IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 73
5369331

	BETWEEN	RUSSELL CHALMERS Applicant
	AND	CITY LINE (NZ) LIMITED t/a "VALLEY FLYER" Respondent

Member of Authority:	Michele Ryan
Representatives:	Sheryl Waring, Counsel for the Applicant Susan-Jane Davies, Counsel for the Respondent
Investigation Meeting:	15 and 16 March 2012 at Wellington
Submissions Received:	21 March and 3 April 2012 from the Applicant 28 March 2012 from the Respondent
Determination:	2 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 20 January 2012 Mr Russell Chalmers was dismissed from his position as Leading Driver, Stokes Valley Depot, following an investigation by his employer City Line (NZ) Limited t/a Valley Flyer (the Company) into his conduct. Mr Chalmers says he was unjustifiably dismissed.

[2] The Company says it justifiably dismissed Mr Chalmers for breach of its 'zero tolerance' policy towards use of alcohol.

[3] On 27 January 2011 Mr Chalmers made an urgent application to the Employment Relations Authority (the Authority) for interim reinstatement. During a case management conference the parties were directed to mediation. Mr Chalmers'

application for interim reinstatement was withdrawn and a tentative date was set down for investigation by the Authority. The parties were unable to resolve the matter and Mr Chalmers' claims proceeded for determination.

Mr Chalmers' claims

[4] In addition to his claim of unjustified dismissal, Mr Chalmers says he was disadvantaged by the way he was suspended in November 2011 and further disadvantaged by the Company's decision in December 2011 to continue his suspension.

[5] Mr Chalmers says he was subject to disparity of treatment in that other employees were not dismissed.

[6] He says the Company failed to provide him with relevant information and was in breach of statutory obligations of good faith.

[7] Mr Chalmers also claims the Company breached terms and conditions of his employment agreement by (a) the way it conducted the disciplinary process, (b) his summary dismissal and (c) not providing a safe workplace.

[8] Mr Chalmers seeks reinstatement to his former position, reimbursement of lost wages, penalty for breach of s120 of the Employment Relations Act (the Act), compensation for his personal grievances, and costs.

Information and facts

Background Information

[9] Two to three months prior to the events which led to Mr Chalmers' dismissal, the Company received a complaint from one of its employees, Mr Waters which alleged that Mr Chalmers may have been in the workplace after work hours, having consumed alcohol. Mr Chalmers provided a written explanation stating he had consumed a bottle of beer and a shot of scotch before returning to the Company's depot after-hours to ensure the safety of the buses during an extreme weather event in

the region. Regional Operations Manager, Ms Lori Bradley, and Team Leader, John Nisbet, held an informal meeting with Mr Chalmers to discuss his response.

[10] Ms Bradley, having emphasized the Company's zero tolerance policy as to drugs and alcohol, decided not take formal action against Mr Chalmers about the matter. No detail of the conversation was recorded or filed other than that recorded in a letter dated 12 September 2011 which advised no further action will be taken on the matter and the documentation would be placed on his file.

Events leading to dismissal

[11] On the evening of Friday 11 November 2011 a farewell barbeque function was held at the Company's Stokes Valley Depot (the Depot). Approximately 23 people attended the Depot which consisted mainly of Company staff, although some staff brought guests. Two staff members were scheduled to commence driving shifts at the end of the function. It is common ground that a staff member and her guest brought a carton of two dozen beers to the Depot which was consumed by some staff and guests.

[12] On 16 November 2011 the Company received a written complaint from Mr Waters which alleged that Mr Chalmers had allowed beer to be consumed at the Depot and that he had distributed beer to those present. The complaint included an allegation that Mr Chalmers appeared to be drunk during the function and identified another staff member who could confirm the events as described.

[13] On 17 November 2011 the Company sent a letter marked 'Private and Confidential' to Mr Chalmers. The letter advised Mr Chalmers of the allegations against him and asked him to respond. The Company did not attach a copy of Mr Waters' complaint to its correspondence. I accept that omission was an oversight. A copy of Mr Waters' complaint was provided to Mr Chalmers before he was required to respond.

[14] On 22 November 2011 Mr Chalmers' manager, Acting Team Leader, Mr Gerard Cooper received two additional complaints from Mr Waters and the staff member identified in the original complaint. They each expressed concern that Mr

Chalmers had displayed Mr Waters' complaint on the Depot notice board for all staff to see. A copy of the complaint placed on the notice board was provided to the Authority. The copy evidenced a handwritten comment inserted onto the complaint which stated "*Wheres complaint?? Put it on the wall 4 us all to see who got big mout [sic]"*]. The complaint was signed by eight staff members who worked at the Depot.

[15] Having become aware that Mr Waters' complaint had been placed on the Depot notice board, Mr Cooper called Mr Chalmers by cellphone and instructed him to remove it. What was communicated between Mr Cooper and Mr Chalmers, and at what time, became the subject of considerable dispute as the Company progressed its investigation.

[16] On 24 November 2011 Mr Chalmers provided a written explanation, the essence of which is as follows:

- He was not on duty and did not distribute beer. He was not intoxicated and he took *"great umbrage at this accusation";*
- He had "*planned and arranged the barbecue"* and *"purchased food and non-alcoholic beverages";*
- He "*assumed that the Alcohol and Drug policy was covered by management as part of an employee's induction, but told staff that they could not have alcohol at the barbecue to reinforce this policy";*
- A staff member who worked at another of the Company's depots had attended the function with a guest who had brought beer;
- He had seen Mr Waters speak to the staff member and her guest, but had not heard the content of their conversation;
- He noticed the staff member and guest then return to their car. He was concerned that Mr Waters had made them feel unwelcome and therefore approached the staff member and guest;
- The "*guest had brought some beer which was put on top of a rubbish bin (not by me) and the beer was offered around the group (again not by me)";*
- *"some of the people present did avail themselves of the invitation for a beer, including Driver Waters' guest";*
- He was called upon by staff to make a speech and felt nervous doing so, which resulted in a flushed face and stammering which may have led Mr Waters to *"uncharitably"* conclude he was drunk;

- If disciplinary action resulted then he would expect and demand all staff present would be subject to the same disciplinary action and if not, could reasonably conclude he had been discriminated against and unjustifiably disadvantaged.

[17] Mr Chalmers and representatives of the Company attended four meetings to investigate the matters.

Investigation meeting: 30 November 2011

[18] Mr Chalmers was represented by a member of his union and supported by his wife, Ms Kerryn Foote, who is an HR professional. The meeting was attended by Mr Cooper and Senior HR Consultant, Ms Anneliese Frickleton, on behalf of the Company. Mr Chalmers acknowledged he had placed Mr Waters' complaint and the Company's letter of 17 November 2011 on the Depot notice board. He referred to the allegations Mr Waters had made against him in August 2011 (which had led to the discussion with Ms Bradley in September 2011) and advised he considered Mr Waters' current complaint as another unfounded accusation. Mr Chalmers noted that he was unhappy with the Company choosing to treat the complaint about conduct at the Depot function in a formal matter when, in his view, the Company had not investigated issues he had raised about Mr Waters two months previously. Mr Chalmers says he had not seen a copy of the Company's Drug and Alcohol policy prior to the meeting.

