATION OF THE AUTHORITY

A. I decline the applicant's claim for a personal grievance; he was not unjustifiably dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Mr Buchanan's employer, Alliance Group Limited (Alliance) dismissed him because he punched an employee in the face. Mr Buchanan admitted punching the employee. Alliance concluded this was misconduct and it warranted immediate dismissal.

[2] Mr Buchanan accepts that punching an employee was misconduct. However, Mr Buchanan says the decision to dismiss him because of that misconduct is not one Alliance could make in the circumstances. This is because:

a. Alliance failed to properly investigate what he said about punching the employee, including the matters leading up to it and other mitigating circumstances;

b. Alliance failed to give him a proper opportunity to respond to the allegation of punching an employee in the face, including a proper opportunity to address witness accounts of what occurred; and

c. Alliance failed to consider properly what he did say about these things when deciding to dismiss him, including giving weight to his personal circumstances.

[3] Mr Buchanan says these factors make his dismissal for misconduct unjustifiable: Alliance's failures mean the disciplinary process it conducted in order to reach its conclusion was unfair and the substantive decision to dismiss him was not sound. The substantive decision is unsound because the unfair disciplinary process renders it so and because, in any event, it cannot be justified on the information Alliance had.

[4] I note two matters that put Mr Buchanan's complaints into context. First, during Alliance's disciplinary process Mr Buchanan admitted to punching the employee and agreed through his union representative that this was misconduct. Second, Mr Buchanan did not challenge the decision that his conduct amounted to misconduct as part of his personal grievance claim before me.

[5] So Mr Buchanan's complaint about an unfair disciplinary process pertains to the decision to dismiss not the factual decision that his behaviour was misconduct.

[6] Likewise, Mr Buchanan's complaint about the substantive decision to dismiss is not that it is substantively unjustifiable because the factual decision, that his behaviour was misconduct, was flawed. Rather, his complaint is that the decision to dismiss is not one that a fair and reasonable employer could have come to given the circumstances of the misconduct. This is because the unfair process renders that decision unsafe or because it is not substantively justified in any event.

Issues

[7] There are two broad issues to consider:

a. Did Alliance follow a fair disciplinary process in coming to the conclusion to dismiss?

b. Was the decision to dismiss substantively justified?

[8] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) and Alliance's own policy on dismissal set out in the employee handbook inform the question of whether Alliance conducted a fair disciplinary process. On my assessment the matters for me to consider are [1]:

a. Did Alliance investigate the allegation of misconduct sufficiently including, carrying out any further investigation it may have been obliged to undertake regarding the circumstances of the misconduct;

b. Did Alliance outline the allegation, explain the possible implications of a finding of misconduct and give all of the information it had that was relevant to the misconduct, to Mr Buchanan for him to consider and respond to;

c. Did Alliance give Mr Buchanan a reasonable opportunity to respond to the information it did provide and the allegation, before it made its decision to dismiss;

d. Did Alliance consider properly any explanation given by Mr Buchanan before it made its decision to dismiss;

e. Was Alliance required to give Mr Buchanan an opportunity to respond to the decision to dismiss him, and if so, did it; and

f. If there was a failing by Alliance in any of the steps above, does that render the disciplinary process unfair?

[9] The matter I must consider on the question of substantive justification is whether the gravity of the misconduct, including any effects of it; the circumstances

[1] See [59] – [70] below

of the misconduct, including any provocation; and/or any mitigating factors mean dismissal was not a decision a fair and reasonable employer could have come to.

[10] The other matter I must consider for both issues is whether the admission by Mr Buchanan affects my analysis because it lowers the standard expected of a fair and reasonable employer.

Events

Mr Buchanan's employment with Alliance

[11] Mr Buchanan commenced employment at a meat processing plant in Makarewa in 1996. Mr Buchanan's employment transferred to the Lorneville plant when Alliance purchased the Makarewa plant in the 1999/2000 season. Mr Buchanan had been a seasonal worker at Lorneville since that time.

[12] Alliance employed Mr Buchanan as a seasonal worker for the 2013/2014 season. His employment commenced in November 2013 and would have ended in June 2014.

[13] Mr Buchanan's employment was subject to a collective agreement: New Zealand Meat Workers and Related Trade Union Inc and Alliance 2014-2016.

[14] When Mr Buchanan accepted work with Alliance for the 2013/2014 season, he signed *an employee starting advice*. By signing that advice, he accepted the terms and conditions of the collective agreement and any additional departmental agreements and the company handbook.

Relevant conditions of Mr Buchanan's employment

[15] The employee handbook for Alliance employees at the Lorneville plant includes the following provisions in relation to Alliance's code of conduct:

> If an allegation of misconduct is made against an employee, the company shall:
>
> - Advise the employee that an allegation has been made, what the allegation is and, if relevant, that the allegation is considered to be serious.
> - Advise the employee that the allegation will be investigated and that the employee has a right to have a representative.
> - Investigate the allegation.

- Formally meet with the employee and his/her representative and allow the employee the opportunity of responding to the allegation.
- Establish whether the alleged misconduct occurred.

An employee may be suspended, with or without pay, while an allegation of misconduct is investigated.

If an employee representative is not available or the employee chooses not to have a representative, the investigation and disciplinary procedure will proceed and will be recorded.

If misconduct has been proven to the satisfaction of the supervisor, the supervisor will consult with the employee and employee representative as to what action is to be taken. If the employee representative does not agree on the disciplinary action proposed, the plant manager, assistant plant manager or personnel manager and, if the employee is a member of a union, a union official will be consulted before a final decision is made.

