

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 133
5520407

BETWEEN CHRISTOPHER HICKS
Applicant

A N D AOTEA ELECTRIC
CANTERBURY LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
John Farrow, Counsel for the Respondent

Investigation Meeting: 17 August 2015 at Christchurch

Submissions Received: 24 August and 7 September 2015 from the Applicant
1 September 2015 from the Respondent

Date of Determination: 11 September 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Hicks' dismissal was procedurally and substantively justified.**
- B. Although Mr Hicks' suspension was justified, he was unjustifiably disadvantaged by not having been given an opportunity to make representations about it before it was implemented. It is not appropriate to award any remedies in respect of that disadvantage, however, for the reasons set out in this determination.**
- C. I impose a penalty of \$750 upon the respondent, payable to Mr Hicks, for having failed to comply with its contractual requirements in giving Mr Hicks an opportunity to make representations about his suspension.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Hicks claims that he was unjustifiably dismissed from his employment with the respondent on 1 April 2014. He also claims that he was unjustifiably disadvantaged in his employment by being suspended on or around 20 February 2014 and that that suspension was carried out in breach of the terms of his individual employment agreement.

[2] The respondent denies that Mr Hicks was unjustifiably dismissed or that he was unjustifiably disadvantaged in his employment and denies that the suspension was carried out in breach of the individual employment agreement between the parties.

Brief account of events leading to dismissal

[3] Mr Hicks was employed by the respondent, Aotea Electric Canterbury Limited (“Aotea”) pursuant to an individual employment agreement that was entered into by the parties on 27 December 2012. Mr Hicks commenced employment on 7 February 2013 in the role of supervisor. Mr Hicks says that this role, also known as an electrical contract supervisor, comprised a middle management position involving all aspects of commercial project management, ranging from ordering materials, supervision of labour and other sub-contractors to monthly claims/budget forecasts and client relations. The respondent says that the role of supervisor at Aotea required the incumbent to manage multiple sites.

[4] On or around 17 December 2013 Mr Hicks had a disagreement with a project manager at Leighs Construction which resulted in Mr Hicks swearing at the project manager. Mr Hicks does not deny that this occurred although he stated that the project manager had behaved unprofessionally towards him. In short, as a result of the disagreement, the project manager advised the respondent that he no longer wished Mr Hicks to work at that site. Mr Hicks was given an informal reprimand by the respondent’s contracts manager, Bryce Reid, as a result of this matter.

[5] While Mr Hicks was on his annual leave over the 2013/2014 Christmas/New Year period, the respondent was advised by another project manager working for Leighs Construction in relation to a different work site that he no longer wished Mr Hicks to be Aotea’s representative on that site. The reason given was that Mr Hicks had been failing to attend co-ordination meetings.

[6] A meeting was held on 20 January 2014, after Mr Hicks had returned from leave, in which these difficulties were discussed. It is understood that Mr Hicks agreed that he found it difficult to manage multiple work sites and that he should be reallocated, on a temporary basis pending a review by the respondent, as a foreman working at a specific site; in other words, going back on the tools. This site was the construction of classroom blocks in Halswell for Halswell School.

[7] Mr Hicks' work as foreman on the Halswell School project commenced around 23 January 2014. At this stage it is necessary to explain that, with construction projects such as the Halswell School project, different sets of drawings are issued to the contractors which they consult to ascertain where their particular services should be installed. In respect of electrical installation, there were two main sets of relevant drawings; electrical services drawings and architectural drawings. Mr Hicks says that he was issued with electrical services drawings in the first week, before he and his men went on site and that he would have had access to the architectural drawings on his laptop. The main construction company, Naylor Love, then issued the architectural drawings in hard copy, which were put up on a board on site, including both floor plans and elevations (also called *wall drawings*).

[8] The evidence of the respondent, which I do not believe is contested by Mr Hicks, is that the electrical services drawings are used to show the electrical circuits that need to be installed in each room. These drawings are marked up with symbols which indicate a number of outlets per room, and which circuits each outlet is to be connected to. The architectural drawings, especially the elevations, show precisely where each socket, flush box etc is to be installed.

[9] It is Mr Hicks's evidence that the standard practice within the electrical industry in New Zealand is for electrical services drawings to be used to determine the general locations of outlets and that the architectural drawings are consulted where the precise location of a socket is required, for example, above or below a work bench. It is the evidence of the respondent that, in this particular job, which was being commissioned by the Ministry of Education, every socket and outlet had to be precisely located.

[10] On 4 February 2014 a series of emails were exchanged which have some importance in the sequence of events that led to Mr Hicks's dismissal. The first was

sent by Mr Hicks to his manager, Timothy Kennedy, who is employed as a supervisor for the respondent. This email included the following text:

NOTE

We need clarification on an instance where the architecturals conflict with the drawing.

OVERSEAS STUDENTS ROOM E.20

Drawing 5500 Rev 2

Shows 3x double outlets north wall

Architectural drawing A. E54 Rev 0 (E-133)

Shows as above on SOUTHERN WALL

Please clarify

[11] Around one hour later James Dennis, building services coordinator for Naylor Love, sent an email to Mr Hicks and Mr Kennedy as follows:

Chris/Tim

Please find attached marked up revised drawing for power & data in Block E for speediness, which should be in conjunction with latest Architect drawings, as discussed.

This will be eventually cadded up and formally issued through Project Centre.

Any issues, give me a shout.

Regards

James Dennis

Building Services Coordinator

[12] Attached to this email was an electrical services plan 5500 Rev 2 which had hand written annotations in red.

[13] Around 11.40am Mr Kennedy replied to Mr Hicks' earlier email regarding the inconsistency between the electrical services and architectural drawings in the following terms:

Hi Chris.

The Architectural take precedence over the electrical. There is a note on the drawings.