[19] At the meeting Mr Cooper advised Mr Chalmers that in addition to the two complaints made in response to Mr Chalmers placing Mr Waters' complaint on the notice board, the Company had received an anonymous email complaint. Amongst other things the anonymous complaint alleged that following Mr Waters' complaint Mr Chalmers had encouraged staff to bully and threaten Mr Waters. The Company however did not provide him with a copy of the email or read out the contents of it to him.

[20] It is clear that the anonymous complaint heightened the Company's concerns as to what may have occurred at the function and also in particular to staff relations at the Depot.

[21] Mr Cooper proposed Mr Chalmers be suspended from the Depot while an employment investigation was undertaken. Ms Foote queried the grounds for suspension and advised that Mr Chalmers would prefer to remain at work during the investigation. Mr Cooper's response was that it may be more appropriate for Mr Chalmers not to attend the workplace during the investigation as the Company wished to speak to attendees of the 11 November 2012 function and conduct a fair investigation.

[22] The meeting was adjourned for approximately 12 minutes while the Company considered the responses to the proposal of suspension. There is a dispute as to whether Mr Chalmers was suspended from the workplace immediately after the meeting was reconvened or whether he was provided further opportunity to comment on the matter.

[23] The Company confirmed its decision to suspend Mr Chalmers on pay in a letter sent later that day.

[24] On 9 December 2011 Mr Chalmers raised a personal grievance and alleged his suspension was procedurally and substantially unjustified.

[25] Between 30 November 2011 and 22 December 2012 the Company had all attendees of the function (with the exception of one staff member who was overseas) answer a set of standard questions as to the events that occurred at the function. Correspondence between the parties was exchanged between 15 and 21 December 2011. Mr Chalmers' representative raised ongoing concerns that the Company had not fully complied with her information request and noted that the Company had not responded to the personal grievance. Arrangements were made to meet on 22 December 2011 so Mr Chalmers could provide his version of the events of 11 November 2011. The Company advised that it would review Mr Chalmers suspension during that meeting.

Investigation meeting: 22 December 2011

[26] The Company was represented by Ms Bradley and Ms Frickleton. Mr Chalmers filled out the set of standard questions and gave his account of events on 11 November 2011.

[27] Mr Chalmers advised he could "*not recall drinking alcohol"* at the function although he had "*a beer at home"* prior to it commencing. He said he was aware of some aspects of the Company's Drug and Alcohol policy and knew there was a zero tolerance while driving a bus on duty. He again referred to his discussion with Ms Bradley in September 2011 but said he could not precisely remember what had been said. He stated that in advance of the function he had told "*whoever was there"* that those driving were not to be drinking if doing night shift.

[28] Mr Chalmers reiterated his views as to Mr Waters' attempts to discredit him and his dissatisfaction with the Company's investigation. Mr Chalmers stated his feelings of frustration and anger would be dissipated if he was allowed to return to the Depot. Ms Bradley responded by saying she considered Mr Chalmers remained upset and angry and should continue on paid suspension over the Christmas period so that neither he nor the Company would be compromised and the investigation could be concluded.

[29] On 23 December 2011 Mr Chalmers' solicitor notified the Company of a second personal grievance and claimed the continued suspension further disadvantaged Mr Chalmers.

[30] Some delay occurred as a result of Christmas holidays. The Company wrote to Mr Chalmers' solicitor on 13 January 2012 to arrange a meeting to allow Mr Chalmers an opportunity to provide further comment before finalising the investigation.

[31] The Company provided copies to Mr Chalmers' solicitor of the set of questions completed by attendees of the function but did not identify who each response was made by. Mr Chalmers' solicitor requested the Company supply details as to who authored each response, which the Company duly did prior to the next meeting.

Investigation meeting: 18 January 2012

[32] It is clear there was considerable discussion between the parties as to what the Company could reasonably conclude from the questions completed by staff and guests who had attended the function.

[33] In response to whether he had permitted alcohol at the function, Mr Chalmers acknowledged he had spoken to the staff member and guest who had brought alcohol when they were returning to their car and had told them to come back to the function. He could not recall what he had said about bringing beer on site.

[34] Mr Chalmers was adamant that he had returned to the work place to remove Mr Waters' complaint off the notice board in response to Mr Cooper's instructions which he says he received during after-work hours and after he had advised Mr Cooper that he had drunk alcohol.

Investigation findings

[35] Ms Bradley wrote to Mr Chalmers' representative after the meeting of 18 January 2012 and advised of the Company's findings as a result of its investigation. The relevant portions of the letter are as follows:

> ...our investigation has concluded that:
>
> - It is unclear whether you consumed alcohol at the function;
> - You, through your own admission, consumed alcohol prior to arriving at the function;
> - You, through your own admission, also consumed alcohol prior to returning to the Stokes Valley depot to remove the complaint that you had posted on the notice board;
> - You authorised for alcohol to be brought onsite. Whilst you are unclear of what you said to [the staff member and her guest], you are clear that you were aware they had alcohol with them, and you welcomed them back to the function and that they brought the alcohol with them back to the function. [The staff member and her guest] also recall that you authorised them to return to the function with alcohol; and
> - Other employees and guests consumed alcohol whilst onsite and in your presence.
>
> In September 2011, John Nisbet and I met with you to discuss a separate incident where you admitted to having consumed alcohol before returning to the Stokes Valley depot after hours. At this time, we discussed the NZ Bus Drug and Alcohol policy

> and I highlighted to you that employees must not, at any time attend work premises, or perform their duties under the influence of alcohol. I am concerned that despite our conversation, there have been a further two instances of this behaviour. I understand that you have said you were unclear of the NZ Bus Drug and Alcohol policy at the time of the farewell function on 11 November 2011, however I do believe you had an awareness of what conduct would be appropriate.
>
> Russell, through your actions on 11 November 2011, it is alleged that you encouraged and authorised alcohol to be onsite at the Stokes Valley depot and similarly encouraged and authorised employees and guests to consume alcohol on site. In addition, you have admitted to attending work premises under the influence of alcohol on two occasions. This is considered to be a direct contravention of the direction given to you in a conversation with me in September 2011 and in breach of the NZ Bus Drug and Alcohol policy.
>
> …

[36] The Company advised that having concluded its investigation it considered the findings to evidence serious misconduct and it had decided to take disciplinary action. It requested Mr Chalmers met with it on 20 January 2012.