Disciplinary actions that may be taken are:

- Warning.
- Final warning.
- Loss of seniority, where relevant.
- Suspension.
- Redeployment, including demotion.
- Not re-employed the following season.
- Dismissal.

DISMISSAL
After an investigation by the company, an employee may be dismissed if any of the following misconduct is proven:

- Fighting or assault or any physical aggression to another person.
- …

[16] Alliance's evidence is that it takes any physical violence in the workplace very seriously. This reflects Alliance's health and safety obligations and in particular its duty to provide a safe work environment for its employees. This is particularly so considering the safety-sensitive nature of the work that the employees carry out. Alliance is a meat processing plant and the employees work side-by-side in an environment where sharp knives, blades, saws and dangerous equipment are used. Alliance says the risk is that fighting near any of this equipment could result in someone "*losing a limb or dying*".

[17] Alliance does not operate a *"zero tolerance"* policy towards physical violence, aggression or any form of assault in the workplace. However, it states that it does not

tolerate any physical violence and in most cases any form of striking, particularly to the head, will lead to dismissal.

Mr Buchanan's work relationships

[18] Mr Buchanan worked in the Further Processing Room 4 (FP4) at Lorneville. Malcolm Templer supervised FP4. Mr Buchanan believes that Mr Templer unreasonably targeted him and that Mr Templer was trying to get him out of his job. Mr Buchanan gave some examples of this alleged targeting during his employment. I am not satisfied that the events occurred or, if they did, that they amount to targeting or some other form of unjustified action by Mr Templer.

[19] It is fair to say, however, that Mr Buchanan did not have a high opinion of Mr Templer and possibly had a difficult relationship with him. That probably resulted from Mr Buchanan's perception of Mr Templer rather than anything Mr Templer did directly towards Mr Buchanan.

[20] There was a certain amount of banter between the employees in FP4. Most of this banter was light hearted. For example, Mr Buchanan jokingly referred to a colleague as *"an over-stayer"*. That colleague, Siitia Niuapu, often referred to Mr Buchanan as *"an old man"*. When considered in isolation, some of these comments might appear unacceptable; however, in the context of the work environment in FP4 as described to me, I am satisfied that none of this banter was intended to be malicious.

[21] The other dynamic in FP4 that is relevant was the allocation of duties and responsibility for getting tasks done. In particular, this was relevant in the pre-op duties. This is where FP4 is set up for the processing work for that day. Employees in the FP4 team have allocated tasks that they must undertake in setting up. Another employee will then check the work to ensure that equipment has been set up properly.

[22] In the course of his work, Mr Buchanan was responsible for installing blades and guards into cutting machinery. Another employee, Tijani Nelson, checked the set-up of this machinery. Ms Nelson would often find that Mr Buchanan inserted the blades incorrectly, as they were dirty with sawdust, blood or fat left on the blades inside the blade protector. This of course was problematic for later work and Ms Nelson would complain about this to Mr Buchanan. Ms Nelson describes this type of incident occurring on a regular basis, sometimes three to four times per week.

She says she would often point this out to Mr Buchanan, not necessarily to get him to remedy the problem, as she was quite happy to clean the blades and guards herself, but just to ensure that he was aware that the set-up was not complete and he was not working to the required standard. It is clear to me that this process of checking and pointing out failings to Mr Buchanan was the cause of some tension and friction between Ms Nelson and Mr Buchanan.

The events on 14 April 2014

[23] During pre-op duties on the morning of 14 April 2014, Ms Nelson found a blade installed in a machine that had a dirty guard. Ms Nelson took the guard down to show Mr Buchanan the dirt in it.

[24] In response, to Ms Nelson raising this, Mr Buchanan confronted her. Mr Niuapu, who was standing nearby, claims that he heard Mr Buchanan call Ms Nelson a *"stupid bitch"*. Mr Niuapu stepped in between Mr Buchanan and Ms Nelson, told Mr Buchanan not to speak to a woman in that manner, and said to him *"do your job right you 60 year old man"*. Mr Buchanan responded to this by grabbing Mr Niuapu by the head and punching him in the face. Mr Niuapu was shocked and stepped back. Ms Nelson stepped in and separated them. There is then disputed evidence about what occurred next; Mr Niuapu says that Mr Buchanan threatened him further. Mr Niuapu then walked away.

Alliance's investigation

[25] Someone told Mr Templer about the incident and he spoke to Mr Niuapu who told him that Mr Buchanan had hit him in the face.

[26] Mr Templer saw this as a serious allegation and, given the Alliance stance on any type of fighting in the workplace, he knew that Alliance would need to undertake an investigation that might lead to some form of disciplinary action.

[27] Mr Templer phoned the Operations Manager, Michael Manson, and explained to him what he had been told. He then sent Mr Buchanan to the union office to speak to his union representative.

[28] Mr Templer then spoke to Ms Nelson and Mr Niuapu about what had happened. Both Ms Nelson and Mr Niuapu had their version of what occurred written down for them and they signed these statements.

[29] Having spoken to Mr Templer briefly about what had occurred; Mr Manson went across to the union office to speak to Mr Buchanan and the union secretary who was assisting Mr Buchanan, Bob Blackie. Mr Manson told Mr Buchanan and Mr Blackie that there had been an allegation of fighting in FP4 that he would investigate and he advised that if proven, the allegation was a serious matter amounting to misconduct and dismissal may result. He advised Mr Blackie that he would require a statement from Mr Buchanan as to what occurred and that in the interim he would get statements from Ms Nelson and Mr Niuapu.

