

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 40
5424627

BETWEEN

JEF FRENCH
Applicant

A N D

McARA AIR CONDITIONING
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
John Dewar, Advocate for Respondent

Investigation Meeting: 5 December 2013 at Hamilton

Date of Determination: 4 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr French) alleges that he was unjustifiably dismissed, unjustifiably disadvantaged and racially harassed in his employment by the respondent (McAra).

[2] McAra resists all of Mr French's contentions, denies that he "*lodged multiple complaints of racial harassment*", denies that it failed to act on the single complaint it received from Mr French, denies that Mr French was subjected to ongoing harassment, denies that Mr French was unjustifiably dismissed and denies that McAra took any unjustified action against Mr French which would have caused him disadvantage.

[3] Mr French was employed by McAra in September 2009 as a Service Technician and the employment was subject to a written employment agreement executed on 30 September 2009.

[4] As a consequence of a complaint made by Mr French on 7 June 2012, McAra's general manager, Mr Greene, had occasion to counsel Mr French's supervisor, Adrian Baars, about his supervisory style. This action was taken after Mr Greene had completed a full investigation and prepared a written report for McAra's Managing Director, Mr Fitzgerald.

[5] On 24 April 2013, Mr French met with Mr Greene after the two men had had two earlier discussions in the month, principally around Mr French's attempts to obtain a pay increase.

[6] When the two men met on 24 April 2013, as well as persevering with his request for a pay increase, Mr French sought to criticise Mr Greene saying that he did not trust him, that Mr Greene was scared of Mr Baars (the supervisor) and that he (Mr French) had no faith in Mr Greene to do his job correctly. Not surprisingly, Mr Greene was not minded to contemplate a pay increase.

[7] Accordingly, Mr French then sought an interview with the Managing Director, Mr Fitzgerald. That meeting took place on 2 May 2013. Mr Greene was also present. The pay increase sought by Mr French was again refused. Mr French repeated his uncharitable observations about Mr Greene's competence.

[8] Having heard those observations for a second time in a short number of days, Mr Greene subsequently raised his personal concerns about Mr French's behaviour with Mr Fitzgerald.

[9] Mr Fitzgerald took the matter up on behalf of McAra and requested Mr French to attend a disciplinary meeting set for Wednesday, 15 May 2013. Mr French was granted a day's leave to prepare for the meeting.

[10] On 10 May 2013, Mr Greene was told by another employee that Mr French was a disruptive influence in the workplace and was effectively fermenting trouble between the workforce and McAra.

[11] As a consequence, Mr Greene told Mr Fitzgerald who prepared a letter indicating that he was considering suspension and Mr Fitzgerald's intention was to give that letter to Mr French. To that end, Mr Fitzgerald telephoned Mr French on the job and asked him to call into the office at the end of the working day. Mr French agreed but in the result did not appear.

[12] When the applicant had not shown up by 11 minutes past 5, Mr Fitzgerald rang Mr French and Mr French said that he was not calling into the office to get fired.

[13] The parties met formally on 14 May 2013 wherein the applicant was advised he was suspended on full pay and was also given a further letter alleging that he had failed to obey a lawful instruction in failing to attend on Mr Fitzgerald on 10 May 2013 as instructed.

[14] Mr French, through his representative, made various last minute attempts to postpone the disciplinary meeting set for 15 May 2013; those requests were refused. At the appointed time, neither Mr French nor his representative were in attendance.

[15] The meeting was rescheduled by McAra to the following day. Mr French attended but with a different support person.

[16] After some initial skirmishing about the way in which the disciplinary meeting was to be conducted, Mr French commented on the allegations of insubordination because of the way he had spoken about Mr Greene but was "*unrepentant*" in his observations. Mr French maintained that his comments about Mr Greene were "*more than fair*" and implied that his view was shared by a number of his work mates.

[17] Mr French then advanced the intelligence that Mr Baars had called him a "*nigger*", that Mr Greene should have dealt with that because he (Mr French) had complained about it "*multiple times*". McAra says this meeting was the first occasion it had ever been advised that Mr French was called a "*nigger*" by the supervisor and it denies it had been advised about it "*multiple times*".

[18] In relation to the other allegation against him, namely his refusal to attend on Mr Fitzgerald when asked, Mr French initially said that he did not have a support person available, then said that it was late in the day and the traffic was bad, and then said that he was soaking wet and uncomfortable from working up a roof in the rain

but he agreed that he had not offered any of those explanations to Mr Fitzgerald when the two men spoke on the telephone on the day in question.