Disciplinary meeting: 20 January 2012

[37] At the disciplinary meeting of 20 January 2012 the Company detailed its investigation findings and Mr Chalmers was asked to respond in further detail to factual aspects relating to the allegations against him including: (a) the communications between Mr Cooper and him and timing of events on the day in which he was asked to remove Mr Waters' complaint from the notice board, (b) whether he had distributed alcohol at the function, and (c) what specifically he had communicated to staff prior to the function as to the use of alcohol.

[38] Mr Chalmers maintained he had spoken to Mr Cooper sometime between 4-5pm on 22 November 2012 and had told him he had been drinking but that Mr Cooper had ordered him back to work. He denied that he had distributed alcohol at the barbeque function. He said the carton of beer had been placed on a wheelie bin and people had helped themselves. He said prior to the function he had told everybody that they were not allowed to drink and go back on shift.

[39] Some discussion was had as to the accuracy of Mr Chalmers' memory. Mr Chalmers' solicitor advised that Mr Chalmers did not have a diagnosable memory condition but that his memory may not be reliable in circumstances where directions were not followed up in writing.

[40] It is apparent from the handwritten notes made during the meeting of 20 January 2012 that Ms Bradley advised Mr Chalmers that she was having difficulty in accepting his explanations as to:

- His memory of the content of their discussion in September about the Company's zero tolerance policy to alcohol in the workplace and his original explanation to the Company that he had reinforced the Company policy by advising staff not to bring alcohol to the function, compared to his response during subsequent investigation meetings that zero tolerance meant drivers were not allowed to drink alcohol and then go onto shift.

- His recollection of events as to what time he had left work on the day in which he was instructed to remove Mr Waters' complaint from the notice board and whether he had told Mr Cooper that (a) he was not at the Depot, and (b) had consumed alcohol at the time Mr Cooper instructed him.

[41] The meeting was adjourned and Ms Bradley consulted with Mr Cooper as to his exchange with Mr Chalmers on 22 November. Mr Cooper reported he was certain that he had spoken to Mr Chalmers at approximately 2pm and had assumed Mr Chalmers was working because Mr Chalmers was not scheduled to finish work until 4pm. He said he was unaware that Mr Chalmers was not at work when he instructed him to remove the documents from the notice board. He denies Mr Chalmers advised him that he had been drinking.

[42] When the disciplinary meeting reconvened Ms Bradley advised Mr Chalmers that Mr Cooper disputed his version of the conversation held between the two**.**

[43] Ms Bradley advised that she was considering terminating Mr Chalmers' employment. Mr Chalmers was provided with an opportunity to make any further comments and was asked whether, if in hindsight, he would do anything differently.

[44] Mr Chalmers stated that he loved his job. He acknowledged his employment position included providing leadership to other drivers and that he now had a much greater understanding of the Drug and Alcohol policy and what was expected of him. The meeting was adjourned for half an hour for the Company to consider Mr Chalmers responses.

[45] When the meeting was reconvened Ms Bradley advised Mr Chalmers that she did not accept his explanations. In particular she rejected his assertion that he was unaware that staff were prohibited from entering a work site after having consumed alcohol. She considered he understood this aspect of the Company's zero tolerance policy having discussed with him this exact prohibition during their discussion in September 2011. She further advised she considered he understood that alcohol was banned from work sites and that his understanding had been reflected in his written response to the Company on 24 November 2011. She asserted her concerns that his memory appeared to be hazy in regards to some factual aspects but not to others. She stated that when she had advised him that termination of employment was a possibility and asked if he would do anything differently, he had not given her any confidence that as a Leading Driver he had taken any responsibility for the situation. Mr Chalmers was terminated from his employment with immediate effect.

[46] Mr Chalmers' solicitor asked the Company to respond to the two personal grievances raised and to provide in writing the reasons for the dismissal.

The legal requirements

[47] The Authority is required, pursuant to s.103A of the Employment Relations Act 2000 (the Act), to examine 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.

[48] The Full Court in *Angus v Ports of Auckland*[1] noted that as part of the examination the Court and the Authority must assess whether the employer complied with minimum standards of procedural fairness. In this regard from 1 April 2011 the Authority must consider[2]:

- Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee;
- Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee;

[1] [2011] NZEmpC 160
[2] Section 103A(3)

- Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns;

- 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.

[49] In addition to the above factors, the Authority may consider any other factors it thinks appropriate[3] but must not determine a dismissal or an action to be unjustifiable solely because of the defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly[4].

Issues for determination

[50] The Authority is required to determine:

- Did the Company adhere to the minimum statutory procedural requirements when investigating the allegations against Mr Chalmers?

- Did the Company follow the 'Procedure' contained in Mr Chalmers' collective employment agreement as it related to;
    - Suspension?
    - Dismissal?

- With regards to Mr Chalmers' suspension, was Mr Chalmers unjustifiably disadvantaged:
    - by the way the Company suspended him?
    - by the Company's decision on 22 December to continue to have leave Mr Chalmers suspended?

- With regards to the allegations against Mr Chalmers, was it reasonable for the Company to conclude that Mr Chalmers:
    - was aware of the Company's drug and alcohol policy?
    - had consumed alcohol on two occasions before attending the workplace?

[3] Section 103A(4)
[4] Section 103A(5)

- had encouraged and allowed staff and guests to drink alcohol at the Company's depot?

- In all the circumstances was dismissal a fair and reasonable option for the Company?

- With regard to statutory and contractual obligations:
    - did the Company summarily dismiss Mr Chalmers in the absence of a contractual provision to do so?
    - did the Company breach its good faith obligations in the provision of information to Mr Chalmers?
    - did the Company breach its contractual obligation to provide a safe workplace?
    - did the Company breach its obligation to provide in writing to Mr Chalmers its reasons for dismissal?

- What, if any, remedies should be awarded?

Discussion of issues

Did the Company adhere to minimum procedural requirements?

[51] In assessing whether the Company sufficiently investigated the allegations against Mr Chalmers, the Authority must consider the resources available to the Company. The investigation into Mr Chalmers' conduct was largely undertaken by Regional Operations Manager, Ms Bradley, who has a background in providing professional HR advice and she was assisted by Senior HR Consultant, Ms Frickleton. Ms Bradley and Ms Frickleton both presented as intelligent and competent in their respective roles. It was submitted that the Company was under resourced in terms of its HR capability at the time of Mr Chalmers investigation. However I consider the Company had the benefit skilled advisors throughout its investigation.