[30] Mr Manson's evidence is that it is accepted practice with the union where there is an incident of misconduct or some other allegation for an employee to answer then a simultaneous exchange of statements from witnesses or participants in the event is what occurs. That is, Alliance's preference is to ensure that the employee who is subject to any disciplinary matter is aware of the allegation and writes up his or her account of events before he or she sees the evidence from other employees. Mr Manson said that if there are then some inconsistencies in the statements, he would take the opportunity to put those inconsistencies to the employee who is the subject of the disciplinary action and the other employees who are witnesses to the allegation in order to deal with that. Mr Manson describes this process as being, in his view, the most efficient way of dealing with the matter and one the union accepts.

[31] Mr Blackie accepts that this is the standard practice. He does however say that on occasion he requested a sequential exchange of statements asking to see any witness or other employee statements before the employee facing an allegation answered it. In this case, he says, the simultaneous exchange of witness statements seemed appropriate, as it was clear what the allegation was and Mr Buchanan obviously had first-hand knowledge of what had occurred.

[32] Mr Manson then went over to FP4 and spoke to Mr Templer. He obtained the signed statements of Mr Niuapu and Ms Nelson. He then spoke to each of Mr Niuapu and Ms Nelson separately with Mr Templer and a union representative, Mr Hanes. They confirmed their statements to him. They explained the events that occurred in a way that was consistent with their statements.

The disciplinary meeting on 14 April 2014

[33] A second meeting between Mr Manson, Mr Buchanan and Mr Blackie occurred on the afternoon of 14 April 2014. Mr Manson gave Mr Buchanan and Mr Blackie a copy of the statements provided by Mr Niuapu and Ms Nelson. In order to be sure that Mr Buchanan understood the content of those statements, Mr Manson read out both statements. In the course of reading those statements, he asked Mr Buchanan if it was a correct account of what had happened. Mr Buchanan told him that it was.

[34] Mr Manson's evidence was very clear. He says that he wanted the statements to be clear to Mr Buchanan and wanted to ensure that he understood what Ms Nelson and Mr Niuapu were saying in order for him to respond. His evidence is that he took the time to do this.

[35] Mr Manson says he then also spoke to Mr Buchanan about his own statement. Mr Buchanan's statement says:

> [Mr Niuapu] has been harassing and abusing me most of last week. This seemed to coincide with my birthday last Monday.
>
> This morning in pre-op [Ms Nelson] abused me for putting a saw guard on that hadn't been cleaned properly. This was followed by some abuse by [Mr Niuapu].
>
> I responded by taking a swing at him.
>
> I don't know if there was any contact but there was certainly no physical damage suffered by [Mr Niuapu] as a consequence of my actions.
>
> My mother is currently unwell. She is likely to be diagnosed with bowel cancer. She is the care giver for my daughter and her illness is causing me to be stressed. I probably should be off work on sick leave but know this causes problems for the company with the current levels of absenteeism and shortage of workers to do pre-op duties.
>
> I apologise for not controlling myself in the workplace.

[36] Mr Manson asked Mr Buchanan about Mr Niuapu harassing and abusing him. Mr Buchanan told him that Mr Niuapu had called him *"a 60 year old man"*. It was consistent with what Mr Niuapu had told Mr Manson. Mr Manson tried to understand what it was that Mr Buchanan was saying about Mr Niuapu's actions: what was it that amounted to harassment and abuse and whether he had spoken to his

union delegate or any of his managers about Mr Niuapu. All that Mr Buchanan described to him was what had occurred that morning; that is, Mr Niuapu had stepped in between him and Ms Nelson and had called him *"a 60 year old man"*.

[37] Mr Manson also asked Mr Buchanan about what had occurred with Ms Nelson.

[38] Mr Manson then asked Mr Buchanan about "*taking a swing*" at Mr Niuapu. In response to his question, Mr Buchanan admitted that he had hit Mr Niuapu. Mr Buchanan told him that he grabbed Mr Niuapu and hit him in the face. Mr Buchanan said that whilst he had hit him in the face, he had not injured him.

[39] Mr Manson then asked Mr Buchanan about his mother. Mr Buchanan did not add anything more than what was in his statement confirming that his mother was unwell and that he was under some stress.

[40] There was then a discussion between Mr Blackie and Mr Manson about Mr Buchanan returning to work. Mr Manson spoke to Mr Templer and Mr Niuapu regarding this and they agreed that Mr Buchanan could return to work. Mr Manson describes this as a decision that, on reflection, was a mistake but he says that Mr Niuapu and Mr Templer were satisfied that it was okay for Mr Buchanan to return to work that day.

Decision on 14 April 2014

[41] After the disciplinary meeting on 14 April 2014, Mr Manson considered everything he had been told. He then met with Tyler Dawe, Production Manager, and David Kean, Plant Manager, to discuss what had occurred and consider what sanction Alliance would impose for the misconduct.

[42] Mr Manson's evidence is at the meeting he discussed the fact that he had had clear evidence from Ms Nelson and Mr Niuapu about what had occurred, that is that Mr Buchanan had grabbed Mr Niuapu and punched him in the face. He had also had evidence from Mr Buchanan, first that he took a swing at Mr Niuapu and denying that he had hit him, but then subsequently admitting that he had hit Mr Niuapu in the face. Mr Buchanan did say that no damage had occurred and Mr Manson was satisfied that there was no harm caused to Mr Niuapu.

[43] Mr Manson concluded:

a. There had been misconduct that was serious as Mr Buchanan had punched Mr Niuapu in the face;

b. There had not been any harassment or abuse by Mr Niuapu nor was Mr Buchanan acting in self-defence when he punched Mr Niuapu;

c. Mr Buchanan was suffering from stress because his mother was unwell but he was neither sick himself, nor suffering from any illness that might make him lash out.