Kind regards

Tim Kennedy/Contracts Supervisor

[14] The note referred to by Mr Kennedy on the electrical services drawing stated *Refer to architects drawings for final positions of fixtures.*

[15] It is Mr Hicks's evidence that, when he saw the email from Mr Kennedy saying that the architectural drawings took precedence, he did not understand this to mean that they were to be used exclusively for the location of power outlets etc. He believed that they were to be referred to only when there was some uncertainty or conflict between the electrical services drawings and the architectural drawings.

[16] Accordingly, between 4 and 12 February 2014 Mr Hicks and the two electricians working under him installed their fittings by reference to the electrical services drawings. Mr Hicks believed that these had by now been marked up to coincide with the architectural drawings.

[17] On 12 February 2014 Mr Dennis from Naylor Love carried out an inspection of the work that had been undertaken by Aotea to date and found that a significant proportion of the outlets had been installed in the wrong locations. Mr Dennis gave evidence to the Authority and said that some of the mis-locations were significant by several centimetres. This was conveyed to Mr Hicks by Mr Dennis and Mr Hicks sent an email to Mr Kennedy telling him that locations for general wall sockets and data outlets had been wired incorrectly. It is germane to mention at this point that, as well as electrical outlets being installed, Aotea was also installing data outlets and data cables under the direction of a foreman called Dean English. In his email to Mr Kennedy, copied to Mr Reid, Mr Hicks pointed out that there would be mismatching quantities if the estimator had not priced off the tender by reference to the architectural drawings as there were more outlets shown in the architectural drawings than the electrical drawings. Mr Hicks ended his email as follows:

We will move everything to match up with the architecturals and going forward we no longer follow what is indicated on the electrical services construction plans.

[18] Mr Hicks' evidence is that he instructed one of the electricians to rectify the mis-located outlets by reference to the architectural drawings. The other electrician carried on working to install further outlets. Mr Kennedy emailed Mr Hicks on Friday 14 February in the following terms:

Hi Chris

Further to our conversation yesterday. I don't want there to be agro between us but I also cant be on-site and go through every flush box position, that is your responsibility. The documents we have are ambiguous but that is why we need to be sure about what we are installing.

I am disappointed that Naylor's have had to pick up our mistakes and we now have to spend time remedying them. You were given the hand marked up wall drawings before you went to site and I explained that you needed to reference them. I then gave you a full set of architectural's on 28/1/14. You were also given the updated drawings by Cade [Cade Scott, site foreman for Naylor Love] on site and by me by email. I also sent an email explaining that the architectural drawings take precedence over the electrical and we spoke about the fact that you needed to go through them to identify any extras or changes.

Your behaviour when James was trying to explain things to us was unprofessional.¹ He was only pointing out our mistakes and Naylor's are our client.

Moving forward:

If we go through each block and box it out then cross reference the opus drawings (which are being updated again soon). We can get Naylor's to check these and okay or change them before we even pull a cable.

Can you please confirm when you have completed your practising licence as you will need this to sign off the mains soon.

[19] On the same day Mr Hicks emailed Mr Kennedy to advise him, amongst other things, that there were 80% through making those adjustments with locations matching up with architectural's.

[20] On 18 February 2014 the area manager for the respondent, Michael Daniel, wrote to Mr Hicks advising that the company had completed a review of client site project managers Mr Hicks had worked with to obtain some feedback in relation to Mr Hicks's performance on site. This was an action which Mr Daniel had undertaken to carry out following the meeting between Mr Hicks and Mr Daniel in which it had been agreed that Mr Hicks would work on a temporary basis as site foreman.

[21] In his letter Mr Daniel advised Mr Hicks that the respondent had spoken to five previous site project managers, of whom three had stated that they had not been happy with Mr Hicks's performance on site and that they would not be happy for him to return to their site in the future. Mr Daniel suggested meeting with Mr Hicks on Friday 21 February in order to discuss his response to the information gathered and to discuss steps that could be taken, such as training, counselling, and/or redeployment.

¹ I understand this to be a reference to Mr Hicks allegedly throwing his hard hat to the ground, although I accept Mr Hicks' evidence that he did this by accident.

[22] Mr Kennedy was called in to the Halswell School site on 18 February by Naylor Love following a further quality assurance inspection which found that 50% of the outlets checked were still in incorrect locations. This prompted Mr Kennedy to send an email to Mr Hicks on 19 February in the following terms:

Chris.

I had to go to site yesterday and was again embarrassed at what has been done on site. You had said last week that we were 80% through the remedial work, from what I saw 50% of what James had checked was wrong.

This was supposed to be sorted out last week we still had issue on Monday so I gave you Cameron to help get these issues sorted. I specifically told you to get the changes done and have Naylor's walk around with you and sign them off. None of this has been done. If there were any issues with the drawings you were mark them up and raise them with Naylor's. This was also not done. I had to go onto site now twice to be shown that we are in capable of setting flush boxes out.

[23] Mr Hicks said that after 12 February, until 19 February, whilst he had told his electrician to rectify the incorrectly located outlets by reference to the architectural drawings, when he had emailed Mr Kennedy to say that 80% had been rectified, he had made this judgment by taking account of how much work the electrician had carried out rather than by doing his own QA assessment. Mr Hicks says that he cannot account for why the electrician had not followed the architectural drawings. Mr Hicks denies that he had told his electricians and Mr English that they should follow the electrical service drawings rather than the architectural drawings, an allegation made by Mr Kennedy. He says that there was no reason why he would make such a statement. I accept Mr Hicks' evidence on that point.

[24] It is the evidence of the respondent that after Mr Kennedy's visit on site on 18 February, two of the project managers from Naylor Love contacted Mr Kennedy and Mr Reid to say that they were not happy with Mr Hicks, that he was not performing on site and that Naylor Love had told Mr Hicks on numerous occasions that the site works needed to be completed as per the architectural plans. The respondent says that these two project managers stated that they had lost confidence in Mr Hicks and that Aotea needed to change its foreman at the Halswell site.