[19] Following the meeting, Mr Fitzgerald directed Mr Greene to conduct an investigation into additional inappropriate texting by Mr Baars. That investigation confirmed that Mr Greene had never had the additional text messages reported to him and that the only text message he had ever been told about was the one reported to him on 7 June 2012 from Mr Baars to Mr French, which Mr Greene had dealt with.

[20] There was a further disciplinary meeting agreed to between the parties on 20 May 2013. Mr French did not attend. Mr Fitzgerald wrote a letter to Mr French on that date concluding that McAra's provisional view was that Mr French be dismissed from the employment because of his insubordination in making objectionable and critical comments about his general manager, Mr Greene, and his failure to follow a lawful instruction when he refused to attend on Mr Fitzgerald when requested.

[21] A further and final meeting was set for 22 May 2013 in anticipation of which Mr French was invited to prepare any:

... written submissions ... as to penalty. ... In the event that I do not receive any written submissions from you, or that you fail to also attend that meeting, I will endorse my provisional determination which was to terminate your employment without further notice.

[22] Later that same day, at 2.42pm on 20 May 2013, Mr French sent Mr Fitzgerald an email resigning his employment.

[23] There was then an argument between Mr French and McAra about whether Mr French had resigned before the proposed dismissal took effect, with Mr French arguing that because his resignation had been received before the dismissal became effective, the employer was bound to treat the termination as a resignation rather than as a dismissal.

[24] Mr French attended a final meeting with the employer on 22 May 2013 at which he was told that he was dismissed from McAra's service.

[25] A personal grievance was then raised alleging unjustified dismissal, unjustified disadvantage in respect of the decision to suspend Mr French and a personal grievance on the grounds of racial harassment.

Issues

[26] The first issue for the Authority to consider is whether Mr French has been racially harassed or harassed at all.

[27] Next the Authority needs to consider whether the unjustified disadvantage grievance, which relates to Mr French's suspension from duty, is made out.

[28] Finally, the Authority needs to consider whether Mr French was unjustifiably dismissed from his employment.

Was Mr French harassed?

[29] As the Authority has already noted, Mr French's evidence is that he was regularly racially abused by his supervisor, Mr Baars, that that abuse included the use of the word "nigger" and that he had told McAra's general manager, Mr Greene, about those matters on "multiple" occasions.

[30] Mr French's evidence is that he:

... had multiple visits to Mr Greene after 15 October 2012 when he returned from ACC leave. I would usually see Mr Greene first thing before I went out on the job.

[31] Mr Greene's evidence is different. He readily acknowledges seeing Mr French regularly at the beginning of the day, as was the case with many staff. But Mr Greene was adamant in his evidence to the Authority that he was never aware of racial or general harassment allegedly directed at Mr French by Mr Baars.

[32] In his evidence to the Authority, Mr Greene noted Mr French's contention that he had been:

... subjected to racial harassment and general harassment by Adrian [Mr Baars], and that he had lodged multiple complaints with me about Adrian's behaviour, including providing copies of inappropriate text messages that he had received. I categorically refute this assertion. The only text Jef [Mr French] has ever raised with me was the singular text that I have earlier mentioned.

[33] There is no dispute that Mr French complained to Mr Greene about an abusive text message that Mr Baars had sent to him. As the Authority has already noted, that matter was followed up, Mr Greene wrote a report, the report was considered by the managing director, and remedial action was taken.

[34] It is also true that Mr French put before the Authority a succession of intemperate text messages sent by Mr Baars to him and duly certified by a Justice of the Peace. So the short point is that, without more, the Authority is entitled to conclude that Mr Baars did send the offending text messages.

[35] But what is in issue here is whether McAra ever knew about them before the disciplinary process and the subsequent Authority investigation was on foot. The Authority concludes on the evidence it heard that McAra had no idea that these other messages had been sent.

[36] This conclusion is reached notwithstanding Mr French's insistence that he raised the matter with Mr Greene on "*multiple*" occasions.

[37] While Mr French is clear that these revelations were provided, Mr Greene is equally clear that he had no idea there were any other offending text messages. More than that, Mr Greene said that had he known, he would have undoubtedly taken steps to address the situation.