[44] Because of these conclusions and because of Alliance's position regarding violence and physical aggression in the workplace, particularly in light of the health and safety consequences of such behaviour, Mr Manson determined that Mr Buchanan's misconduct warranted immediate dismissal.

[45] However, before Mr Manson advised Mr Buchanan of his decision, he wanted to give Mr Buchanan and Mr Blackie a further opportunity to explain any circumstances that they thought might be relevant. For this reason, Mr Manson drafted a letter of 14 April 2014. That letter states:

> Further to my investigations regarding the allegation of misconduct by Raymond Buchanan in that he physically struck a fellow worker, I find the allegation has been proven.
>
> To assist me with my decision-making, will you please provide me with any further relevant information.
>
> I would like to formally meet on Tuesday, 15 April 2014 at 1pm in my office. Would you please confirm that this time is suitable bearing in mind that I have appointments all morning.

[46] In addition, because he had determined that dismissal was appropriate, Mr Manson also drafted a letter of termination dated 15 April 2014. Mr Manson drafted this letter on the evening of 14 April 2014. But Mr Manson had decided that he would not advise Mr Buchanan of the termination of his employment if Mr Buchanan or Mr Blackie provided him with any further relevant information that satisfied him that he should be reconsider his decision to terminate Mr Buchanan's employment.

[47] The termination letter stated:

> The outcome of my investigation into the allegation of physically striking a fellow worker is that the allegation is proven and dismissal as at today, 15 April 2014, is the appropriate outcome. Raymond's final pay and holiday pay entitlements will be paid on Wednesday, 23 April 2014 and available to him on Thursday, 24 April.

The decision meeting on 15 April 2014

[48] Mr Blackie's evidence was that he received the 14 April letter from Mr Manson prior to the meeting which took place on 15 April 2014 (i.e. that he received it in the morning of 15 April 2014). Mr Manson believes he may have given Mr Blackie this letter at the start of the meeting on 15 April and asked at that point if they had any further matters to put forward to him.

[49] What is clear to me is that for whatever reason, by the morning of 15 April, Mr Blackie knew that Mr Manson had decided to terminate Mr Buchanan's employment because of the misconduct. Mr Blackie told Mr Buchanan this prior to the meeting on 15 April. I am satisfied that Mr Buchanan and Mr Blackie attended the meeting with Mr Manson on 15 April knowing that Mr Manson had decided to dismiss Mr Buchanan but they would have an opportunity to counter that decision. This is clear from the evidence of Mr Blackie and clear from the fact that prior to that meeting Mr Blackie and Mr Buchanan put a letter together which they gave to Mr Manson in the meeting of 15 April. That letter states:

> The union accepts that the allegation against Raymond Buchanan physically striking a fellow worker is proven.
>
> However we believe that there are mitigating circumstances with this case and request that the company look sympathetically in regard to a disciplinary outcome.
>
> Our suggestion is that Raymond is issued with a final written warning and suspended for the rest of the 2013/2014 season.

[50] There is also conflicting evidence about when Mr Blackie presented this letter to Mr Manson. Mr Manson says he received it in the meeting on 15 April but he is equivocal about whether it was before he decided to proceed with his decision to terminate Mr Buchanan's employment or after.

[51] What is clear from Mr Manson's evidence is that he attended the meeting on 15 April 2014 and specifically asked Mr Buchanan and Mr Blackie whether they had anything further to add in relation to the allegation of misconduct. They had nothing to add so he decided on that basis that his decision to dismiss was correct and he proceeded to read out the termination letter.

[52] What followed then was a discussion about other possible outcomes. Mr Blackie's letter prompted this. The tenor of that conversation is not entirely clear but essentially Mr Blackie was suggesting to Mr Manson that one of two things could occur:

a. Alliance either rescinds that decision to dismiss and suspends Mr Buchanan until the end of the season and reinstates him next season (as suggested in Mr Blackie's letter); or

b. That the dismissal stands but there is an agreement that Mr Buchanan would be re-employed the next season.

[53] Mr Manson agrees that there was a discussion about the possible re-employment of Mr Buchanan the following season but he says he simply advised that Mr Buchanan was welcome to apply – he did not make any commitment by Alliance to re-employ Mr Buchanan the following year.

Subsequent events

[54] On 17 April 2014, Mr Blackie on behalf of Mr Buchanan wrote to Mr Kean. That letter stated:

> On Monday 14 April 2014 Raymond Buchanan physically struck another worker, Siitia Niuapu, while performing pre-op duties.
>
> The outcome following a disciplinary hearing with Operations Manager Michael Manson was dismissal.
>
> In normal circumstances the union will accept that this decision, irrespective of any provocation, was indeed a correct one.
>
> However Raymond is currently unwell. He is severely stressed by his mother's bowel cancer illness and worried about caring for his 4 year old daughter.
>
> Raymond is being treated for an obsessive compulsive disorder and it is thought that the additional stress in relation to his mother's illness has led to the loss of control in the workplace. Due to the above

> circumstances, the union is seeking some compassion in regard to Ray's future employment with the company.
>
> We request that you consider issuing a final written warning and suspending him for the remainder of the 2013/14 season rather than dismissal.

[55] This letter constitutes a form of appeal against dismissal; a request to Mr Kean to rescind the decision to dismiss and replace it with a final warning and suspension for the remainder of the season.