[52] With the exception of the process undertaken at the time Mr Chalmers was suspended (which I shall return to) I am satisfied from the evidence that the Company advised Mr Chalmers of its concerns in relation to his conduct and initiated an investigation. Three investigation meetings were held in order to obtain Mr

Chalmers' account. Over the course of the meetings additional concerns emerged to which Mr Chalmers was able to respond. On 18 January 2012, having considered Mr Chalmers' explanations, the Company advised him of its findings and notified him that it considered he had engaged in serious misconduct. A disciplinary meeting was held on 20 January 2012 where Mr Chalmers was provided with further opportunity to comment. At the conclusion of that meeting he was advised of his dismissal. In these circumstances I find the Company complied with the minimum requirements of procedural fairness as set out requirements of s103A(3) of the Act.

The 'Procedure' contained in Mr Chalmers collective employment agreement

[53] The relevant provisions of Schedule 1 are attached to the collective employment agreement which contains Mr Chalmers' terms and conditions of employment. Schedule 1 provides inter alia:

> **PROCEDURE**
>
> When an employee's immediate manager believes that a breach of expected behaviour has occurred, the following steps must be followed:
>
> 1. The manager will ensure that the facts of the matter in hand are correct and complete.
> 2. The employee will be advised at the earliest opportunity, by the manager, about the matters in question, and given an opportunity to discuss them.
> 3. If the matter is not settled by this procedure, and the manager decides the matter should be taken further, he or she will advise the employee of the right to a representative.
> 4. The manager will advise the employee of the problem behaviour and of any intended action against the employee and consider any explanation made.
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> **THE ACTION WHICH MAY BE TAKEN**
>
> 1. A warning, either oral or written, consisting of
>   (a) a clear statement of expected performance or behaviour in the future; and
>   (b) the likely consequences of a further lapse.
>
> 2. Suspension, with-out pay pending dismissal.
>
> Dismissal will not be invoked without a prior written warning except for serious misconduct. The warning must relate to conduct of the same kind as

subsequently leads to dismissal. Warnings of dismissal will remain active for twelve months only.

Did the Company follow the 'Procedure' as it related to Mr Chalmers' suspension?

[54] Mr Chalmers was suspended during the first investigation meeting on 20 November 2011. He says that the plain words of the Schedule 1 provision do not provide for suspension during an employment investigation. He says the wording of the provision allows the Company to only suspend at the conclusion of a disciplinary process and then only in circumstances where dismissal is proposed and "pending".

[55] I do not accept such a narrow reading of the provision. While the construction of the Schedule 1 'Procedure' is not well crafted, I do not consider the provision prescribes that the investigation steps recorded at numbers 1-4 act as mandatory preconditions to suspension. Such an interpretation would negate the purpose of the provision to suspend, which in this case is to enable the employer to prevent an employee from attending at the workplace where it is concerned that a breach of expected behaviour may have has occurred, so that an investigation can be undertaken. I reject Mr Chalmers' view as to the operation of this portion of Schedule 1 and do not accept his submission that the Company breached the contractual 'Procedure'.

Did the Company follow the 'Procedure' as it related to Mr Chalmers' dismissal?

[56] Mr Chalmers says that his direct manager Mr Cooper was not involved in the investigation other than to attend the initial meeting. He says in this way the Company breached the investigation 'Procedure'.

[57] I do not accept Mr Chalmers' submission on this point. At the outset of the investigation Mr Cooper put the facts relating to the Company's concerns to Mr Chalmers and provided an opportunity for Mr Chalmers to respond. This is evidenced in the initial letter of 17 November 2011, Mr Chalmers' response of 24 November 2011 and the meeting of 30 November 2011. The matter was not settled by *"this procedure"* and during the meeting of 30 November 2011 Mr Cooper advised that the Company would progress its investigation. Mr Chalmers was advised of his right to representation, the possible consequences as a result of the behaviour, and his

responses were considered. Ms Bradley gave evidence that the information gathered up to 30 November 2011 resulted in the Company wishing to make further inquires which it did. I consider a senior manager's involvement in the investigation is not precluded by the words of the Company's 'Procedure' and do not consider Mr Chalmers was disadvantaged by the process undertaken.

Was Mr Chalmers unjustifiably disadvantaged by the way the Company suspended him?

[58] Mr Chalmers submits that the way the Company suspended him was procedurally unfair. He says that he was not provided with a copy of the anonymous complaint (which he says the Company appeared to rely on as grounds for its decision to suspend) nor the reasons why the Company wished to suspend. He alleges that the Company did not allow him further opportunity to comment on the proposal to suspend as had been recorded in the meeting notes. He says the Company did not consider his views before making its decision to suspend.

[59] Mr Chalmers says he was he was not informed that suspension was a possibility prior to the meeting of 30 November 2011 and was therefore not provided with an adequate or fair opportunity to respond. I find that the Company did not raise its proposal to suspend Mr Chalmers prior to the meeting on 30 November 2011 but on balance I do not find that this omission was deliberate or intentional. My finding is made on the basis that the Company received an anonymous complaint by email in the afternoon of 29 November 2011 and that the contents of the email generated the Company's consideration of suspension. Also on that afternoon, a telephone discussion was had between the Ms Frickleton and Ms Foote. Ms Foote says she was assured by Ms Frickleton that suspension was not on the agenda for the meeting on 30 November 2011. However it was not clear from the evidence whether the telephone conversation occurred before or after receipt of the email.

[60] There is a factual dispute between the parties as to whether Mr Chalmers, having made some initial comments on the proposal to suspend, was provided with a further opportunity to comment on the proposal before a decision was made. The evidence is that having heard Mr Chalmers' initial response to the proposal, the meeting was adjourned to enable the Company to consider his responses. The meeting notes record that when the meeting was reconvened *"[Ms Frickleton]*

queried whether there was anything that [Mr Chalmers] or his representatives would like to add. [Ms Foote] confirmed there was nothing to add". Mr Chalmers and Ms Foote each attest that the notes are incorrect and that there was no further opportunity to comment on the issue of suspension before Mr Chalmers was advised he was suspended. In contrast, Ms Frickleton and Mr Cooper both maintain that an opportunity to comment further was provided and not taken.

[61] I do not consider I need to determine the matter due to the following factual issues. It is apparent from the evidence that once the Company received the anonymous complaint, the Company regarded the possibility of bullying towards staff at the Stokes Valley Depot as of concern. At the meeting the Company advised that it had received an anonymous complaint which led it to consider the situation as more serious than initially perceived. The Company advised Mr Chalmers that it was proposing to suspend and asked him to respond to the proposal. In this regard I consider the Company provided an opportunity for Mr Chalmers to respond to the possibility of suspension. However by not providing the anonymous complaint to Mr Chalmers I consider the Company did not adequately provide Mr Chalmers with sufficient information for him to answer the concerns on which the proposal to suspend were founded.