[38] That evidence is consistent with the steps that he took in relation to the only text message the Authority is satisfied he knew about, namely the one that Mr French complained about on 7 June 2012. By comparison with the tenor of some of the subsequent text messages, this one is comparatively mild, although still inappropriate.

[39] What is important is that despite the relatively low level of seriousness of the 7 June 2012 text message, Mr Greene addressed the issue, wrote a report about it, referred that report to Mr Fitzgerald, the managing director, and after consideration of that report by the managing director, an action plan was agreed, and that action plan was subsequently put into place.

[40] It seems to the Authority that if Mr Greene responded in the way that he did to the 7 June 2012 notification, and he had been told about other much more serious examples, it is difficult to understand why he would have completely ignored them. Because that is the logical consequence of what Mr French is alleging; Mr French is saying that notwithstanding his "*multiple complaints*" to Mr Greene about Mr Baars' behaviour, Mr Greene did nothing.

[41] That is inconsistent not only with Mr Greene's behaviour in respect of the 7 June 2012 complaint but it is also inconsistent with the Authority's observation of

Mr Greene's general process. He struck the Authority as a methodical man and, amongst other things, he kept careful notes of meetings that he had with Mr French (and presumably with other staff). Examples of Mr Greene's careful note taking are before the Authority. It is difficult to understand why Mr Greene would have taken careful notes of some meetings and not of others. It is equally difficult to understand why Mr Greene would have acted promptly in respect of the 7 June 2012 complaint but apparently done nothing about a whole raft of other complaints which Mr French says he drew to Mr Greene's attention.

[42] Further and finally, the Authority feels obliged to dwell on what it considers to be the worst of the subsequent text messages, the one wherein Mr French is referred to as a "*nigger*". That word in this country is mercifully so rare now that its use in any workplace situation would likely raise a red flag. Certainly, when McAra management became aware of the use of that word in a text message from Mr Baars to Mr French as part of the disciplinary process, it immediately reacted, as the notes of that meeting make clear. The notes suggest that it immediately wanted to address the matter and that it was Mr French who, according to the notes of the meeting, said "*irrelevant, as I said I'm not complaining about that at the moment*".

[43] In all the circumstances then, the Authority is not persuaded that Mr French ever made it plain to McAra management that Mr Baars was making a habit of sending him intemperate and abusive, including racially abusive, text messages. Indeed the Authority's conclusion is that the only inappropriate text message that McAra was aware of was the one that Mr French complained about on 7 June 2012. The Authority is satisfied on the balance of probabilities that the evidence is that McAra was never aware of any other inappropriate text messages until the disciplinary meeting with Mr French held on 16 May 2013.

[44] At that meeting, there was the exchange the Authority has just referred to between McAra management and Mr French wherein Mr French indicated that the "*nigger*" text was "*irrelevant*". Notwithstanding that apparent dismissal of the importance of the text message by Mr French, Mr Fitzgerald quite properly immediately commissioned a report on the subsequent text message exchanges in contention and that report subsequently established, to McAra's satisfaction anyway, that McAra management knew nothing about the other text messages.

[45] The Authority does not presume to rely on McAra's finding; rather, the Authority makes its own judgment based on the evidence before it, but it is appropriate to highlight the fact that as soon as McAra became aware, on its evidence, of the other offending text messages, it immediately sought to investigate the matter.

[46] That process is absolutely consistent with what McAra did in relation to the only text message it says that it knew about, the one subject to a complaint on 7 June 2012.

[47] In the absence then of any evidence that Mr French has properly drawn to the employer's attention evidence of the harassment that he says he suffered, it is impossible for the Authority to make a finding against McAra because it cannot be required to have dealt with something it knew nothing about. The onus is always on the complainant in matters of this kind to draw attention to the matters complained about so that the employer can fulfil its obligations to ensure that the matter is addressed and dealt with. If the employer does not know about the matter then it is difficult to see how it can be held liable for not addressing it.

Was Mr French unjustifiably disadvantaged?

[48] This claim is made by Mr French because of his contention that McAra inappropriately suspended him. The context of this claim is that on 9 May 2013, Mr French was given a letter alleging that he was guilty of serious misconduct in making the intemperate observations that he made about Mr Greene, the general manager.

[49] The following day, Mr Greene was approached by another staff member who made it clear that in that staff member's view, Mr French was "*fermenting conflict towards the employer*" in the lead up to the disciplinary meeting to consider Mr French's behaviour towards Mr Greene.