[56] Mr Kean responded to that letter by considering the events that gave rise to the dismissal of Mr Buchanan and the matters raised by Mr Blackie on Mr Buchanan's behalf. He was not satisfied that it was appropriate to rescind the decision made by Mr Manson and he advised Mr Blackie of this. In a letter of 1 May 2014 he stated:

> I have considered your request for compassion in regard to the future employment of Raymond Buchanan with the company.
>
> I have consulted with the Operations Manager, Supervisor Malcolm Templer and reviewed Raymond's work history before coming to a decision.
>
> I know several issues with Raymond over the years have been recorded including a previous altercation with a fellow worker. I am uncomfortable re-employing Raymond and am not confident he will not re-offend.
>
> In this case we are fortunate Mr Siitia Niuapu did not retaliate in a more aggressive nature which could have resulted in two dismissals.

[57] Mr Kean refers to Mr Buchanan's previous work history and the possibility of him re-offending. Mr Kean, as part of the "appeal", considered this. It was not information considered by Mr Manson when he formulated his decision to dismiss.

[58] Mr Buchanan did not apply for employment in the 2014/2015 season. He has been without work for some time and has subsequently moved from Invercargill to Christchurch because he believes there are more opportunities in Christchurch. He thinks Christchurch would be a good place for a fresh start with his children.

Did Alliance follow a fair disciplinary process?

What is required from Alliance to conduct a fair disciplinary process?

[59] I ascertain the requirements for a fair disciplinary process by applying ss 4(1A) and 103A of the Act and considering any relevant policies of the employer.

[60] In order for the disciplinary process to be fair, the actions of Alliance, in conducting that process, must be justifiable. Section 103A(2) of the Act establishes the test for justification and s 103A(3) of the Act sets out the factors I must consider when applying that test. Section 103A(4) of the Act makes it clear that I may also consider other factors I think are appropriate. The Employment Court has discussed and elaborated on these requirements and this is not controversial[2].

[61] The other factors that I think are appropriate for the test of justification are the obligations imposed on Alliance by s 4(1A) of the Act[3] and the policy on dismissal set out in the Alliance employee handbook.

[62] Section 4(1A)(c) of the Act relates to the statutory obligation of good faith. This subsection requires an employer to provide an employee with access to relevant information and the opportunity to comment on that information before it makes a decision that might be adverse to the continuation of employment.

[63] I posed the question to counsel in the course of oral submissions that s 4(1A)(c) of the Act might require an employer that has decided to dismiss an employee to put that decision to the employee as a proposal for comment before a final decision is made.

[64] In *Chief Executive of Unitec Institute of Technology v Henderson* [4] the Employment Court considered s 4(1A)(c) and did not conclude that it always required an employer to put a preliminary decision to dismiss to an employee for comment before a final decision was made. The Court did state that in many cases an employer should give an employee the opportunity to comment on the consequences of a finding of misconduct. The Court said at [55]:

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[2] *Angus v Ports of Auckland* [2011] NZEmpC 160

[3] See *Jinkinson v Oceania Gold (NZ) (No. 2)* [2010] NZEmpC 102 where the Employment Court stated at [42] "[t]*he relationship between ss 4(1A)(c) and 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with section 4(1A)(c) will not be justifiable."*

[4] [2007] 4 NZELR 418

> [55] While in many cases a discrete opportunity for an employee to address the possible consequences of a finding of misconduct would be necessary as an integral part of a fair process, this case is an exception for two reasons. First, the comprehensive procedures that Unitec bound itself to follow did not so provide. Second, and no less importantly, the consequences of Ms Henderson's admitted misconduct in sending two letters to Mrs Nummy were canvassed at the first substantive meeting at which Ms Henderson was represented by an employment advocate. So, although ideally, Unitec should have allowed Ms Henderson to know of its conclusion of serious misconduct and to have had input into the question of sanction for it, this breach of the requirement of fair process was neither particularly serious nor, in my assessment, would have affected the outcome of dismissal had it been given by Unitec and taken by Ms Henderson.

[65] This obligation is consistent with giving an employee access to *information* relevant to the continuation of employment and the opportunity to comment on that before the employer makes a decision. The *information* is that misconduct may result in dismissal not necessarily that the employer has reached a decision on the appropriate sanction. It might be that the provision of this *information* is to be at the point that an employer has made a decision on sanction. But in many cases, an earlier opportunity may be required, or may suffice, instead of the later opportunity.

[66] Section 4(1A)(c) of the Act does not impose an absolute requirement on Alliance to put its proposed sanction to Mr Buchanan for comment before a final decision is made. It must however provide the opportunity to comment on the consequences of it finding that misconduct had occurred.

[67] This however does not conclude the question of whether Alliance should have put the proposed sanction to Mr Buchanan for comment before it made a final decision. One of the exceptions in the *Unitec* case was that the employer's "*comprehensive procedures*" did not provide for the opportunity to comment on a proposed sanction. I think it follows that the opposite applies, where the employer's procedures provide for an opportunity to comment on the possible consequences of a finding of misconduct, then part of a fair process must incorporate that opportunity simply by course and also because s 4(1A)(c) applied in the circumstances means it is required.

[68] The Alliance employee handbook requires:[5]

a. Advice to Mr Buchanan of the allegation and that it is considered to be serious;

b. Advice to Mr Buchanan that the allegation will be investigated and that Mr Buchanan has a right to a representative;

c. Alliance to investigate the allegation;

d. Alliance to meet with Mr Buchanan to allow an opportunity to respond to the allegation;

e. Alliance to establish if the misconduct occurred;

f. If misconduct is proven then Alliance will consult with Mr Buchanan and Mr Blackie as to what action is to be taken;

g. If Mr Blackie does not agree on the proposed disciplinary action then, before Alliance makes a final decision, Mr Manson will discuss the proposed action with Mr Keane and Mr Blackie.