[25] On 20 February the respondent received a letter from one of the project managers at Naylor Love, Brendon Keenan, in the following terms:

Halswell School – Site Supervisor/Project Management*Bryce**I am very concerned about the level of site supervision that you have at present. To date we have remedial works undertaken after our QA checks which have resulted in over 50% of the re-work being incorrect.**This as you all will appreciate is unacceptable not only from your company's perspective but from a site programme level which has now caused a delay with follow on trades.**We have put extensive resource over and above what we would consider necessary to deal with your sub contract works.**Can you by return advise your course of action to rectify this situation.*

[26] As this complaint had come in shortly before the meeting with Mr Hicks was due to take place on 21 February, that meeting was cancelled by the respondent. On 20 February 2014 Mr Reid suspended Mr Hicks on full pay. It is Mr Reid's evidence that he cannot recall the details of his conversation with Mr Hicks whilst Mr Hicks states that he was not asked to comment on any proposal to suspend him and indeed was told not to speak but was simply sent home. Mr Hicks says that this was in breach of his rights under his contract of employment.

[27] Mr Hicks was sent a letter by Mr Daniel confirming Mr Hicks's suspension and summarising that a meeting had been set up to discuss the feedback from five of his previous site project managers. This letter went on to say the following:

...

6. *As discussed in the meeting between Bryce Reid and yourself yesterday, it appears that a significant number of the electrical outlets completed for Naylor Love on the site will need to be replaced. This appears to be a problem related to you following the electrical plan as opposed to the architectural plan.*
7. *The overall concern is that these events on the face of things could suggest that you have failed to follow reasonable instructions and/or take reasonable care in the performance of your work duties. We need to investigate these events to determine whether this concern is established, and if so, whether disciplinary action is necessary.*
8. *We propose to meet with you to discuss things further and hear your version of events and any explanation you have.*
9. *As set out in your Employment Agreement at Clause 35 Disciplinary Procedures, specifically clause 35.2(a), we shall*

inquire into the matter and give you a reasonable opportunity to comment. You are entitled to be represented at the meeting. We are obliged to advise that the outcome of this disciplinary procedure could, if it is established that your conduct does amount to misconduct or serious misconduct result in you receiving a final warning or your employment with Aotea being terminated.

10. *We enclose the following documents for your information:*
 - (a) *Copy of notes of telephone discussions with previous Site Project Managers;*
 - (b) *Letter from Naylor Love in relation to current work on site;*
 - (c) *Email correspondence between you and Tim Kennedy, Aotea Contracts Supervisor.*
11. *We suggest that the meeting take place on Tuesday 25 February 2014 at 10.30am.*
12. *If you have any questions in regard to this please do not hesitate to contact me.*

[28] Mr Hicks wrote a letter to the respondent on 24 February 2014 setting out his explanation. In this letter Mr Hicks acknowledged that he had been informed to follow the architectural drawings and that he had referred to these *where deemed necessary*. He explained his experience of the standard industry practice and that, when it was identified that all trades were installing their first fixed cabling in locations that it did not exactly match those indicated on the architectural drawings then *all steps were taken to realign and make good*.

[29] Mr Hicks stated that the architectural drawings were sometimes found to have been misleading; for example, in the server room where no indication of power or data was shown on the architectural plans. He also referred to the fact that in many instances taking exact measurements off the architectural elevation plans placed flush boxes in awkward or impractical locations. Mr Hicks finished his letter by stating that he had devised strategies and procedures to ensure things ran smoothly and to schedule.

[30] On 25 February 2015 Mr Hicks attended a disciplinary investigation meeting with Mr Daniels and Mr Reid present. He chose not to be accompanied by a representative or a support person. Also present by telephone was Brenda Thom, a solicitor employed by Webb Ferry Lawyers in Dunedin, which are the respondent's legal advisers. A detailed file note of that disciplinary investigation meeting was prepared and has been seen by the Authority. The file note shows that there was some

discussion about the fact that Mr Hicks did not know that a telephone conference was going to take place but that he agreed to continue with the meeting despite this.

[31] There was some discussion about the use of the word *supervisor* and how, according to the respondent, Naylor Love refers to a *supervisor* when the respondent would refer to a *foreman*.

[32] Mr Hicks's explanation at this meeting for the problems that had arisen was that he and other trades had been following the electrical and power instructions from when they had arrived on site until around 12 February when Naylor Love pointed out that outlets were in the wrong places. Mr Hicks repeated his explanation about the standard practice to refer to architectural drawings for *tricky positions* and electrical drawings for all other places. Mr Hicks said that he had told his electricians to relocate outlets in accordance with the architectural drawings as soon as he had found out that the architectural drawings were *the bible*, which was around 12 February. The notes record that Mr Hicks admitted that he had been following the wrong drawings but noted that everyone else had been too, and that he wanted to look at *moving things forward as they were looking at blaming him*.

[33] On 28 February 2014 Ms Thom wrote to Mr Hicks attaching notes of conversations that the respondent had had with another project manager with whom Mr Hicks had worked in the past, as well as one of the electricians working under Mr Hicks, Mr English and Mr English's supervisor, the Naylor Love site team and one of the Naylor Love project managers.

[34] Mr Hicks replied to Ms Thom's letter on 3 March denying that the letter to the respondent from Brendon Keenan of Naylor Love had been a complaint about him as he had not been referred to expressly in the letter. He also expressed the view that mediation should be entered into and expressed doubt that Ms Thom was playing a neutral role in the proceedings.² Mr Hicks also stated that Mr English should also be subject to the same scrutiny as him in respect of the problems at the Halswell School and that the onus also lay with Naylor Love as their drawings were not aligned with the architectural drawings. Mr Hicks also referred to the fact that other trades had had the same misunderstanding of the drawings as he had had.

² Ms Thom agreed in her reply that she was not neutral, as she was advising the respondent.

[35] On 11 March 2014 Ms Thom wrote a detailed five page letter to Mr Hicks which set out the history of events to that date and addressing the points raised in Mr Hicks's letter of 3 March. The letter concluded as follows:

....