[62] Given that the anonymous email made serious allegations that Mr Chalmers was encouraging a campaign of bullying against Mr Waters, and that the Company's proposal to suspend was in direct response to the issues raised in the anonymous complaint, I find it was unfair of the Company not to provide Mr Chalmers with a copy of it. I find this procedural defect was not minor because it deprived Mr Chalmers of an opportunity to consider the information and to properly respond to it. I find the Company's process in determining Mr Chalmers' suspension was not in accordance with principles of natural justice or the minimum requirements of s103A of the Act. In these circumstances I conclude the decision to suspend was not an option available to a fair and reasonable employer. I find Mr Chalmers was unjustifiably disadvantaged by the Company's actions in suspending him. I shall return to this matter in the Remedies portion of this decision.

Was Mr Chalmers further disadvantaged by the Company's decision on 22 December 2011 to continue to have Mr Chalmers remain on suspension?

[63] Mr Chalmers claims that the Company's decision on 22 December 2011 to continue his suspension further disadvantaged him. He alleges that the Company continued to keep him on suspension, not for good cause but due to media interest in the matter and the Company's desire to appear publically to be taking strong action. In this regard Mr Chalmers considers he was used as a scapegoat by the Company.

[64] Prior to the second investigation meeting on 22 December 2011 Mr Chalmers received a copy of the anonymous email and Mr Frickleton advised his solicitor that the Company intended to review the suspension at the upcoming meeting. In this regard Mr Chalmers was given notice of the issue so as to be able to properly respond. The evidence is that during the meeting Mr Chalmers reiterated his dissatisfaction with the Company's investigation and regarded Mr Waters' complaint as an attempt to discredit him. The notes from the meeting record that Ms Bradley appraised Mr Chalmers' responses during the meeting and expressed her concerns that she considered Mr Chalmers to be upset and angry. She maintained her view that the investigation was ongoing and her wish to continue to ensure the investigation was conducted fully and in a fair way.

[65] Ms Bradley stated in cross- examination that media interest was a factor in her decision to continue Mr Chalmers' suspension and that Mr Chalmers was aware of this factor. She stated however that her first priority was to maintain a full and fair investigation without the possibility of interference with any of the people who had attended the function. She says it was on these grounds that she decided to have Mr Chalmers remain on suspension. I accept Ms Bradley's evidence on this point.

[66] I do not consider Mr Chalmers' expressed anger was a sufficient basis to continue suspension. However the evidence supports Ms Bradley's assertion that Mr Chalmers apparent irritation was not the sole basis of her decision to have him remain on suspension. I conclude she genuinely considered Mr Chalmers' responses before determining that he should remain on suspension whilst the investigation continued. I find the decision to have Mr Chalmers remain on suspension was an option available to a fair and reasonable employer. I do not accept Mr Chalmers' claim that he was

further unjustifiably disadvantaged by the Company's actions on 22 December to continue his suspension.

The Company's reasons for dismissal

[67] Ms Bradley's evidence was that as a result of its investigation the Company found Mr Chalmers had on two occasions returned to the worksite having consumed alcohol. It also found on the evening of the barbeque function Mr Chalmers had encouraged and authorised a staff member and her guest to bring alcohol on site and had encouraged and authorised staff and guests to drink at the event. She says these actions were in breach of the Company's zero tolerance policy. She further advised that during the investigation she found Mr Chalmers' responses to the Company's concerns to be contradictory and she did not accept his explanations. She says as a result she no longer had trust and confidence in Mr Chalmers in his role as Leading Driver.

Could the Company reasonably conclude that Mr Chalmers was aware of the Company's policy that staff were not to (a) consume alcohol prior to coming to the workplace, or (b) to consume alcohol at the workplace?

[68] Ms Bradley gave compelling evidence of the discussion she had with Mr Chalmers in September 2011. During an extreme weather event in August 2011 Mr Chalmers had drunk alcohol prior to coming back to work. She told the Authority that in early September 2011 she had a face to face conversation with Mr Chalmers and discussed the Company's policy of zero tolerance as to drugs and alcohol. She advised that she told Mr Chalmers that in addition to the prohibition against having alcohol on site and the ban on staff drinking then driving, in no circumstances could Mr Chalmers drink alcohol and come back onto a worksite. She told him the zero tolerance policy applied to all staff and all worksites. She says she had been very direct in her discussions with Mr Chalmers and based on his responses during their discussion she had felt certain that he clearly understood what was expected of him as regards the policy and in his responsibility to model the policy. She says she had given Mr Chalmers the benefit of doubt as to the August incident and had decided not to take disciplinary action. I accept her evidence on this matter.

[69] Throughout the Company's investigation Mr Chalmers did not deny that Ms Bradley had discussed with him the zero tolerance policy but rather, that he could not remember the details of the discussion. During the Authority's investigation Mr Chalmers agreed that Ms Bradley may have advised him of the Company's policy in the way Ms Bradley described.

[70] Ms Bradley attested that she also regarded Mr Chalmers' first response to the allegations against him, whereby he advised that he had reinforced the Company's policy and told staff not to bring alcohol to the function, as evidence that he understood that alcohol was not allowed at the Depot. During subsequent investigation meetings Mr Chalmers asserted that his knowledge of the Company's Drug and Alcohol policy was limited to an awareness that drivers were not allowed to drink and then drive and that this is what he had meant by his advice to staff prior to the function. It is apparent from the letter of 18 January 2012 and the notes recording the meeting of 20 January 2012 that Ms Bradley did not accept Mr Chalmers explanations as to his understanding of the policy as compared to his first response and advised him of this.

[71] I find, in circumstances where in August 2011 Ms Bradley and Mr Chalmers had discussed the Company's Drug and Alcohol policy as a direct result of Mr Chalmers' attendance at the Depot having drunk alcohol, it was reasonable for her to reject Mr Chalmers explanations that he was unaware of the policy except to the extent that it prohibited staff drinking and then later driving. I also find it was reasonable for Ms Bradley to conclude that he was sufficiently aware of the Company's policy to know he should not consume alcohol before attending work sites and that alcohol was prohibited on work sites.

Could the Company reasonably conclude that Mr Chalmers had consumed alcohol prior to the barbeque function of 11 November and was in breach of Company policy?

[72] There is no dispute that during the Company's investigation Mr Chalmers conceded that he had drunk alcohol prior to the barbeque function of 11 November 2011. I have already found on the balance of probabilities that Mr Chalmers was aware that he could not to drink alcohol prior to attending the workplace. In these circumstances I find it was reasonable of the Company to conclude Mr Chalmers had

consumed alcohol on 11 November 2011 before attending a function at work and his actions were in breach of the Company's policy.

Could the Company reasonably conclude that Mr Chalmers had consumed alcohol on 22 November prior to removing Mr Waters' complaint from the notice board and was in breach of Company policy?

[73] It is clear that when instructed to remove Mr Waters' complaint from the Depot notice board Mr Chalmers did so. However Mr Chalmers asserted throughout the Company's investigation that when Mr Cooper had instructed him to remove the complaint Mr Chalmers had left work and had told Mr Cooper he was not at the Depot and had already been drinking. The inference is that he should not be held accountable for being in breach of the zero tolerance policy in circumstances where he had informed his manager he had drunk alcohol but was instructed to attend work anyhow.