[69] Therefore, as part of a fair process, Alliance was required to give Mr Blackie, on Mr Buchanan's behalf, the opportunity to consult with Mr Manson over the proposed sanction, if Mr Blackie did not accept that dismissal was appropriate.

[70] In conclusion then, the question of whether Alliance carried out a fair disciplinary process requires me to consider:

a. Did Alliance investigate the allegation of misconduct sufficiently including, in particular, any further investigation it may have been obliged to undertake regarding the circumstances of the misconduct;

b. Did Alliance outline the allegation, explain the possible implications of a finding of misconduct and give all of the information it had that was relevant to the misconduct, to Mr Buchanan for him to consider and respond to;

[5] See the code of conduct section in the Alliance employee handbook; the relevant section is set out at [15]

c. Did Alliance give Mr Buchanan a reasonable opportunity to respond to the information it did provide and the allegation, before it made its decision to dismiss;

d. Did Alliance consider properly any explanation given by Mr Buchanan before it made its decision to dismiss;

e. Did Alliance give Mr Blackie an opportunity to respond to the decision to dismiss Mr Buchanan, and if so, did it consider this response; and

f. If there was a failing by Alliance in any of the steps above, does that render the disciplinary process unfair?

[71] Before I turn to consider each of these aspects there is one other relevant matter. As I have already noted, in the course of the disciplinary process Mr Buchanan admitted punching Mr Niuapu and he agreed that this was misconduct. The question is, does this impact on the process required?

[72] In *Murphy and Routhan t/a Enzo's Pizza v van Beek* [6] the Employment Court held that it was not unfair or unreasonable for an employer to rely on an admission of misconduct even to the extent that any subsequent steps in a process may be unfair. The Court said at p 620:

> … An employer who has carried out no inquiry as to the possible existence of innocent explanations for the apparently irregular conduct cannot claim to have reasonably reached an honest belief that the employee was guilty of serious misconduct justifying dismissal. However, that requirement does not extend to admitted conduct. …
>
> … The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair enquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy of that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy.

[6] [1998] 2 ERNZ 607

[73] This principle has been applied by the Authority in at least two determinations post the Act coming into force[7]. *Enzo's Pizza* is still good law. If an employee admits that he did the act then this removes the need for further investigation.

[74] In this case, that principle applies not only to the finding of serious misconduct but also to some of the relevant circumstances of the misconduct, which were admitted, that inform the decision on sanction.

Did Alliance investigate the misconduct and the relevant circumstances, properly?

[75] As I have already pointed out this question pertains to the decision to dismiss not the factual decision that Mr Buchanan's behaviour amounted to misconduct. This is because of Mr Buchannan's admission.

[76] I am satisfied that Alliance investigated the circumstances that gave rise to the misconduct adequately. Alliance interviewed the two relevant employees, Mr Niuapu, the victim and Ms Nelson, the closest eye witness and a participant in the events leading up to the incident. It took statements from them and then Mr Manson spoke to each of them about their statements. Mr Manson then spoke to Mr Buchanan about what occurred, took his statement, presented the two statements it had, questioned him about the two statements and then asked further questions about the matters raised in his statement.

[77] Mr Manson was conscious of Mr Buchanan's lack of literacy and took steps to ensure that Mr Buchanan understood what was being alleged and what was contained in the two statements it had.

[78] In my view, in light of the decision in *Enzo's Pizza* Alliance did more than was necessary to investigate the circumstances of the misconduct.

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[7] *Reynolds v Mount Cook Airline Limited* [2013] NZERA Christchurch 155 and *Rivers v SCA Hygiene Australasia Limited* [2011] NZERA Auckland 42.

Did Alliance provide relevant information and explain the allegation and the disciplinary consequences, to Mr Buchanan?

[79] As this relates to the decision to dismiss, I am satisfied that Alliance explained the allegation and the consequences of a finding of misconduct to Mr Buchanan. It also gave Mr Buchanan the relevant information it had.

Did Mr Buchanan have an appropriate opportunity to respond to the allegation and the information provided?

[80] Mr Buchanan had two opportunities to respond to the allegation and the information provided as it pertained to the question of dismissal. That is he had two opportunities to explain his version of what occurred, including the events leading up to the incident as well as an opportunity to address any other mitigating or relevant circumstances.

[81] In the disciplinary meeting on 14 April 2014, Mr Buchanan responded to the allegation by admitting the behaviour and conceding this was misconduct. Mr Manson then questioned Mr Buchanan about the circumstances giving rise to the misconduct and Mr Manson gave Mr Buchanan an opportunity to provide further information on matters he raised in his statement.

[82] Prior to the decision meeting on 15 April 2014 Mr Blackie drafted a letter setting out matters relevant to the sanction for misconduct. In the meeting of 15 April 2014, Mr Buchanan was given the opportunity to provide any further information relating to the misconduct and the sanction. I accept that Mr Buchanan knew at this time that Alliance was contemplating dismissal and he was able to respond to that both in the letter and in the meeting.

Did Alliance consider Mr Buchanan's response properly before it made its decision?

[83] Mr Manson's evidence is he considered the matters raised by Mr Buchanan before he made his decision, including discussing what he had been told and what his investigation had revealed with Mr Kean and Mr Dawe. I accept this was adequate.

Did Alliance give Mr Buchanan an opportunity to respond to the decision to dismiss him, and if so, did Alliance consider this?

[84] Mr Buchanan knew from the outset that dismissal was a possible sanction for misconduct; he also knew that Alliance takes assault seriously and has a hard line on the consequences because of the safety sensitive environment of its operations:

a. Mr Manson's evidence, corroborated by Mr Blackie is that Mr Buchanan was told this in the first meeting on 14 April 2014;

b. Mr Blackie knew this from his dealings with Alliance and discussed this with Mr Buchanan;

c. On the night of 14 April 2014 Mr Buchanan told his mother about the incident and that he could lose his job.