[50] Mr Greene referred that issue to the managing director, Mr Fitzgerald, and Mr Fitzgerald decided that he should consider suspending Mr French and wrote a letter to that effect in which it was proposed that Mr French have the opportunity to make submissions on the proposed suspension. Mr Fitzgerald wanted to hand his letter to Mr French personally and to that end, he telephoned Mr French during work hours and asked Mr French to attend at the office at the end of the working day on 10 May 2013.

[51] Mr French did not appear and when he was finally contacted again by telephone by Mr Fitzgerald, Mr French simply said that he was not coming into the office because he “*did not want to be fired*”. Mr Fitzgerald sought to reassure him but to no avail.

[52] Eventually, Mr Fitzgerald was able to prevail upon Mr French to attend a meeting which happened on 14 May 2013 at which Mr Fitzgerald handed Mr French a letter confirming the decision to suspend.

[53] The question whether Mr French had an adequate opportunity to respond to the proposal to suspend him from duty then arises. Two points arise.

[54] The first is that McAra continued Mr French on full pay during the suspension so while Mr French may have been deprived of the enjoyment of fulfilling his role during the period of suspension, he was not deprived of the income he would normally have enjoyed from that process.

[55] The second point and more fundamental to the Authority’s conclusion in this matter is that Mr French made it impossible for McAra to consult with him about the suspension. The Authority is satisfied that Mr French had an adequate opportunity to respond appropriately to the proposal but he simply made it impossible for McAra to deal with him and on that footing, he cannot now be heard to say that he did not have an opportunity to comment on the proposal that he be suspended from duty.

[56] Accordingly, the Authority does not accept Mr French’s contention that he suffered a disadvantage as a consequence of McAra’s unjustified action. The Authority has difficulty in seeing McAra’s action as unjustified given the difficulties that Mr French put in its way concerning consultation and the disadvantage, if any, was modest given that McAra maintained Mr French on full pay.

Was Mr French unjustifiably dismissed from the employment?

[57] Mr French faced two separate allegations. The first was that he had made a series of intemperate and uncharitable observations about his general manager which McAra considered amounted to insubordination.

[58] Dealing with that allegation first, it is apparent from the earlier sections of this determination that Mr French made the observations in question on not one but two

occasions. The first was the meeting that he had with Mr Greene, ostensibly to seek an increase in his rate of pay and that meeting took place on 24 April 2013. The Authority has seen the notes of that meeting. They record Mr French making a number of thoroughly inappropriate observations about his general manager. Mr French did not object to the record of that meeting when it was subsequently proffered to him and he never resiled from the words complained of because he repeated them in a subsequent meeting at which both Mr Greene and Mr Fitzgerald were present. That subsequent meeting was on 2 May 2013.

[59] Mr French says that if Mr Greene was unhappy about the observations that he made initially on 24 April 2013, Mr Greene should have dealt with him on the spot, given him a warning, or otherwise remonstrated with him and he said that the fact that Mr Greene took no steps simply emphasised the point that he (Mr French) was making that Mr Greene was not dealing with leadership issues appropriately.

[60] But Mr Greene said that he thought Mr French was just “*sounding off*” when the pair of them met on 24 April 2013 and he decided not to take any steps because he did not regard the matter as particularly significant. It was only when Mr French repeated the allegations, more or less word-for-word, in the subsequent meeting with Mr Fitzgerald and Mr Greene on 2 May 2013 that Mr Greene thought he needed to take the matter further and he complained to Mr Fitzgerald. The tipping point the Authority fancies in Mr Greene’s change of view was the fact that Mr French was now broadcasting his views about Mr Greene’s competence to the managing director of McAra who was effectively ultimately the employer of both Mr Greene and Mr French.

[61] As a consequence of Mr Greene’s referral of the matter to Mr Fitzgerald, Mr Fitzgerald prepared a disciplinary letter which invited Mr French to attend a meeting on 15 May 2013 in order to explain himself.

[62] Before that meeting could take place, the second incident on which McAra relies took place. Because of the suggestion that Mr French was “*fermenting conflict toward the employer*”, Mr Fitzgerald judged that McAra should contemplate suspending Mr French until the disciplinary process was complete in order to avoid that possibility. Mr Fitzgerald wanted to hand to Mr French the letter proposing suspension in order to give Mr French a proper opportunity to comment upon it, but in the course of trying to achieve that, Mr French refused to attend at McAra’s office at

the end of the working day, as instructed, apparently on the basis that he was not going to turn up to be fired. Notwithstanding Mr Fitzgerald's attempt to assure Mr French that he was not going to be fired, Mr French maintained that he was not going to come in.