[74] In contrast Mr Cooper says he had called Mr Chalmers from another depot by cellphone at or about 2pm on the assumption Mr Chalmers was working. He says Mr Chalmers did not advise him he was not at the Deport or that had been drinking. The issues of dispute between the parties during the Company's investigation were (a) whether Mr Chalmers advised Mr Cooper that he had consumed alcohol and (b) the time Mr Cooper instructed Mr Chalmers to return remove the complaint from the notice board. Mr Chalmers' time sheet recorded that he had finished work at 3.57pm.

[75] It is clear from the notes of the meeting on 20 January 2012 that Ms Bradley preferred Mr Cooper's version of events and in particular that Mr Cooper would not have instructed Mr Chalmers to go to the Depot in circumstances where Mr Cooper was aware Mr Chalmers had consumed alcohol.

[76] With Mr Chalmers' consent, on the first day of the Authority's investigation the Company produced a copy of Mr Cooper's cell phone activity on 22 November which evidenced a call between Mr Cooper and Mr Chalmers at 2.09pm. The Authority was advised that this information had not been available previously as Mr Cooper had been on lengthy holiday break and it had taken some time to obtain phone records on his return.

[77] In response to the evidence which verified the timing of the phone call Mr Chalmers advised the Authority that he wished to change his evidence. He says it was his routine to have a drink after work and he had assumed Mr Cooper's instructions had been given to him after work. He says he now believes he had not consumed alcohol and was at work when Mr Cooper contacted him on his cell phone.

[78] I do not accept Mr Chalmers' revised evidence. However, even if his new evidence is true the role of the Authority is to assess whether the Company was able to reasonably conclude that Mr Chalmers had gone to the workplace having drunk alcohol. Mr Chalmers advised the Company during each of the four meetings that this was the case and I consider it was reasonable for the Company to reach this conclusion albeit that it did not accept Mr Chalmers' further assertions that Mr Cooper had instructed him to go to the workplace in the knowledge that he had consumed alcohol.

Could the Company reasonably conclude that Mr Chalmers encouraged and authorised a staff member and her guest to bring alcohol to the work site?

[79] It was not disputed that a staff member from another depot and her guest brought a carton of beer to the barbeque function on 11 November 2011. In his first response of 24 November 2011 Mr Chalmers claimed he was concerned Mr Waters had made the staff member and her guest unwelcome and he had therefore welcomed the staff member and her guest onto the depot site.

[80] The statements of the staff member and her guest respectively were:

- I took a case of beer and yes I had a drink. I wandered onto the site with the beer and [Mr Waters] told us we weren't allowed to have beer on site in line with the policy. I was surprised but [Mr Waters] was insistent. We went back to the car and put the beer away. [Mr Chalmers] came over to us and told us it would be ok.

- When we arrived [Mr Waters] told us that we couldn't have it so we put it in the car. [Mr Chalmers] then told us that it was ok and we asked if he was sure and he confirmed "yes'.

[81] Over the course of the investigation Mr Chalmers' response varied in reply to those statements. The evidence was that he initially denied saying it was okay to bring the beer onsite. Alternatively he says he cannot recall what he said.

[82] No further evidence was presented by Mr Chalmers or the Company on this aspect of the Company's findings. In all the circumstances I find it was reasonable for the Company to conclude that that Mr Chalmers had authorised the staff member and guest to bring alcohol to the depot site.

Could the Company reasonably conclude that Mr Chalmers encouraged and authorised staff and guests to drink alcohol at the Company's Depot?

[83] The Company's zero tolerance policy had been instituted in 2008. Witnesses for the Company attested that alcohol was prohibited at any work site since the introduction of the policy and that social functions rarely occurred in the workplace and when they did occur, they were alcohol free.

[84] A witness in support of Mr Chalmers stated that alcohol had been present during an on-site Christmas party in 2010. However it was clear that the Company was unaware of the incident described, and if true, would have found that unacceptable.

[85] Company management were unaware that a barbeque function had been held at the depot on 11 November 2011 until it received Mr Water's complaint.

[86] It was accepted by the Company that its inquiry with staff as to its zero tolerance policy, undertaken during its investigation, revealed that many staff were unaware of the policy, let alone the detail of it. Most staff were unaware that alcohol was absolutely prohibited at the work site.

[87] It is apparent that approximately a third of the attendees at the barbeque function consumed alcohol. Throughout the Company's investigation Mr Chalmers acknowledged that the beer brought to the Depot had been placed on a rubbish bin and distributed. Mr Chalmers remained steadfast that he had not distributed alcohol to attendees. The Company had received conflicting statements from staff and guests as

to whether Mr Chalmers had actively distributed beer amongst the attendees at the function and it appears no conclusion was reached by the Company as to that point.

[88] During the Authority's investigation there was considerable dispute as to the level of authority Mr Chalmers had in his role as Lead Driver at the Stokes Valley Depot. Mr Chalmers points to Schedule 1 of his collective agreement which includes, in addition to the 'Procedure' previously referred, a very minimal description of the responsibilities of a Lead Driver. It is submitted there is nothing in Schedule 1 to indicate that Lead Drivers have delegated authority over any staff. The Company says Schedule 1 does not reflect all of the responsibilities of a Lead Driver nor is it an exhaustive list of the range of duties a Leading Driver is expected to fulfil.

[89] The Company has five Wellington depots of which three are considered satellite. One of those is the Stokes Valley Depot. At each of the satellite depots there is one allocated Leading Driver position which is regarded as the senior position at the Depot. Mr Cooper attested that Leading Drivers are paid an allowance which reflects their authority and those positions are regarded as supervisory roles.

[90] No written material, such as a job description, was provided to the Authority to evidence what the expectations were and/or what was required of a Leading Driver in the performance of the role. However during the final disciplinary meeting on 20 January 2012 Mr Chalmers acknowledged that he was in a leadership role and during the Authority's investigation he confirmed on several occasions that his role included leadership and supervisory duties and that staff looked to him for guidance and role modelling.

[91] I accept it was agreed between Mr Chalmers and the Company that he was employed in a senior role which required management and leadership at the Stokes Valley Depot. I consider Mr Chalmers' statement to staff to not to bring alcohol to the barbeque as an example of his authority over staff and was further evidenced during the function when he overrode Mr Waters' direction to the staff member and her guest to take the beer back to the car.

[92] I find that Mr Chalmers was in a leadership position and that he exercised his authority by allowing the alcohol to be brought onto the depot and allowed it to

drunken by staff and guests. I find the Company could reasonably conclude that Mr Chalmers encouraged and authorised staff and guests to drink alcohol at the Company's Depot.