[85] Mr Manson gave Mr Buchanan the opportunity to provide any further information on sanction before he finalised his decision. It was for this reason Mr Manson gave Mr Blackie the letter of 14 April 2014 requesting further information.

[86] Whilst the evidence around whether Mr Buchanan knew that Alliance had decided to dismiss him prior to the disciplinary meeting on 15 April 2014 was conflicting I am satisfied that through the course of the process he knew prior to that meeting that Alliance was proposing to dismiss him. Mr Buchanan and Mr Blackie attended the meeting with Mr Manson on 15 April 2014 knowing that Mr Manson had decided to dismiss Mr Buchanan but they would have an opportunity to counter that decision.

[87] Therefore, I conclude that Mr Buchanan had the opportunity to address possible sanction and explain relevant circumstances to Mr Manson:

a. In his statement which was his opportunity to explain what occurred and why he acted as he did;

b. In the second meeting of 14 April 2014 where Mr Manson asked questions about the matters he had raised;

c. In the decision meeting on 15 April where he was specifically asked if he had anything further to add; and

d. In the letter of 15 April 2014 which was drafted for this purpose.

[88] Mr Manson considered the information provided before he decided to dismiss Mr Buchanan.

If there were any procedural failings, was the disciplinary process unfair?

[89] When I stand back and look at the process conducted by Alliance, I have two concerns: the simultaneous exchange of statements as part of the investigation process, and the procedure for giving Mr Buchanan an opportunity to respond to the decision to dismiss.

[90] There might be a basis to criticise the simultaneous exchange of statements in relation to the investigation into the conduct. A fair process would normally dictate that statements setting out an allegation be given to an employee before he/she makes his/her statement. In this case, the process was agreed and part of the normal procedure in such cases and, in any event, this aspect relates to the finding of misconduct and the admission by Mr Buchanan renders this aspect of the process moot.

[91] There might also be a basis to say Alliance was required to do more than just give Mr Buchanan an opportunity to respond to possible sanction; Alliance had a positive obligation to put to Mr Buchanan that dismissal was the proposed sanction and allow him to respond to that. In essence, the issue with my analysis at [83] – [87] is that it does not require a strict application of the code of conduct. That strict application might require Mr Manson to explain that notwithstanding the information provided, he had come to a preliminary decision and as Mr Buchanan did not agree with it, he would consult further with Mr Kean and Mr Blackie over it.

[92] I do not accept that the formal process or step of putting a proposed sanction to Mr Buchanan or Mr Blackie for comment was required. The relevant part of the code of conduct states:

> If the employee representative does not agree on the disciplinary action proposed, the plant manager, assistant plant manager or personnel manager and, if the employee is a member of a union, a union official will be consulted before a final decision is made.

[93] What this contemplates is if, after consultation about the misconduct and possible sanctions, an employee representative does not agree with the sanction then other people will be involved. Those other people are more senior in the organisation, such as the plant manager Mr Keane and someone more senior in the union, a union official, Mr Blackie. Whilst there may not have been a clear sequence of ordered and separate consultation with the individuals named that consultation did happen. The lack of sequence arises because Mr Blackie was the employee representative and the union official and there was no separate consultation with Mr Blackie over sanctions, just consultation throughout the process.

[94] Therefore, the steps taken by Mr Manson meet the procedural requirements of the code of conduct.

[95] In the alternative, applying a pedantic and strict application of the code of conduct it could be that Mr Manson should have specifically told Mr Buchanan or Mr Blackie that he had decided to dismiss Mr Buchanan prior to the decision meeting of 15 April 2014.

[96] If the code of conduct required this actual step of putting the proposed sanction to Mr Buchanan or Mr Blackie once Mr Manson had made that decision, prior to the decision being delivered, then the failure to do so was of no consequence.

[97] As I have already stated Mr Buchanan knew dismissal was a possible outcome. He knew the strict approach that Alliance takes to violence in the workplace so he should have known dismissal was a likely outcome. He had the opportunity to address the possible sanction in two meetings and was specifically asked about this by Mr Manson. And he knew prior to the decision meeting that Alliance had decided to terminate his employment.

[98] In these circumstances, the failure to put a proposed sanction to Mr Buchanan was minor and did not result in Mr Buchanan being treated unfairly. The requirements of s 103A(5) of the Act are met and I cannot determine that the dismissal was unfair for this failing alone.

Is Alliance's decision substantively justified?

Does Mr Buchanan's admission of misconduct affect the level of justification required?

[99] In my view, Alliance was obliged to consider the circumstances of the misconduct when considering the appropriate sanction to impose for that misconduct. Mr Buchanan's admission meant Alliance was not required to investigate the circumstances as fully as it might otherwise but it still had to consider the information that Mr Buchanan provided to it. Alliance still had to be satisfied that the misconduct was severe enough to justify dismissal. It also had to be satisfied that the misconduct was not excused by the circumstances such as provocation, nor were there any mitigating circumstances such that dismissal was not justified.

Is the decision to dismiss justified in light of the severity of the misconduct?

[100] This question is simply whether a fair and reasonable employer in the circumstances could have decided to dismiss Mr Buchanan. The misconduct was a punch to the face. There was no harm to Mr Niuapu but the fact that he was not injured may just have been good luck and nothing to do with intention or the possible outcome given the nature of the work environment. The work place is a safety sensitive environment and there is risk of harm to employees from the machinery particularly the blades if there is fighting of any kind. As a result, there is little tolerance for any fighting or assault, particularly any strikes to the head.