35. *It is clear to us that Naylor Love did advise Aotea of the drawings to be referenced. Tim Kennedy, your supervisor, passed this information on you very clearly by way of discussion and by email of 4 and 12 of February 2014. You chose to ignore this. It is not accepted that Opus has any part to play in the sequence of instructions. A reasonable instruction was made by Tim and you chose to interpret it in a way which we do not believe is reasonable given your level of experience and seniority. Your attitude appears to indicate that you take little or no responsibility for the issues raised by Naylor Love. This places us in a very difficult position in terms of placing you in a role in the future which requires you to take instructions from both fellow colleagues at Aotea and/or clients and to adhere to those directions.*
36. *In the circumstances we believe we have no other option but to propose to terminate your employment due to the failure of you to follow reasonable direction and to perform your duties as a Supervisor or Site Foreman in a manner which allows Aotea to be confident in your performance and to satisfy its commitments to its customers.*
37. *In the circumstances we suggest that you [sic] employment be terminated with two weeks notice.*
38. *We would like to set up a meeting to discuss this further with you and hear your view on our proposed decision.*
39. *Please confirm your ability to meet, with your support person, at 1pm on Thursday 13 March 2014.*

[36] At around 12.50pm on Friday 14 March, ten minutes before the scheduled meeting, Mr Hicks emailed to say that he wished to seek advice. Accordingly, the meeting was rescheduled for Thursday 20 March.

[37] Ms Thom also raised an issue of Mr Hicks having gone to Wellington during his suspension without permission and suggesting that part of his suspension should therefore be without pay. Although Ms Thom wrote further letters repeating this proposal, Mr Hicks does not contest that he was actually paid throughout his suspension and it is not necessary therefore to consider whether this aspect of his suspension created an unjustified disadvantage.

[38] Mr Hicks instructed Goldstein Ryder Limited to represent him and correspondence ensued between Goldstein Ryder and Webb Farry over the coming days. On the morning of 20 March Mr Goldstein emailed Ms Thom to say that he and Mr Hicks would not be attending the meeting scheduled for 2pm that afternoon. The meeting was consequently rescheduled for Thursday 27 March at 1pm.

[39] On Wednesday 26 March Mr Goldstein emailed Mr Farrow of Webb Farry in the following terms:

*Dear John
Neither my client nor I will be attending any meeting with the employer. It is apparent that the employer has made up its mind as to the outcome of this matter.*

Clearly the parties have an employment relationship problem. Is your client prepared to attend mediation with MBIE?

[40] Ms Thom responded to this email on 28 March 2014 setting out the recent history of matters to date and stating that the respondent proposed to make a decision in relation to the matter on 1 April 2014. Ms Thom offered Mr Hicks a further opportunity to attend any meeting prior to 1 April and stated *If Mr Hicks continues with his decision to provide no further input Aotea will make the decision based on the information it has.*

[41] By 1 April 2014 neither Aotea nor Webb Farry had received any further communication from Mr Hicks or Goldstein Ryder and Ms Thom wrote to Goldstein Ryder on that date to advise that a decision had been made to terminate Mr Hicks's employment. The material clause of this letter stated as follows:

In the circumstances, given all the information before it, Aotea has decided to terminate Mr Hicks employment, on notice, due to his failure to follow reasonable direction and to perform his duties as either Supervisor or Site Foreman in a manner which allows Aotea to be confident in his performance and to satisfy its commitments to its customers.

[42] Mr Hicks was given two weeks' notice of termination of his employment. Mr Goldstein raised a personal grievance on behalf of Mr Hicks by way of a letter dated 30 April 2014. Further correspondence ensued between the two law firms until Mr Hicks lodged his statement of problem in October 2014.

The issues

[43] The two principal issues that the Authority must determine are:

- (a) Whether Mr Hicks was unjustifiably dismissed; and
- (b) Whether Mr Hicks was unjustifiably disadvantaged in his employment when he was suspended.

Was Mr Hicks unjustifiably dismissed?

[44] In determining the question of unjustified dismissal, there are a number of sub-issues to consider, as follows:

- (a) Whether there was an unjustified disparity of treatment;
- (b) Whether Mr Hicks was dismissed for a performance issue in breach of his employment agreement;
- (c) Whether Mr Hicks' dismissal was otherwise procedurally unfair; and
- (d) Whether dismissal was substantively justified.

Was there unjustified disparity of treatment?

[45] Mr Hicks' concern is that he was unfairly targeted by the respondent when Dean English, the communications foreman employed by the respondent, was not suspended or disciplined. It is Mr Hicks' contention that Mr English was in *exactly the same boat* as Mr Hicks as Mr English was also a foreman supervising staff and that he had been responsible for data outlets and cabling being installed in incorrect locations. It appears that the data outlets were installed next to or between electric outlets and Mr English had had the same access to the architectural drawings as Mr Hicks had.

[46] It was the evidence of the respondent that the communications division was treated as a subcontractor to the electrics division and that it was normal for data outlets to be installed second, after the electric outlets had been installed as they were almost invariably located next to one another. This was the case in the Halswell School project. Mr Hicks did not contest this evidence during the investigation

meeting, but did state in his submissions that data outlets were occasionally installed first.³

[47] It is an accepted principle of New Zealand employment law that an employer should treat similar offences in a similar manner. This question was examined by the Court of Appeal in *Chief Executive of the Department of Inland Revenue Department v. Buchanan* [2005] ERNZ 767. The three questions that have to be considered in relation to an allegation of disparity of treatment are as follows:

- (a) Was there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity? and
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[48] Addressing the first question, on the face of it, there was a disparity of treatment between Mr English and Mr Hicks. They both held the same position of foreman and they were both responsible for the installation of fittings which needed to be completed before other trades could commence working. Both individuals also had access to architectural drawings. The disparity arises because Mr Hicks was suspended and dismissed whereas Mr English was not suspended or disciplined.