Summary of assessment of the Company's findings

[93] The statements Mr Chalmers made during the Company's investigation as to (a) his understanding of the Company's policy on alcohol, (b) what he communicated to staff prior to the function about alcohol, (c) what he said to the staff member and guest who brought alcohol to the function, and (d) what was said to Mr Cooper on the day he was instructed to remove Mr Waters' complaint from the notice board and when, required Ms Bradley to assess the credibility of the information provided and the available evidence provided and draw conclusions. I find the inferences drawn and credibility findings made by Ms Bradley on behalf of the Company were reasonable and available for her to make.

Was there disparity of treatment?

[94] The legal test in assessing whether an employer has subjected an employee to disparity of treatment so as to render a dismissal unjustified is set out in *Chief Executive Officer v Buchanan (No 2)*[5]. The Authority must consider whether (a) there was a disparity of treatment (b) if so, whether there is an adequate explanation for the disparity and (c) if not, is the dismissal justified despite the existence of disparity?

[95] Throughout the investigation process Mr Chalmers consistently complained it was unfair of the Company to conduct an investigation on the strength of Mr Waters' complaint against him. Mr Waters is a lead delegate of a union which has a current collective employment agreement with the Company. Mr Chalmers alleges that the Company conducted a formal investigation in response to Mr Waters' unmeritorious complaint to keep "onside" with the union. Mr Chalmers further says the Company did "a deal" with the union to dismiss him but agreed not to dismiss other staff who participated in the function.

[96] Mr Chalmers did not provide evidence other than his assertions that the Company advanced Mr Waters' complaint on the basis that Mr Waters is a delegate of

[5] [2005] ERNZ 767 (CA).

a prominent union in the workplace. I accept the Company's explanation that when it received Mr Waters' complaint it regarded the matters complained of as serious and initiated an investigation. It says in circumstances where it was aware of the discord between Mr Waters and Mr Chalmers it interviewed all the attendees of the function (with one exception) so as to ensure it received information independent from Mr Chalmers and Mr Waters.

[97] There is insufficient evidence of a bias in favour of Mr Waters which led to a disparity in the way the Company treated Mr Chalmers during or as a consequence of the Company's investigation and I do not accept this claim.

[98] There is also no evidence to support the allegation that there was an arrangement between the Company and the union to dismiss Mr Chalmers in exchange for lesser sanctions against other staff. The Company says it issued a final written warning to one staff member and two staff each received a written warning in regards to events at the function. Mr Chalmers says no one else has been dismissed and there has been a disparity of treatment evidenced by the sanction imposed on him.

[99] Although it initially appears that the sanction of dismissal imposed on Mr Chalmers is disparate as compared to the action taken against other employees I consider the disparity has been adequately explained by the Company. Mr Chalmers was the only Leading Driver at the function. In this regard he was in a position of greater responsibility than other staff and a higher standard of behaviour was expected from him. Additionally it was evident that although there was a limited understanding by attendees at the function as to the Company's zero tolerance policy, Mr Chalmers had a sufficient understanding of the policy to know his conduct in allowing alcohol onto the work site was in breach of it. Mr Chalmers was also found by the Company to have returned to the work site having consumed alcohol on two occasions. I consider these factors, separately and in combination, distinguished Mr Chalmers' conduct from that of other staff and satisfactorily explains the Company's imposition of a harsher sanction.

In all the circumstances was dismissal an option which the Company, acting as a fair and reasonable employer could make?

[100] In *Angus v Ports of Auckland*[6] the Full Court made it clear that the Authority must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer's response to the situation that gave rise to the grievance against that standard. The Authority is also still required to assess, objectively and carefully, the conduct of both the employee and the employer, and then the employer's response to the employee's conduct.

[101] I have already found that the Company complied with the procedural requirements of s103A. I have also found that it was reasonable for the Company to find Mr Chalmers actions amounted to serious misconduct. However in *Angus* the Court found that the recent changes to the legislative test do not entitle an employer, having found serious misconduct, to automatically dismiss.[7] The Court also found that an employers' obligation to justify its decision to dismiss an employer requires an assessment "in all the circumstances".

[102] Mr Chalmers' circumstances were that he had been employed by the Company for 22 years, with 10 of those years in a position of Leading Driver. I was not provided with evidence of poor performance or previous misconduct other than reference to the incident in August 2011 where Mr Chalmers had been clearly advised of the Company's policy of zero tolerance to alcohol but no disciplinary action had been taken in relation to that matter.

[103] The Court noted that the phrase "in all the circumstances" includes taking into account the particular nature of the employer's enterprise. The circumstances of the employer in this case are that it is large transport operator which provides an urban bus service to the public and bus services for private charter.

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[6] Ibid at para [48]

[7] Ibid at para [48]

[104] Ms Bradley gave evidence that in the meeting of 20 January 2012 when she told Mr Chalmers she was *"struggling to have trust"* in him and the Company was considering termination, Mr Chalmers did not give her confidence that he understood his responsibility as a Leading Driver in the context of the matters of concern. She advised she had considered alternatives to dismissal including having Mr Chalmers work at another depot and/or in a less senior role. She advised the Authority that regardless of whether or not Mr Chalmers maintained his position as a Leading Driver, or if he was transferred to another Depot, he was perceived by staff as a long serving and experienced senior employer and was influential amongst staff and therefore neither of those alternative options were acceptable to the Company.

[105] In assessing the obligation to act fairly and reasonably I accept Ms Bradley's testimony that she had weighed the option of dismissal against less severe alternatives. Her evidence was that she had lost trust and confidence in Mr Chalmers as a Leading Driver and the alternative options to dismissal would not dispel the perception of his status amongst staff. I accept Ms Bradley's decision was one within her discretion and there is no suggestion that her conclusion was reached unfairly or unreasonably.

[106] In weighing up the competing factors of Mr Chalmers' length of service against the Company's findings of serious misconduct and its decision to dismiss, it is tempting to, as the Arbitration Court described in *Hepie*[8]*, "to put aside the merits of the matter and give judgment in accordance with our human sympathies*". However, as was the case before the 1 April 2011 amendment, the Authority cannot substitute its own view of what it would have done in the circumstances.

[107] I consider in all the circumstances the Company's decision to dismiss was an option available to it as a fair and reasonable employer. The Company's decision to dismiss Mr Chalmers was justified and he does not have a personal grievance in regards to this aspect of his claims.

Claims of statutory and contractual breaches

[8] Wellington Road Transport IUOW v Fletcher Construction Co Ltd [1983] ACJ 656

Did the Company summarily dismiss Mr Chalmers in the absence of a contractual provision to do so?