[101] I have no hesitation in accepting that a fair and reasonable employer could have concluded that dismissal was appropriate in these circumstances.

Is the decision to dismiss justified in light of the circumstances of the misconduct?

[102] In *Housham v Juken New Zealand* [8] the Employment Court recognised that not every case of physical assault in the workplace will result in dismissal. The Court said that in some cases an assault might in fact be a reasonable response to the circumstances that employee faces:

> [23] There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an

[8] [2007] ERNZ 183

> employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such confrontation under any circumstances.
>
> [24] An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault on the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.

[103] In *Howard v Carter Holt Harvey Limited* [9] the Employment Court referred to *Housham* and the difference between culpable and non-culpable conduct in the context of a workplace assault. Carter Holt had dismissed Mr Howard for striking another employee. The Court found multiple procedural defects and some of these defects went to resolving the questions of whether Mr Howard's action was retaliatory or reflex and whether there was provocation. The Court concluded that the process was so flawed that Mr Howard was denied the opportunity of establishing that this was not a case where dismissal was appropriate. It follows from this and the reference to *Housham* that the Court was of the view that the nature of the action, retaliatory or reflexive, and the level of provocation are matters to be considered that might excuse an assault and render a decision to dismiss as being unjustified.

[104] I conclude therefore that I must answer the question, was Mr Buchanan acting in self-defence or was he responding to provocation from Mr Niuapu such that this excuses or explains the misconduct to the extent that a fair and reasonable employer could not have decided to dismiss him.

[105] There was no suggestion at any stage that Mr Buchanan was acting in self-defence when he struck Mr Niuapu.

[106] Mr Buchan did say Mr Niuapu provoked him by harassing him on the day and in the days prior to this. However, there was limited information provided to give

[9] [2014] NZEmpC 157

credibility to this. In the end, the information that Mr Manson had was that Mr Niuapu had been giving Mr Buchanan a hard time about his age since his recent birthday but this was no more than the normal workplace banter. It was accepted that immediately prior to striking Mr Niuapu, Mr Buchanan had been called a "*sixty year old man*" and Mr Niuapu had stepped into an argument between Mr Buchanan and Ms Nelson, in essence to tell him off for speaking to Ms Nelson as he did.

[107] In the absence of self-defence and in the circumstances of limited provocation I am satisfied that the circumstances of misconduct do not cause it to fall into the category described in *Housham* or the kind of extreme provocation in *Howard* that might mean a fair and reasonable employer could not decide that dismissal was appropriate.

[108] Or, the other way around, I accept that notwithstanding Mr Buchanan's explanation for the misconduct a fair and reasonable employer could have decided that dismissal was appropriate.

Is the decision to dismiss justified in light of any mitigating circumstances?

[109] In *Fuiava v Air New Zealand Ltd* [10] the Employment Court held that s 103A of the Act did not limit the test of justifiability to determining whether the misconduct was sufficiently serious to warrant a dismissal. The Court said that under s 103A of the Act it should consider the harshness of the decision to dismiss: this is contrary to the decision of the Court of Appeal in *Northern Distributers Union v BP Oil NZ Ltd* [11] that had been decided prior to the Act. This was because the test in s 103A of the Act required an assessment of what a fair and reasonable employer would have done in all the circumstances (as the test was in 2006). The Court said "*[t]he circumstances may include whether the hypothetical fair and reasonable employer would have been persuaded by mitigating factors to impose a penalty that was less than a dismissal.*"[12]

[110] Applying *Fuiava* I must consider whether the mitigating circumstances are so strong that a decision to dismiss is not one that a fair and reasonable employer could have come to.

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[10] [2006] ERNZ 806
[11] [1992] 3 ERNZ 483
[12] *BP Oil* at [70]

[111] The mitigating circumstances for Mr Buchanan included that he was suffering from stress due to his mother's illness and the consequences of that on him and his family. Counsel for Mr Buchanan also submitted that Alliance should have considered that the misconduct was a one off incident and that there was no risk of re-offending evidenced by the Alliance decision to return Mr Buchanan to work in FP4 the same day of the incident.

[112] Alliance considered the mitigating factor of Mr Buchanan being under stress and it concluded that whilst he was suffering stress he was not sick himself nor suffering from an illness that might explain him lashing out as he did. I find that to be a reasonable conclusion and therefore it does not make the mitigating factor so strong that it displaces the decision to dismiss as one that a fair and reasonable employer could come to.

[113] Likewise, the risk of re-offending and Mr Buchanan's otherwise clean employment history in respect of assault or fighting in the workplace are not mitigating factors that are so strong that dismissal was not a decision that a fair and reasonable employer could come to.

[114] Combining all of the mitigating factors does not change my view on this either.

What is the overall conclusion on the substantive justification of the decision to dismiss?

[115] The decision to dismiss Mr Buchanan was a decision that a fair and reasonable employer could have come to in all the circumstances. Those circumstances include the severity of the misconduct, the circumstances giving rise to the misconduct and Mr Buchanan's personal circumstances. Those circumstances do not render Alliance's decision as unjustifiable.

Determination

[116] I decline the applicant's claim for a personal grievance. Mr Buchanan was not unjustifiably dismissed neither from a procedural aspect or substantively.

Costs

[117] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred by taking part in these proceedings. If they cannot agree, any party seeking a contribution to its legal costs may lodge and serve a memorandum within 28 days of the date of this determination. Any party opposing that application may then lodge and serve a memorandum in reply within a further 14 days.

Peter van Keulen
Member of the Employment Relations Authority