[49] Having found that there was a disparity of treatment between the two individuals, it is necessary to examine whether there is an adequate explanation for that disparity. Mr Hicks did not contest in any way the evidence of Mr Kennedy that there was a subcontractor relationship between the communications division and the electric division of the respondent company. This subcontracting relationship, in itself, does not necessarily explain the disparity of treatment. However, Mr Hicks also did not contest during the Authority's investigation meeting the evidence of Mr Kennedy that it was standard practice for the communications work to follow the electric work. In addition, Mr Hicks agreed during the Authority's investigation meeting that he had been in overall charge of the work being carried out by the

³ Mr Hicks made a number of statements of new evidence in his otherwise helpful written submissions. These statements of new evidence made at the submission stage are not admissible, however, as the respondent's counsel has not had the opportunity to question Mr Hicks in respect of them.

respondent at the Halswell project. This is supported by the fact that no complaints were received about Mr English from Naylor Love.⁴

[50] In light of this, whilst both Mr English and Mr Hicks held the position of foreman, it is clear that Mr Hicks carried the ultimate responsibility for ensuring that the electric outlets were installed in the correct locations in accordance with the architectural drawings. I do not believe, in these circumstances, that it was unreasonable for Mr English to have relied on the work of Mr Hicks' team in placing the data outlets. Mr Hicks was aware, I find, that Mr English would have been largely following his team's lead in respect of identifying the correct locations.

[51] In light of this, I am satisfied that there was an adequate explanation for the disparity of treatment by the respondent between Mr Hicks and Mr English. Therefore, this factor does not enable me to conclude that Mr Hicks was unjustifiably dismissed.

[52] Mr Hicks has also referred to Mr Kennedy making Diane McFarlane, an employee of one of the respondent's suppliers, cry and of him swearing over the telephone so that she heard him. Mr Hicks states that Mr Kennedy was allowed to smooth things over with Ms McFarlane whilst he was not given the opportunity to do so with the Leighs Construction project manager at whom he had sworn. However, I do not see these situations as comparable. First, there is a difference between a supplier and an important customer. Second, there was no evidence that Ms McFarlane refused to have anything to do with Mr Kennedy.

[53] Most importantly, Mr Hicks was not disciplined about his contretemps with the project manager in any event. He was given an informal reprimand. Although this incident was taken into account by the respondent in the decision to dismiss, it was the multiplicity of the incidents with customers that was relevant, and not the particular swearing itself. I examine this further below.

[54] In conclusion, I do to accept that there was an unjustified disparity of treatment.

⁴ In his written submissions Mr Hicks states that it was never decided that he would take responsibility for the layout of the data flush boxes. However, Mr Hicks did not challenge the assertion at the Authority's investigation meeting that he was in overall charge of the respondent's work at the site.

Was Mr Hicks dismissed for a performance issue in breach of his employment agreement?

[55] The individual employment agreement between Mr Hicks and the respondent provided, at clause 18.4, the following:

18.4 If at any time the Employee is not performing to the expected level:

- (a) The Employer will outline the areas of dissatisfaction, indicate what is regarded as satisfactory performance, and discuss ways in which the standard can be obtained;*
- (b) If, after a reasonable period notified to the Employee, he/she fails to achieve the required standards of performance, the Employer will meet formally with the Employee in order to hear the Employee's explanation in relation to the Employer's concerns and any other matter the Employee wishes to raise; and*
- (c) After consideration of the Employee's explanation and of all favourable aspects of the Employee's employment record as well as the Employer's responsibility (if any) for the situation that has developed, the Employer may if appropriate put in place possible remedial steps such as training, counselling and/or re-deployment of the Employee. The Employer may also set further performance measures and review periods, and may issue a warning to the Employee.*

[56] Clause 35 of the employment agreement deals with disciplinary procedures and provides as follows:

35. *DISCIPLINARY PROCEDURES*

35.1 The Employer shall act fairly in all disciplinary matters.

35.2 The following procedures shall apply when it is alleged that you have been guilty of misconduct or any other act or omission which may entitle the Employer to terminate your employment under this Agreement:

- (a) The Employer shall enquire into the matter as soon as practicable after it comes to the Employer's attention and shall give you a reasonable opportunity to comment on the matter;*

- (b) *You shall be entitled to be represented at all stages throughout the enquiry, other than at any meeting which must be convened as a matter of urgency;*
- (c) *Pending the Employer's decision on the matter, you may be suspended from work in accordance with clause 36; and*
- (d) *If, after hearing your explanation or other response, the Employer is satisfied that grounds exist for terminating your employment, the Employer may terminate your employment without notice, or on such notice as the Employer considers appropriate in the circumstances.*

35.3 *If the Employer decides that dismissal is not warranted, the Employer may at the Employer's discretion:*

- (a) *Take the matter no further; or*
- (b) *Give the Employee a written warning; such warning may be expressed to be a final warning.*

35.4 *If you are given a final warning and the Employer, after due inquiry, is satisfied that you have committed an act or omission entitling the Employer to terminate your employment, then the Employer may, at the Employer's discretion terminate your employment without notice, or in giving such notice that the Employer deems appropriate in the circumstances.*

[57] As at 29 January 2014, it is clear that the respondent was treating its concerns about Mr Hicks as a performance matter. This is made clear in Mr Daniel's letter to Mr Hicks of that date in which he states the following:

We must note at this point that if your performance as a Supervisor is not satisfactory, taking into account your explanation, remedial steps may need to be taken. These remedial steps could include training and/or redeployment.

[58] The specific concerns that the respondent had at that point related to the following:

- (a) Mr Hicks swearing at a project manager who subsequently communicated that he no longer wished Mr Hicks to be a supervisor on the relevant site;

- (b) Mr Hicks being barred from another site by the same client because of concerns the client had about his supervisory capabilities and not attending enough coordination meetings; and
- (c) Mr Hicks saying that he found it difficult to coordinate multiple sites.