[63] Mr Fitzgerald then told Mr French that his refusal to engage was potentially a refusal to obey a lawful and reasonable instruction but Mr French maintained his position.

[64] There was a meeting eventually between the two men on 14 May 2013 wherein, amongst other things, Mr Fitzgerald gave Mr French a letter identifying the second disciplinary allegation, that is the failure to follow a lawful and reasonable instruction.

[65] At the disciplinary meeting set for 15 May 2013, Mr French failed to appear. Accordingly, McAra rescheduled the meeting to the following day and Mr French was in attendance on that occasion. The Authority has had the advantage of reading the transcript of that meeting.

[66] In relation to the allegation of insubordination, which related to Mr French's observations about Mr Greene's competence, Mr French was unrepentant and indeed again repeated his views.

[67] Mr Hugh Beecroft who attended the disciplinary meeting as a support person for Mr French, criticised the way that the employer dealt with the insubordination claim and contended that too much was being made of a matter that was "*not serious*". Mr Beecroft contended that McAra was simply trying to get rid of Mr French.

[68] Mr French said that his comments about Mr Greene were "*more than fair*" and that "*quite a few people say that*". Mr French then went on to allege that Mr Baars had called him "*a nigger*", that he had "*complained about [it] multiple times to [Mr Greene]*", and that Mr Greene had simply told him to "*harden up*". Later in the meeting, Mr French refused to allow McAra to progress the "*nigger*" comment by saying it was "*irrelevant*", but that he might rely upon it later.

[69] Concerning the second allegation of failing to follow a lawful and reasonable instruction, Mr French first maintained that what Mr Fitzgerald proposed was a

meeting, of a disciplinary nature, and that therefore he ought to have had time to arrange a support person which was not possible given the timeframe that Mr Fitzgerald was proposing. Mr Fitzgerald interposed that the meeting that was in prospect was simply a one-on-one meeting between Mr Fitzgerald and Mr French to enable Mr Fitzgerald to give Mr French the letter proposing suspension and to emphasise to him the need for him to provide some response. There was to be no discussion beyond that according to Mr Fitzgerald.

[70] But whatever the nature of the meeting, Mr French then indicated that he could not attend because the traffic was bad and then that *“I was soaking wet and started to cough and very uncomfortable. I was wet from working in the rain the whole day”*.

[71] But as is evident from the text of the disciplinary meeting, none of those observations were provided to Mr Fitzgerald at the time and indeed McAra was hearing the explanation for the first time at the disciplinary meeting some days later. Mr French maintained that if he had attended on Mr Fitzgerald as requested, he would have been *“ambushed”* and he believed he had *“made a good decision”* in not attending.

[72] When the disciplinary meeting concluded, McAra undertook to consider what Mr French had told it in the meeting and a letter was generated by McAra on 20 May 2013 making findings about both matters as Mr French had again failed to attend a scheduled disciplinary meeting of that date. Mr Fitzgerald’s letter of even date was courier packed to Mr French together with advice of a final meeting to be held on 22 May 2013.

[73] At 2.42pm on 20 May 2013, McAra received an email from Mr French resigning his employment. McAra responded by refusing to accept the resignation and there were two subsequent emails from Mr French offering to work out his notice period and complaining about the possibility of being fired on the footing that he had resigned first. McAra maintained its position that the disciplinary process would be concluded.

[74] In McAra’s email to Mr French sent at 2.49pm on 20 May 2013, in response to Mr French’s communications, Mr Fitzgerald concludes his email by encouraging Mr French to get some advice about McAra’s provisional conclusion that he be

summarily dismissed. The final two sentences of the email are important and read as follows:

Following your failure to attend today's meeting I had courier packed to you a letter with my interim decision which I will ratify at a meeting set for this coming Wednesday. You will have an opportunity before then to make written submissions as to penalty.

[75] It was apparent at the Authority's investigation meeting that Mr French thought the reference to penalty was some suggestion that he had to pay money to McAra in order to remain in the employment; of course, what Mr Fitzgerald was saying was simply that McAra had made findings of serious misconduct against Mr French and had reached a provisional conclusion that the penalty for those breaches should be summary dismissal but that Mr French could potentially persuade it otherwise by any submissions that he chose to make.

[76] In the result, the final meeting took place on 22 May 2013 and Mr French, for whatever reason, chose to make no submissions at all and as a consequence was summarily dismissed from his employment.

[77] Despite Mr French's evident confusion about the use of the word penalty, it is not McAra's problem that Mr French did not appreciate the nature of what was being said to him. He had originally engaged an advocate who, for reasons the Authority is unable to establish, refused to act at the eleventh hour, and Mr French was then subsequently supported in the first disciplinary meeting that he attended by a friend and former workmate, Mr Beecroft.

[78] Mr Beecroft also assisted Mr French at the Authority's investigation meeting and impressed the Authority as a straightforward and honourable man who could well have further assisted Mr French, assuming that Mr French had sought his advice.

[79] Even if Mr French's failure to make observations about whether he should be summarily dismissed or not was a function of his misunderstanding about the use of the word penalty, the Authority is not persuaded that that blights McAra's process.

[80] In the Authority's judgment, McAra followed a careful and measured process, clearly identifying two separate allegations and giving Mr French the opportunity of addressing both of those allegations.

[81] While Mr French made things very difficult for the employer by arbitrarily refusing to attend scheduled meetings, McAra persevered and eventually held one significant disciplinary meeting with Mr French on 16 May 2013 where the Authority is satisfied Mr French had a proper opportunity to be heard, and was assisted by a sensible and level-headed support person.

[82] But the short point is that Mr French did not take advantage of the opportunity to explain away the matters complained of. Rather, the transcript of the 16 May 2013 meeting suggests a truculent approach from Mr French and, especially in relation to the allegation of insubordination touching on his comments about Mr Greene, Mr French simply used the disciplinary meeting as another opportunity to repeat the offending material.

[83] On the second allegation, the transcript tends to suggest that Mr French simply came up with a range of excuses for not obeying the instruction given to him by Mr Fitzgerald and of course none of those excuses were advanced to Mr Fitzgerald at the time but were only offered at the disciplinary meeting some days later.

[84] In all the circumstances, the Authority is persuaded that Mr French is the architect of his own misfortunes in respect to his claim of having been unjustifiably dismissed. The Authority is persuaded that had Mr French adopted a more conciliatory approach at the 16 May 2013 meeting, he would have been able to preserve his employment. The Authority did not detect any enthusiasm on the part of McAra to dismiss simply for the sake of it and it was acknowledged throughout the Authority's investigation that Mr French was a good tradesman. Furthermore, Mr Fitzgerald told the Authority that in his three decades in business, this was the first personal grievance that the business had suffered and the first dismissal.

[85] Looking at each of the allegations levelled at Mr French by McAra, the Authority's conclusion is that a good and fair employer could have dismissed for either allegation singly and taking the two together, the conclusion is all the more firm that a good and fair employer, having conducted the robust inquiry that the Authority is satisfied McAra did, could have concluded that the only finding was one of serious misconduct in both cases and that the only consequence appropriate in all the circumstances was summary dismissal.

[86] Of course, the Authority must observe that the fact that McAra decided it could dismiss in these circumstances does not mean that that outcome is the only possible outcome that the law would contemplate. The test mandated by s.103A of the Employment Relations Act 2000 requires the Authority to assess if the decision the employer makes is one of the possible legitimate outcomes of the process and the Authority is satisfied in the present case that the decision to dismiss Mr French was an outcome that was available to a fair and reasonable employer in the particular circumstances of the case.

Determination

[87] The Authority has concluded that Mr French has no personal grievance whatever against McAra. It follows that his allegation of a personal grievance on the basis of racial harassment fails, as does his personal grievance alleging disadvantage from an unjustified action of the employer in the implementation of his suspension and his allegation of unjustifiable dismissal.

Costs

[88] Costs are reserved but the parties are urged to endeavour to resolve any costs issues by direct negotiation between themselves. McAra may take the view as the completely successful party that, while it was assisted by its able advocate, and Mr French had no professional representation, costs might appropriately lie where they fall.

[89] In any event, if the parties are unable to agree on a costs regime, leave is reserved for McAra to make application to the Authority and forthwith on that application being filed and served, and in any event within 14 days of that date, Mr French is to respond with submissions of his own about costs and the Authority will then deal with the matter in the usual way.

James Crichton
Member of the Employment Relations Authority