[108] Mr Chalmers alleges that the Company did not comply with the provisions of clause 31 of his employment agreement when he was summarily dismissed. He says he was entitled to two weeks' pay upon termination of his employment and refers to the wording of the agreement as follows:

> **31 TERMINATION OF EMPLOYMENT**
>
> 31.1 Both the Company and the employee shall give at least two weeks notice of termination of employment, except as provided in paragraph 32.2 of this agreement, or where suitable arrangements are agreed between the Company and the employee concerned. This clause shall be taken to affect any agreement relating to redeployment or redundancy.
>
> 31.2 Nothing in this clause shall negate the Company's right to dismiss an employee for serious misconduct; or the employee's right to leave without notice for serious breach by the Company of its obligations.
>
> …

[109] Clause 32 provides:

> **32 BEHAVIOUR**
>
> The Company's Behaviour Code may be reviewed between the parties setting out the general principles and any specific rules which apply to all the parties.

[110] The employment agreement does not contain paragraph 32.2 and it is submitted by the Company that reference in clause 31.1 to paragraph 32.2 is an obvious mistake. The Company says it is clear that that the reference to paragraph 32.2 should be substituted with paragraph 31.2. I accept this submission and do consider Mr Chalmers claim on a technical point which relies on an overt typographical mistake should be allowed.

Breach of s4(1A) Employment Relations Act 2000

[111] Mr Chalmers claims that the Company breached its duties pursuant to s4(1A) by failing to be active and communicative, and to provide information relevant to the continuation of Mr Chalmers' employment. He alleges the Company did not (i)

respond to the notices of personal grievances with regard to his suspension, (ii) provide a full copy of his personal file further to a Privacy Act request, (iii) provide a copy of the anonymous complaint in which the Company relied to form its decision to suspend, and (iv) provide copies of the set questions answered by attendees of the function which identified the authors until 17 January 2012.

[112] I have already found that Mr Chalmers was unjustifiably disadvantaged by the Company's failure to provide the anonymous email and decline to make further orders in relation to this aspect of Mr Chalmers claim.

[113] With regard to the provision of Mr Chalmers' personal file, Mr Chalmers had been employed by the Company for 23 years. As I understand from the evidence the Company did provide Mr Chalmers' file as it related to recent employment however it acknowledged it did not provide a copy of his entire file at first instance. I understand this omission was later rectified by the Company when it became aware it had not provided Mr Chalmers with all documentation relating to his employment.

[114] The Company says that throughout the investigation it sought to be responsive and communicative with Mr Chalmers' representative and keep her well informed as to its investigation process. It is evident from the file that there was considerable correspondence and communication between the parties on a variety of matters although the Company did not explain why it did not specifically respond to the two personal grievances raised during the investigation.

[115] There is no evidence that the Company withheld information (with the exception of the anonymous email) and Mr Chalmers was not required to respond to information which was not provided. In all other aspects of the investigation Mr Chalmers received and was provided an opportunity to respond to relevant information. I accept there were times when it appears there may have been some minor delays in providing him with information but I do not accept Mr Chalmers was materially disadvantaged by those.

[116] I do not consider the Company to be in breach of s4(1A) of the Act.

Breach of s120 Employment Relations Act 2000

[117] On the first day of the Authority's investigation Mr Chalmers made a claim for a penalty to be awarded against the Company for breach of its statutory obligation (s120) to provide within 14 days a statement of reasons for his dismissal.

[118] Having assessed the evidence I find that a verbal request for a statement of reasons for dismissal was made immediately following notification of Mr Chalmers' dismissal on 20 January 2012. The Company accepts it did not respond to Mr Chalmers' request within 14 days.

[119] In relation to the Authorities jurisdiction to order penalties, s133 of the Act provides:

> (1) The Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the Act-
>
> (a) for any breach of an employment agreement; or
>
> (b) for a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.
>
> …

[120] This aspect of Mr Chalmers' claim relates to an alleged breach of the Employment Relations Act. Section 120 of the Act does not contain provision for an order of penalties in circumstances where the section is breached. Alternatively there is no provision within Mr Chalmers' employment agreement which allows for a penalty to be recovered where the Company had failed to provide a statement of reasons for dismissal. While I consider it unsatisfactory that the Company did not provide reasons for dismissal in writing, the Authority has no jurisdiction to order a penalty for breach of s120 and is unable to determine this claim.

Breach of contractual health and safety obligations

[121] Mr Chalmers submitted that the Company breached his employment agreement by failing to provide a safe and healthy work environment. His evidence in support of this claim was limited to his assertions that he was distressed and physically impacted by the effects of the investigation and disciplinary process.

[122] I accept that an employee subject to an employment investigation which may result in dismissal is likely to experience a measure of stress and anxiety. However I do not accept that those effects give rise, in and of themselves, to an action for breach of contractual terms to provide a safe work environment. No further information was provided to the Authority by Mr Chalmers to support this claim and on this basis I do not accept it.

Remedies

[123] Mr Chalmers was unjustifiably disadvantaged by the process undertaken by the employer when it suspended him on 30 November 2012. He seeks compensation for hurt and humiliation associated with that action. He says that he was confused and humiliated by the way the Company suspended him on 30 November 2011. I accept his testimony in this regard as he was not provided with the anonymous email which made allegations of bullying by him and which was the cause of the Company's decision to suspend.

Contribution

[124] In assessing the nature and extent of the remedy to be awarded I am required to apply s124 of the Act, which provides where there has been contribution or fault on the part of the employee, remedies are to be withheld or reduced.

[125] During the course of the meeting which resulted in Mr Chalmers' suspension, he acknowledged he had placed Mr Waters' complaint and the Company's letter of 17 November 2011 on the notice board. He said he was seeking support from staff and *"everyone had a right to know".* However at the time of the Authority's investigation, in answer to whether he regarded his action of placing the complaint on the notice board as placing Mr Waters at risk Mr Chalmers stated "*Yes. I put [Mr Waters'] complaint on the board because he put my job at risk. Yes".* Mr Chalmers further conceded that along with his desire to obtain support from staff he wanted staff to know who had made a complaint against him.

[126] I consider there was a causal connection between Mr Chalmers actions and the Company's apprehension that he may unduly affect staff (in particular Mr Waters) likely to provide information in response to the Company's investigation. In this

regard whilst the Company did not provide Mr Chalmers with the information on which it based its decision to suspend, I consider the Company's reasons for wishing to suspend Mr Chalmers were legitimate. I assess that Mr Chalmers' actions contributed to the circumstances of his suspension.

Compensation

[127] On the basis of the evidence available I award $2000 as compensation under s123(1)(c)(i) for the unjustified disadvantage relating to Mr Chalmers' suspension, I reduce this sum by 20% to $1600 to reflect Mr Chalmers' contribution.

[128] Costs are reserved.

Orders

City Line (NZ) Limited t/a Valley Flyer is ordered to pay Mr Chalmers $1600 as compensation pursuant to s123(1)(c)(i) of the Employment Relations Act.

Michele Ryan
Member of the Employment Relations Authority