[59] These issues appear to be a combination of both performance and misconduct. Certainly, swearing at a client is misconduct and is specifically characterised in clause 37.4(b) of the employment agreement as serious misconduct, justifying termination of the employment without notice. However, at this point, the employer had chosen to treat its concerns overall as a performance issue rather than a misconduct issue. This cannot be said in any way to have disadvantaged Mr Hicks as the employment agreement, as is typical, had more safeguards in place for the employee under its poor performance clause (training, counselling and re-deployment) than under its disciplinary procedures clause.

[60] By 21 February 2014, however, problems in respect of Halswell School had become known to the respondent and Naylor Love had expressed concerns about Mr Hicks, including declaring that it no longer wished Mr Hicks to be Aotea's site foreman. Mr Daniel's letter to Mr Hicks dated 21 February 2014 made clear that the respondent was now treating the matter as a misconduct matter. It referred to its concern being that, on the face of things, Mr Hicks had failed to follow reasonable instructions and/or take reasonable care in the performance of his work duties. It referred specifically to clause 35.2(a) of the employment agreement and made clear that the outcome of the disciplinary procedure, if it was established that Mr Hicks' conduct amounted to misconduct or serious misconduct, could result in him receiving a final warning or his employment being terminated.

[61] It is necessary to consider whether this recharacterisation of its concerns as a disciplinary matter involving an investigation into potential misconduct or serious misconduct, was justified. Clause 37.4(c) of the employment agreement provides as follows:

37.4 *This Agreement may be terminated by the Employer without notice in the following circumstances:*

...

- (c) *The Employee breaching or failing to observe any of the conditions of this Agreement in a way which seriously undermines the Employer's confidence in the Employee;*

[62] Clause 9 of the employment agreement deals with the employee's duties and responsibilities. Clause 9.2 provides of the employment agreement provides as follows:

9.2 *The Employee shall:*

- (a) *Diligently and faithfully serve the Employer, perform their duties with all reasonable skill and diligence and use their best endeavours to promote the interests of the Employer;*
- (b) *Devote the whole of their efforts and attention to the discharge of their duties as an Employee of the Employer at all times while working;*
- (c) *At all times comply with all lawful and reasonable policies, rules and regulations from time to time set down by the Employer; and*
- (d) *Maintain appropriate standards of appearance and conduct as shall be set down by the Employer from time to time.*

[63] At the time when it started its inquiries into the problems that had arisen in the Halswell School project, it appeared to the respondent that Mr Hicks had failed, inter alia, to follow a reasonable instruction; namely, to use the architectural drawings instead of or in preference to the electrical services drawings. Therefore, I am satisfied that one of the principal concerns of the employer at this point was a matter that can be characterised as a potential misconduct or serious misconduct matter as it was concerned that Mr Hicks had breached his obligation under clause 9.2(c) which, in turn, engaged clause 37.4(c).

[64] In conclusion, I do not believe that, with effect from 21 February 2014, it was inappropriate for the respondent to have treated its concerns as a potential misconduct issue rather than a poor performance issue.

Was Mr Hicks' dismissal otherwise procedurally unfair?

[65] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test for justification that the Authority must consider when determining whether or not a dismissal, amongst other things, was justified. This section also sets out the fundamental process that must be adopted by an employer in taking action against or dismissing an employee. I set out this section in full:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

Investigation

[66] First, the respondent is large and well-resourced and so can be expected to have investigated the allegations against Mr Hicks thoroughly. In light of the fact that the respondent's evidence is that, in deciding to dismiss Mr Hicks, it took into account the issues it had experienced when Mr Hicks was a supervisor as well as the Halswell School issues, it was necessary for the respondent to have carried out an investigation

into Mr Hicks' performance and conduct as a supervisor as well. This process had already commenced before the respondent became aware of the dissatisfaction of Naylor Love with respect to the Halswell School project.

[67] Prior to its making its decision to dismiss, the respondent spoke to a number of individuals, both within and outside of its company. Prior to 21 February 2014, the respondent had spoken to five site project managers with whom Mr Hicks had worked in the previous year. Of these five, three had stated that they would not want to see Mr Hicks on site again. The respondent later spoke to a further project manager specifically named by Mr Hicks as someone he wished them to speak to, who had stated, amongst other things, that Mr Hicks had been at his limit in respect of that particular project (the Transitional Cathedral). The respondent also spoke to one of the electricians who was working under Mr Hicks, Mr Kennedy, Mr English and Mr English's supervisor. The respondent also spoke to members of the Naylor Love site team.

[68] Whilst the notes of these conversations were, in some cases, reasonably brief, it does appear from the contents that pertinent questions were asked of the individuals concerned. It is Mr Hicks' contention that the questions should have been posed by an independent third party rather than by a member of the respondent company or someone acting on its behalf. However, I do not believe that this is a prerequisite to procedural fairness and there was no prohibition imposed on Mr Hicks preventing him from contacting the individuals concerned himself. Mr Hicks accepted that he did not do this. It is to be noted that he was advised by a very experienced employment lawyer prior to his dismissal and I am satisfied that, if this had been a genuine concern of Mr Hicks at the time, he would have instructed his solicitor to have asked for permission to contact the witnesses himself.

[69] In addition, the respondent investigated the allegation about Mr Hicks not following reasonable instructions, by seeking a statement from his supervisor, Mr Kennedy. He provided this by way of an email dated 25 February 2014 to Mr Reid, who passed it to Mr Daniel the following day. Mr Kennedy attached pertinent emails to his statement. The summary provided by Mr Kennedy covers the salient points of what had transpired over the previous weeks in relation to the misplacing of electrical outlets.

[70] In summary, I am satisfied that a sufficient investigation was carried out with respect to both the concerns the respondent had about Mr Hicks' performance as a supervisor and the concerns in regard to him apparently not following instructions during the Halswell School project.

Raising the concerns with Mr Hicks

[71] The next requirement upon the respondent was to raise its concerns with Mr Hicks before dismissing or taking action against him. There is ample evidence to show that the respondent, either through Mr Daniel or through Ms Thom, raised its concerns in unambiguous terms with Mr Hicks. The fact that Mr Hicks was able to respond fully in writing on 24 February and 3 March demonstrates to my satisfaction that Mr Hicks was very clear as to the nature and seriousness of the respondent's concerns.

A reasonable opportunity to respond

[72] The third requirement was for the respondent to have given Mr Hicks a reasonable opportunity to respond to its concerns before dismissing him. The evidence before the Authority makes clear that Mr Hicks was given a full opportunity to respond and, in the early stages, took that opportunity. It is of particular note that the respondent provided Mr Hicks a further opportunity to comment even after Mr Goldstein had advised the respondent's solicitors that neither Mr Hicks nor Mr Goldstein would be attending a meeting with the employer. Despite this stance, Mr Hicks was still afforded a final opportunity to make representations prior to the respondent deciding to dismiss.

Genuinely consider Mr Hicks' explanation

[73] The fourth requirement on the respondent was to genuinely consider the employee's explanation in relation to the allegations. On balance, I believe that the respondent did genuinely consider Mr Hicks' explanations. For example, Ms Thom's letter of 11 March 2014 addresses the points made in Mr Hicks's letter of 3 March in some detail. Ms Thom also responded to an email from Mr Goldstein dated 20 March 2014 in her letter dated 21 March 2014, in which she addressed the main points raised by Mr Goldstein.

[74] Furthermore, Mr Hicks and Mr Goldstein chose not to make any further comments once Mr Hicks had been told of the proposal to terminate his employment. There was no explanation given for this stance, and one cannot help but note that this was a lost opportunity for Mr Hicks.

The rationale for dismissal

[75] Mr Daniel was the final decision-maker and he explained to the Authority his rationale in deciding that dismissal was the appropriate step to take. He stated that when he looked at the overall picture, it presented one of client dissatisfaction. The complaints were not one-offs and, if any of the three incidents had occurred in isolation, they would not have led to dismissal. However, taken together, Mr Daniel came to the conclusion that Mr Hicks was not going to change as he had refused to take responsibility for the issues that had arisen.

[76] When I step back and consider this rationale against the obligation of the employer to genuinely consider Mr Hicks' explanation, I am satisfied that the respondent did take note of Mr Hicks' explanation but that that explanation did not reasonably account for the continued failure to ensure that electrical outlets were placed in the correct location, both after 4 February and 12 February 2014.

Conclusion

[77] Having considered the process followed by the respondent, I am satisfied that it did not prejudice Mr Hicks in any significant way. On the contrary, the respondent took great pains to ensure that Mr Hicks had every opportunity to respond to its concerns and also carried out sufficient investigation.

[78] Therefore, I do not believe that there was any material defect in the process which resulted in Mr Hicks being treated unfairly. The process followed by the respondent was one that a fair and reasonable employer could have followed in all the circumstances.

Was the dismissal substantively justified?

[79] As examined above, Mr Daniel explained that his rationale for deciding that dismissal was the only appropriate option and was founded upon his conclusion that Mr Hicks would not take responsibility for the issues under investigation. This, in turn, led Mr Daniel to conclude that the respondent was no longer able to have trust

and confidence in Mr Hicks, either as a supervisor or a site foreman as it could not be confident that he would follow reasonable directions in the future. Mr Daniel explained that the foreman and supervisor roles were specific roles which could not be reshaped to accommodate Mr Hicks' particular approach.

[80] It is my finding that, after 4 February 2014, Mr Hicks should reasonably have known that Naylor Love required the architectural drawings to take precedence over the electrical services drawings. Even though, as Mr Hicks pointed out, the architectural drawings were not completely fool-proof (for example, they did not show the location of electrical outlets in the server room), I am satisfied that sufficient information was given to Mr Hicks on and after 4 February 2014 for him to have understood that he was to ensure that the architectural drawings were followed in any case where they did not align with the electrical services drawings and that it was his responsibility to check proactively for mismatches. I do not accept that nothing should reasonably have alerted Mr Hicks to the fact that, even after 4 February 2014, the electrical services drawings and the architectural drawings were not matching exactly.

[81] Furthermore, Mr Hicks could not possibly have been in any doubt that there were major problems with respect to the electrical services drawings by 12 February 2014. Notwithstanding this, although I accept his explanation that he told his electricians to rectify the problems by reference to the architectural drawings, he failed to ensure that they did so. He was the site foreman and, by 12 February 2014, could be in no doubt how important it was to Naylor Love, and by extension to his employer, for the errors that had occurred up to that point to be corrected urgently. These errors were holding up other trades which Mr Hicks must also reasonably have known.

[82] It would appear both from the note of the disciplinary investigation meeting on 25 February 2014, and from his own two letters, that Mr Hicks never did satisfactorily explain why the errors had continued to occur.

[83] Finally, the respondent took into account the two previous incidents of clients saying that they did not want Mr Hicks on site. These incidents had occurred only a few weeks of the problems at the Halswell School site, and I believe that it was reasonable for the respondent to have taken them into account in evaluating whether it

had lost trust and confidence in Mr Hicks to work in any supervisory role they had available.

[84] It is unfortunate that Mr Hicks decided to withdraw from the process prior to the respondent's decision to dismiss him. I see no cogent evidence to suggest that the respondent had already predetermined the issue prior to 1 April and Mr Hicks deprived himself of the opportunity to give the respondent the comfort it needed that he could be trusted in the future to follow reasonable direction and hold the position of site foreman.

[85] I note at this point that the test of justification does not permit the Authority to step into the employer's shoes but requires it to assess whether the decision to dismiss was one that a fair and reasonable employer could have taken in all the circumstances. Put another way, the Authority must ask whether dismissal fell within the range of actions that a fair and reasonable employer could have taken. Having examined the process followed, the evidence available to the respondent at the time, the explanations given by Mr Hicks and the rationale for the decision to dismiss, I am satisfied that dismissal did fall within that range of actions open to the respondent if it were acting reasonably and fairly.

[86] In conclusion, I am satisfied that there was a substantive justification for Mr Hicks' dismissal and that the decision to dismiss was one that a fair and reasonable employer could have taken in all the circumstances. Having found that Mr Hicks' dismissal was both procedurally and substantively justified, I dismiss his personal grievance for unjustified dismissal.

Was Mr Hicks unjustifiably disadvantaged in his employment by being suspended?

[87] Clause 36 of the employment agreement provides as follows:

36. SUSPENSION

36.1 Where the Employer considers it appropriate, it may require the Employee to undertake reduced or alternative duties or remain away from work on suspension but on full pay while it conducts an investigation into the Employee's actions or conduct. If suspension is being considered, the Employer will, where possible, discuss this with the Employee and consider the Employee's comments before a final decision on whether to suspend is made. Where any suspension extends beyond four (4) weeks due to matters beyond the Employer's control the

suspension may continue without pay in such instances, [sic] before making any final decision, the Employer will discuss and consider the Employee's comments before making a decision.

[88] I accept that it was reasonable for the respondent to have elected to suspend Mr Hicks in accordance with its right to do so in clause 36 of the employment agreement given that it had received three serious complaints about Mr Hicks in the space of just over two months, and which had resulted in Mr Hicks having to be removed from three different worksites. Under these circumstances, it is reasonable for the respondent to have had considerable concerns about Mr Hicks' ability to carry out his duties as either a supervisor or site foreman until after it had investigated its concerns.

[89] Accordingly, I believe that it was appropriate under these circumstances to have required Mr Hicks to be removed from his duties pending that investigation and that any disadvantage Mr Hicks suffered from the suspension itself was justified. In other words, suspension as an action that a fair and reasonable employer could have taken in all the circumstances.

[90] However, I do accept Mr Hicks' evidence that, when Mr Reid told him that he was being suspended, he did not give Mr Hicks the opportunity to make comments and then consider those comments before a decision on whether to suspend was made. This means that there was a breach of clause 36.1 of the employment agreement.

[91] Mr Hicks was entitled to expect his rights under clause 36.1 to have been complied with. The fact that they were not placed him in a position of disadvantage, as he was deprived of the opportunity to make representations about his suspension before it was implemented. Also, there does not appear to be any justification for that failure to provide him with an opportunity to comment. The need to suspend was not so urgent that Mr Hicks could not have been given that opportunity.

[92] I conclude that no fair and reasonable employer could have failed to have given Mr Hicks an opportunity to comment prior to a final decision being made on whether to suspend him. Accordingly, I find that Mr Hicks was unjustifiably disadvantaged in this respect.

Remedies

[93] Having established that Mr Hicks was unjustifiably disadvantaged in his employment by not having been given the opportunity to comment prior to his suspension being implemented, it is necessary now to consider what remedies, if any, he is entitled to as a result of that finding.

[94] It is clear that Mr Hicks did not suffer any financial loss as a result of that unjustified disadvantage. It is therefore necessary to consider whether he is entitled to any compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[95] Mr Hicks did not give fulsome evidence during the investigation meeting with respect to the effects on him of his suspension and did not say specifically what the effects on him of not having been given an opportunity to comment had been.⁵ He did say that being suspended put him *in a bad place* as he wanted to resolve things and move forward. I have already found that the fact of the suspension itself was not unjustified and so Mr Hicks cannot receive any compensation in relation to having been suspended per se. It would not be appropriate for the Authority to guess what the specific effects on Mr Hicks of having been deprived of the opportunity to comment had been and, in the absence of any evidence with respect to those effects, I am unable to award any compensation for that particular unjustified disadvantage.

Penalty

[96] In his submissions, Mr Hicks seeks a penalty to be imposed upon the respondent under s.134 of the Act for breaching his employment agreement in respect of the suspension. Whilst this was not specifically pleaded in his statement of problem, I note that a penalty for breach of contract was referred to in his personal grievance letter sent by Mr Goldstein on 30 April 2014 and that Mr Farrow has raised no objection to the applicant seeking a penalty in his submission in reply. Accordingly, I am satisfied that the respondent was put on notice of Mr Hicks seeking a penalty and had an opportunity to oppose it.

⁵ Mr Hicks did give further evidence in his submissions but, as noted above, I cannot take this into account as the respondent's counsel has not had the opportunity to question Mr Hicks in respect of it.

[97] Section 134 of the Act provides as follows:

134 Penalties for breach of employment agreement

(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

(2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[98] In *Xu v McIntosh*⁶ Chief Judge Goddard gave the following guidance on the imposition of a penalty⁷

[47]A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach....

[99] Addressing the first question, I do not find that any significant harm was caused by Mr Kennedy not consulting with Mr Hicks prior to suspending him. However, I accept that it is likely Mr Hicks would have felt somewhat helpless in being suspended without having been given a chance to comment.

[100] Turning to the second question, was the breach flagrant and deliberate? I suspect that it was not, and that Mr Kennedy was acting out of haste. However, Mr Kennedy was acting under advice at that point, so the breach was not wholly excusable.

[101] On balance, I believe that it is appropriate to impose a modest penalty as, in the words of the Court of Appeal, *Agreements are made to be kept*.⁸ In addition, consultation with employees prior to the taking of a potentially disadvantaging step in their employment is a fundamental requirement of the Act, and when such an obligation is referred to expressly in the employment agreement, a failure to abide by such an obligation should not be unpunished.

⁶ [2004] 2 ERNZ 448

⁷ At [47] and [48]

⁸ *Fuel Expresso Ltd v Hsieh* [2007] NZCA 58, [2007] ERNZ 60 at [21].

[102] I believe that an appropriate level of penalty is \$750. Pursuant to s.136(2) of the Act I order that this sum be paid to Mr Hicks.

Costs

[103] Costs are reserved. The parties should seek to agree how costs are to be dealt with between them but if they are unable to reach that agreement within 28 days of the date of this determination, any party seeking costs should serve and lodge a memorandum setting out what those costs are, and the basis on which they believe they are entitled to a contribution, within a further 14 days. Any reply to those memoranda may be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority