

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 85  
5521537

BETWEEN            JAMES HIGGS  
                                 Applicant

A N D                MONRO LIMITED  
                                 Respondent

Member of Authority:    Helen Doyle

Representatives:        Robert Thompson and Carren McDonald, Advocates for  
                                 the Applicant  
                                 Tim Mackenzie, Counsel for the Respondent

Investigation Meeting:    5 May 2015 at Christchurch

Submissions Received:    6 May 2015

Date of Determination:    25 June 2015

---

**DETERMINATION OF THE AUTHORITY**

---

- A    James Higgs was not unjustifiably suspended.**
- B    James Higgs was unjustifiably dismissed.**
- C    Taking contribution into account Monro Limited is ordered to pay to James Higgs the following:**
- (i)    Three weeks lost wages in the sum of \$2399.55 gross. Mr Thompson and Mr Mackenzie are to try to agree a figure for the remaining ten week period less the contribution figure. Failing agreement leave is reserved to return to the Authority.**
- (ii)    Compensation in the sum of \$2000 without deduction.**

**D Costs are reserved and failing agreement a timetable has been set.****Employment relationship problem**

[1] James Higgs commenced employment with Monro Limited (Monro) in January 2014 as a truck driver. He had previously worked for a few weeks in late 2013 for Monro as a casual employee.

[2] Monro is a transport operation that Peter Monro, the sole director, started in 2008 with his two sons, Richard and Philip. At a later stage he was joined by a third son, Matthew. Monro has 11 employees and six trucks and carries on business in trucking, excavator hire and has a logging operation.

[3] Mr Higgs says that he was unjustifiably dismissed from his employment for events that occurred on 16 July 2014. Further he says that he was unjustifiably disadvantaged when he was suspended without consultation on 24 July 2014.

[4] Monro says that Mr Higgs' dismissal was for assault and that it was justified. It says that any issues about an alleged suspension are technical and forensic at best. It does not accept that Mr Higgs is entitled to any remedies.

[5] Mr Higgs seeks reimbursement of lost wages, payment of compensation and a sum towards his costs.

**Test of Justification**

[6] Whether a dismissal or action was justifiable requires the Authority on an objective basis to apply the test in s 103A (2) of the Employment Relations Act 2000 (the Act) whether Monro's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or suspension occurred.

[7] In applying the test the Authority must consider four procedural factors as set out in s 103A (3) of the Act and any other factors it thinks appropriate. The Authority must not determine a dismissal or action to be unjustified because of defects in the process followed if the defects were minor and did not result in the employee being treated unfairly.

[8] A fair and reasonable employer could be expected to comply with the statutory good faith obligations in s 4 of the Act.

### **The issues**

[9] The issues for the Authority to determine in this case are:

- (a) Was Mr Higgs led to believe that he would not be disciplined for the events of 16 July 2014 by Peter Monro?
- (b) Could a fair and reasonable employer, in light of the telephone conversations on 16 and 18 July 2014 and an apology, have continued to a disciplinary meeting and a disciplinary outcome?
- (c) Was the conduct of Mr Higgs on 16 July 2014 conduct that could amount to serious misconduct?
- (d) Was Mr Higgs unjustifiably suspended?
- (e) Was Mr Higgs unjustifiably dismissed?
- (f) If Mr Higgs was unjustifiably dismissed, what remedies is he entitled to and are there issues of contribution?

### **Background against which to assess the issues**

#### *16 July 2014*

[10] Mr Higgs was asked as part of his duties on 16 July 2014 to drive a truck to Lyttelton Port to deliver some logs. A port employee unloaded his truck. He returned to Monro's.

[11] Peter and Philip Monro had been advised that afternoon that Matthew Monro had a logging excavator breakdown at a job and needed some tools delivered to fix it. Peter Monro decided that Mr Higgs should take the small truck home and he could on the way drop the tools off to McLeans Island.

[12] Peter and Philip Monro were gathering the tools in the workshop and loading the small truck for this purpose. Peter Monro noticed some damage to the fuel tank on the logging truck. He raised the matter with Mr Higgs. Mr Higgs said that he did

not know what had occurred and was cross about it because he assumed the loader driver at the Port had caused the damage. The logging truck was the newest rig in the fleet.

[13] The evidence supports that whilst Peter Munro was cross about the damage he did not blame Mr Higgs. Mr Higgs in his evidence said that Philip Monro swore about the damage and also came out to the truck. Philip Monro accepted that he may have said *oh fuck* in respect of the damage and Peter Monro agreed his son probably swore. Peter Monro left Philip Monro and Mr Higgs to finish loading the small truck. Peter Monro wanted to get a cover for the damaged spout and he went into the workshop. He did not see what was to follow.

[14] There were a few tools still to load. I find that it was more likely than not that the truck was caged as shown in a photograph provided at the Authority investigation meeting. It was usually used for transporting firewood.

[15] Philip Monro opened the tailgate and threw in a crow bar and some heavy chains into the truck. He agreed that they made a lot of noise and that the noise *sparked Mr Higgs off*. He said there was no discussion before Mr Higgs ran at him *full tilt* and shoulder charged him. Philip Monro said that he took two to three steps backward when he was hit but did not fall. He told Mr Higgs to *calm down dude*. He said that Mr Higgs then turned and ran towards the truck and got in. Philip Monro went to go towards the passenger door as the tailgate to the truck was not secure but Mr Higgs did a u turn to get out of the gate and was screaming abuse out the window.

[16] Mr Higgs had a different view when he gave his evidence of what occurred that day. He said that Philip Monro became aggressive and abusive towards him when he saw the damage to the logging truck and that he felt Philip's mood was *pretty dark*. Mr Higgs said that during the previous six months of working Philip had bullied him. He said that he believed that Philip threw the crowbar in his direction deliberately to get a reaction from him and that they then got into a heated exchange. As they were standing close Mr Higgs decided that he should leave and as he walked past Philip shoulder bumped him. He agreed when he was leaving in the truck he said words like *fuck up I don't need this shit*.

[17] Peter Monro heard Mr Higgs yelling abuse and driving aggressively from the workshop.

[18] After Mr Higgs had left the yard, Philip Monro told his father that he had been assaulted by Mr Higgs. Peter Munro recalled that he appeared shaken up.

[19] Later that afternoon, Peter Monro received a text message from Mr Higgs that provided the following:

*Im sorry Peter but I was devastated to see that damage. I had no idea. I did not need someone treating me like crap because of it, getting aggro and throwing their toys. Feeling very stressed out about it. I try take the utmost care of your trucks.*

[20] Mr Monro responded that he appreciated Mr Higgs took good care of the truck and that:

*I know we are all pretty pissed off at the damage and I'm certainly not blaming you. Phil doesn't blame you either although it seems that is how it appeared to you.*

[21] Mr Higgs then sent the next text message, responding:

*I know you weren't. I guess I mistook his anger for the situation as anger towards me and being upset about it caused a problem.*

[22] Peter Monro then sent a text message *We all get grumpy when things go wrong and I think the industry we are in is probably worse than most....* He then asked whether Mr Higgs was in a position to talk if he gave Mr Higgs a call.

[23] A time for a telephone call was confirmed for about 8pm. Peter Monro said from his perspective the main purpose of the phone call was a *welfare check* on Mr Higgs as he was concerned about how he was feeling.

[24] There is a dispute in the evidence as to what was said during the telephone call. Mr Higgs said he was cautious about talking to Peter Monro on the telephone because he thought he might fire him so he arranged to have a friend listen to the conversation. The Authority did not hear from that witness.

[25] Mr Higgs says that the incident earlier in the day with Philip Monro was discussed and that Peter Monro said to him that they all had to get along and to apologise and move forward. Mr Higgs said that the conversation was that it was good to leave *the past in the past* and that they should move on and he should apologise to Philip Monro and he agreed he would do that.

[26] Peter Monro said that he did not call Mr Higgs to discuss the assault at this stage and intentionally avoided discussing it in any sort of disciplinary way. He accepted there was discussion about the truck damage and that he was disappointed about it. Peter Monro said he advised Mr Higgs that accidents happen and repeated that he was not being blamed for the damage to the truck. Peter Monro said that he may have talked about damage being in the past but did not talk about the assault in that way.

[27] The evidence supported that there probably was some discussion about the shoulder incident. Peter Monro did not recall saying *the past is in the past* at all and in his oral evidence said *certainly not* in relation to the shoulder incident. He said that the call ended with him saying that he would like to discuss it further.

[28] Peter Monro had never really had to deal with employment law issues before and said he was reluctant to raise the issue about the shoulder incident on the telephone. He wanted to get some advice before he said or did anything. Monro is a member of the Road Transport Association of New Zealand and Peter Monro said he wanted to talk to them first.

[29] Mr Higgs to a degree supported this cautious approach during the telephone call. He said in his oral evidence that Peter Monro never mentioned *shoulder charge* or talked about a shoulder at all rather referring to an altercation.

[30] In his written evidence Peter Monro said that he did not ask Mr Higgs to apologise and that he did not volunteer to. In his oral evidence Peter Munro recalled that Mr Higgs asked him if he thought he should apologise and that Peter Munro said *it couldn't do any harm*.

*18 July 2014*

[31] Mr Higgs apologised to Philip Monro on 18 July 2014 for *pushing past him with his shoulder*. Mr Higgs said that Philip Monro accepted his apology but said that Philip Monro advised him that *his wife wanted Mr Higgs gone*, that he had *big friends* and that Mr Higgs was *lucky he was on his angry pills or it would have been worse for him*.

[32] Philip Monro agrees that Mr Higgs apologised but for assaulting him not pushing past him. He said pushing would not have warranted a discussion. Philip

Monro agreed that he did say that his wife was concerned Mr Higgs had assaulted him and was worried about what would have happened if he had fought back. Philip Monro recalled Mr Higgs saying something about putting the matter behind them and leaving it in the past. He said that he couldn't and that Mr Higgs would need to talk to his father. Philip Monro said that he was trying to stay out of Mr Higgs way. The two of them did shake hands.

[33] Mr Higgs said that he was working that day as normal and then broke a locking pin on the truck's tail gate. He said that he panicked because he was concerned about Philip Monro's reaction and dropped the truck back and left immediately.

[34] There was a telephone call between Peter Monro and Mr Higgs that day. Mr Higgs explained about the pin and advised that he had apologised to Philip but had left without telling anyone about the pin because he was worried about how Philip would react. He said that he advised Peter Monro that Philip Monro was bullying him.

[35] Peter Monro recalled the exchange differently. He said that he hoped he would be able to catch Mr Higgs in the yard that day as he wanted to talk about the issues. He found out the pin had been broken and talked to Mr Higgs on the phone. He said that all that was said by Mr Higgs was that he had apologised to Philip and that Philip's wife was not happy.

*21 July – 23 July 2014*

[36] Mr Higgs said that he was very anxious about returning to work and seeing Philip Monro and he went to see a doctor who advised him to take some time off work until 24 July 2014. He advised Peter Monro of this.

*Thursday 24 July 2014*

[37] Peter Monro sent a text message to Mr Higgs at about 7.50pm on 23 July 2014 suggesting that he have another day off as the weather meant there was not a lot on. Mr Monro advised he would be in touch on 24 July 2014, Mr Higgs responded that was ok but that he was going *stir crazy at home*.

[38] Peter Monro did not accept that he suspended Mr Higgs rather, as happens from time to time, the weather impacted on the work available and employees are advised not to come in. Mr Higgs was paid for that day. Peter Monro said that there was no work for another employee that day.

[39] On 24 July 2014 Peter Monro sent a letter to Mr Higgs inviting him to a meeting on 25 July 2014 at 9am to discuss his response to an allegation that he assaulted Philip Monro. The letter advised Mr Higgs that disciplinary action up to and including dismissal may occur and that he was entitled to bring a support person or a representative to the meeting.

[40] Mr Higgs said that he telephoned Peter Monro and asked if he should bring a lawyer. He said Peter Monro advised him not to saying *I am not bringing one- you don't need to either*. He also said that he raised that he considered the matter had been resolved. Peter Monro denies both those matters.

[41] Mr Higgs decided to bring his mother Jennifer Paterson to the meeting.

*25 July 2014*

[42] Mr Higgs attended this meeting with his mother. Peter Monro attended with his son Richard Monro.

[43] Peter Monro took some very brief notes. Mr Higgs recalled very little discussion about the physical altercation. He said that he advised that Philip Monro started it and that the situation was already resolved. He said that he probably agreed there should be a consequence for his action but never thought he should be fired. He did not accept that he said *I know I can get fired for this*.

[44] There is nothing in the notes taken that day about the nature of the physical conduct. The handwritten notes record a discussion between Mr Higgs and his mother about whether he should talk to his life coach. There is a comment from Mr Higgs recorded that *if Phil is angry I get angry too – anger breeds anger* and that *Phil started it by throwing crowbar*. The notes conclude with a comment from Mr Higgs that *Phil should lead by example*.

[45] Richard and Peter Monro said that Mr Higgs did not disagree that he had shoulder charged Philip Monro. Peter Monro denied that Mr Higgs said that the matter was resolved.

[46] There was agreement that the meeting was about 45 minutes long. Mr Higgs indicated he wanted a decision as soon as possible.

[47] Peter Monro said that he considered the apology but thought the matter was just as likely to happen again. He thought about the small team that worked at Monro's and decided the assault was too serious for Mr Higgs to retain his role. He placed some reliance I find on an earlier meeting about six weeks earlier after Mr Higgs had become *fired up* although under re-examination by Mr Mackenzie accepted that he did not think the decision would have been a different one even if the meeting had not taken place earlier.

[48] He called Mr Higgs that afternoon and advised he had concluded the conduct was serious misconduct and would be dismissing him. Mr Higgs, the evidence supports, became concerned about the impact of a dismissal on his record with getting another job and the possibility of resignation.

[49] Peter Monro sent an email on 25 July 2014 at 5.30pm. The email provided amongst other matters that he had come to the conclusion Mr Higgs had committed serious misconduct and that he could not have an employee in a small team who acted like that. Peter Monro advised that he had decided to terminate Mr Higgs employment from that day. He then records that Mr Higgs during an earlier telephone call that day in which he had advised him of his conclusions had asked to resign instead and he was agreeable to that. He set out that if he did not heard from Mr Higgs by lunchtime on Monday he would proceed as above.

[50] Mr Higgs sent an email that same evening saying that he disagreed with the finding, the manner in which things had taken place and treatment from a senior staff member. He advised he intended to seek legal advice first thing Monday.

[51] Peter Monro sent an email on Monday morning 28 July 2014 expressing surprise at the email and change of tone because Mr Higgs had agreed he had assaulted Philip and that termination was fair enough. He wrote that he had given Mr Higgs the option of resigning.

[52] Mr Higgs sent a further email that he did not agree with the decision to terminate his employment and that he believed that matter had been resolved. He confirmed he would not be resigning.

[53] Peter Monro then confirmed in an email sent on Tuesday 29 July 2014 his original decision that Mr Higgs had been terminated for serious misconduct on 25 July 2014.

**Was Mr Higgs led to believe that there would be no disciplinary action arising from the events of 16 July 2014?**

[54] Mr Higgs said that his interaction with Philip Monro was resolved short of a disciplinary process by an apology and the parties moving forward. Mr Thompson submits that Peter Monro misled and deceived Mr Higgs about the intention to progress the matter to a disciplinary meeting in those circumstances and that there was no reason for the significant delay before meeting from the time of the incident. He submitted that Peter Monro gave the impression the matter was concluded when Mr Higgs apologised.

[55] The evidence relied on is the telephone calls on 16 and 18 July 2014 and the apology. Mr Higgs said that there was a witness to the telephone conversation who although named in his statement of evidence did not give evidence by summons or otherwise.

[56] I find it more likely than not that Mr Higgs hoped that he could apologise and that would be the end of the matter of the shoulder incident without a disciplinary process or outcome. He may have been encouraged because there was no suggestion of a disciplinary process during either telephone call that the matter of the shoulder incident may go further. There may also have been a possibility as Mr Mackenzie submits that Mr Higgs conflated the discussion during the telephone call with Peter Monro on 16 July 2014 about damage to the truck with the shoulder incident. The damage to the truck was not going any further.

[57] Peter Monro was a straightforward and credible witness. It was clear to me that Peter Monro was unfamiliar with disciplinary processes. He conceded matters in evidence and under questioning that were unfavourable to his case. I accept his evidence that he did not intend to convey that the issue would be at an end during telephone discussions on 16 and 18 July 2014. I find it more likely that he was unsure

of what to do about the situation and before discussing it with Mr Higgs to any degree wanted to get advice.

[58] I cannot rule out a possibility that Mr Higgs did believe matters were at an end and may have been surprised to receive a letter inviting him to a disciplinary meeting on 24 July. I am not satisfied however that Mr Higgs stated as part of his explanation at the disciplinary meeting or during the telephone conversation the day prior that the matter had already been resolved. I accept Mr Mackenzie's submission that a firm protest would have been expected if he had genuinely believed that to be the case. There is nothing in the notes to support that explanation was given. I place further weight on the fact that Mr Higgs in his evidence agreed he may have at the disciplinary meeting accepted there may be a consequence, although not termination, for his action. That would be inconsistent with a view the matter was resolved without a disciplinary outcome.

[59] I have placed weight on the email exchange that followed the 25 July 2014 disciplinary meeting when Peter Monro, on 29 July 2014, wrote in response to an email from Mr Higgs stating that he believed matters had been resolved *When we met for the disciplinary meeting you admitted the assault again and certainly did not suggest at all that you thought we had already resolved it somehow.*

**Could a fair and reasonable employer, in light of the telephone conversation on 16 July 2014, have continued to a disciplinary meeting and a disciplinary outcome?**

[60] If Mr Higgs was somehow unintentionally led to believe that by apologising there would be no disciplinary process or outcome then I have considered whether a fair and reasonable employer could, within a short timeframe of the 16 July incident, continue to a disciplinary meeting.

[61] There was no significant discussion I find about the events of 16 July and the alleged assault during the telephone conversation that evening or the later telephone call on 18 July 2014. There was I have found no clear advice that the matter was at an end from Peter Monro because that was not what he intended. The disciplinary process was commenced within a very short timeframe of the incident and I do not

find it a situation where conduct could be said to have been overlooked and employment affirmed - *Ashton v Shoreline Hotel*<sup>1</sup>.

[62] If the disciplinary process commenced on 24 July 2014 with an invitation to a meeting is to be viewed as a re-opening then I agree with Mr Mackenzie's submission that the doctrine of *res judicata* does not apply to disciplinary processes - *B v Virgin Australia (NZ) Employment and Crewing Ltd*<sup>2</sup>. Judge Inglis in *B* stated at [147]

*In the present case the plaintiff argued that the defendant was prohibited from reopening the disciplinary process, in the absence of fresh information. I do not accept that a blanket legal barrier of the sort contended for applies. This conclusion is reinforced by the wording of s 103A itself.*

[63] I find that a fair and reasonable employer in the circumstances of this case could still hold a disciplinary process with a disciplinary outcome and there was no prohibition to doing so.

**Was the conduct of Mr Higgs on 16 July 2014 conduct that could amount to serious misconduct?**

[64] An assault in the workplace is conduct that could amount to serious misconduct. Whether it does depends on the circumstances in each situation.

**Was Mr Higgs unjustifiably suspended?**

[65] I could not be satisfied having heard the evidence that there was a conscious decision to suspend Mr Higgs on 24 July 2014 rather than the weather reducing work availability and a suggestion by Peter Munro to Mr Higgs that he should have another day at home on his usual pay. Mr Higgs was accepting of that suggestion.

[66] As it transpired the letter inviting Mr Higgs to a disciplinary meeting was sent that day and that has caused concern that the reality of the suggestion to have a day away from the work place was in fact a suspension.

[67] I accept if it is to be viewed as a suspension then it does not comply with clause 13.3 of Mr Higgs employment agreement which provides that the proposal of suspension should be discussed with the employee and the employee's views considered before suspension.

---

<sup>1</sup> [1994] 1 ERNZ 421 at 429

<sup>2</sup> [2013] ERNZ 72 at [143] to [146]

[68] In conclusion I am not satisfied that there was a decision made to suspend Mr Higgs. If I am wrong on that matter and it was an unjustified suspension then there was no evidence of disadvantage that would result in a compensatory remedy.

### **Was Mr Higgs unjustifiably dismissed?**

#### *Procedural fairness*

[69] There were various criticisms about the process in this case.

[70] The first was the short time between Mr Higgs being invited to the disciplinary meeting and the disciplinary meeting. I do not find that Peter Monro discouraged Mr Higgs on the balance of probabilities from bringing a representative with him to the meeting and no adjournment was sought. I have considered Mr Thompson's submission that because Mr Higgs believed the matter had already been dealt with he did not consider dismissal a possible outcome. The letter inviting him to a disciplinary meeting though made it clear dismissal was a possible outcome. I do not find unfairness about that.

[71] Mr Thompson submits that Peter Monro as Philip's father would not be able to approach the process with an open mind. Peter Monro did accept under questioning as sole decision maker that it was probably fair that he felt influenced by others in his decision making. There was no-one else from within the company though to undertake the process but the nature of the allegation being assault of his son did make it difficult I find for Peter Monro to objectively consider the matter with an open mind. I find that could have led to some unfairness in the decision making. I am strengthened in my view of this by what I find was the lack of sufficient investigation to put the assault in context.

[72] Mr Higgs said in evidence that he bumped Philip Monro with his shoulder. The allegation was one of a shoulder charge to the chest. The latter is a more significant assault than the former. The notes taken at the disciplinary meeting do not describe any explanation about the actual events of that day. Peter Monro concluded that the allegation of a shoulder charge was simply admitted.

[73] I find that a fair and reasonable employer could have been expected when the decision was made to proceed to a disciplinary investigation to have undertaken some investigation. Monro is a small family business. I would not expect it to carry out an

investigation into the allegation of assault to the standard that one would of a large company with a human resource department. What is required is an adequate investigation not an exhaustive one.

[74] It would have been appropriate for Peter Monro to interview Philip Monro formally or to have asked Philip Monro to write down his recollection of what occurred on 16 July 2014. That information should have been provided to Mr Higgs before the disciplinary meeting and then the questions and explanations at the investigation meeting could be focussed on the events as set out and Mr Higgs explanation clearly recorded.

[75] Peter Monro only had Philip Monro's verbal allegation and nothing in writing. I could not be satisfied that the complaint was fully and fairly put to Mr Higgs. Mr Higgs in evidence said that there was a heated discussion just before the altercation. Philip Monro denies that there was anything said before he was assaulted. An employer approaching the matter with an open mind would have wanted to know what had preceded the assault and whether there was anything said before the altercation. Good faith obligations require the provision of information to an employee and an opportunity to comment on it before an adverse decision about continuation of employment is made.

[76] The degree of force is in dispute. Philip Monro said that the shoulder charge left a bruise on his chest that he showed his mother who is a general practitioner two days after the incident. That was some days before the disciplinary meeting. He said that she noted a hollow in his sternum which felt *squishy* and had a yellowing bruise. Peter Monro came to hear from his wife about her observations but that matter although within the knowledge of the decision maker and persuasive as to the degree of force was never put to Mr Higgs. It was a relevant matter to put to Mr Higgs as the bruise and its position would seem inconsistent with a shoulder bump. Mr Mackenzie submits that the failure to discuss the visible injury supports that Mr Higgs never suggested he merely bumped into Philip Monro. Equally too the fact it was not discussed may have been the reason it was not explained or discussed.

[77] As part of investigating what happened on 16 July 2014 Matthew Monro could also have been expected to have been interviewed. He saw Mr Higgs shortly after the altercation. Matthew Monro said that Mr Higgs telephoned him on his way to McLean's Island with the tools and advised he had had an altercation with Philip and

sounded stressed. Matthew Monro said that Mr Higgs advised him when he arrived on site that he had shoulder charged Philip and when Matthew asked him what he meant he said *dropped shoulder and ran right through him*. Matthew said he responded that doesn't sound too good. Mr Higgs in his evidence did not agree that he said that to Matthew.

[78] In an email dated 29 July 2014 confirming the dismissal Peter Monro states that he has found that Mr Higgs assaulted Philip Monro and it was *relatively serious and intentional, hostile and could have injured him*. I find that supports a conclusion was reached by Peter Monro as decision maker that the impact was more serious than a shoulder bump. I am unclear from the notes of the basis for that finding and what Mr Higgs said or agreed to about the force of the assault. In short it is unclear what assault was admitted to and the circumstances surrounding it.

[79] There was a dispute as to whether Mr Higgs raised at the meeting that he had been bullied previously by Philip Monro. Peter Monro in his written statement of evidence indicated that such a claim was raised. There was some general knowledge that they did not have the best of relationships although they did not see each other for days or sometimes weeks. I am not satisfied that if a claim was raised about bullying it was done so in detail.

[80] I find that there were some matters raised at the disciplinary meeting by way of explanation that a fair and reasonable employer could have been expected to talk again with Philip Monro about as part of a full and fair investigation to put the assault in context. I refer in this regard particularly to whether Philip Monro threw the crowbar with more force than usual because he was angry and whether Mr Higgs could have thought it was in his direction. I also find it was unfair for Peter Monro to place some reliance on an earlier meeting about Mr Higgs anger without talking about that with him at the meeting.

[81] I find that Monro failed as set out above to comply with minimum procedural fairness requirements as required in s 103A (3) of the Act and good faith obligations. These failures were not of a technical nature.

#### *Substantive justification*

[82] Notwithstanding that there was procedural unfairness I find that a fair and reasonable employer could conclude that Mr Higgs connected his shoulder with Philip

Monro in more than a technical way and did so deliberately. It was an assault. There was no suggestion that Mr Higgs was or thought he was in imminent danger. The explanation was that he reacted to what he considered at the time was directed anger at him for damage to the logging truck and the noise of a crowbar being thrown in the back of a caged truck.

[83] A fair and reasonable employer could regard that conduct as serious misconduct.

*Could a fair and reasonable employer have made the decision to dismiss?*

[84] The procedural failings in this case were not minor procedural failings. I do not find that the context of the assault was properly and fairly investigated. Mr Higgs did not have a fair opportunity to explain the circumstances that he saw mitigated his actions in those circumstances and have those matters properly taken into account and considered in a decision whether he could continue in his employment. Consequently the decision to dismiss on the basis of an inadequate investigation was not one that a fair and reasonable employer could have made in all the circumstances.

[85] Mr Higgs has a personal grievance that he was unjustifiably dismissed from his employment and is entitled to consideration of remedies.

## **Remedies**

### *Lost Wages*

[86] Mr Higgs claims lost wages of \$3,954.00 gross. This is for three weeks lost wages from 25 July 2014 less earnings of \$936 by way of two casual appointments. Also claimed is a loss of \$30 per week, from 18 August 2014 when permanent employment was obtained, for 13 weeks.

[87] The lost earnings for three weeks were assessed on the basis of a basis of \$1500 gross per week from Monro. I do not find that is correct. The final pay was \$1500 gross but that included leave owing. I have averaged gross earnings for Mr Higgs for a period of four weeks before employment ended as the amount varied somewhat from week to week and have excluded the final pay. I have arrived at an average weekly pay of \$1111.85 gross per week.

[88] On that basis Mr Higgs would have received \$3335.54 for three weeks. Taking his earnings for that period into account of \$936 gross I arrive at a figure of \$2399.55 gross for lost wages for the first period.

[89] I am unsure for the second period whether the loss of \$30 per week was based on a weekly wage of \$1500 or a lesser wage. Mr Thompson should clarify that with Mr Mackenzie. In the circumstances of this case I intend to limit reimbursement of any shortfall to ten weeks. Leave is reserved if agreement cannot be reached about the amount of any reimbursement for this later period.

#### *Compensation*

[90] I accept there was some financial difficulty for Mr Higgs arising from his dismissal although he was able to obtain some casual work and then permanent employment which mitigated that to a degree. Mr Higgs accepted that he was able to buy a car a few weeks after termination. He said that he felt embarrassed by the termination and that the dismissal had been unfair.

[91] The sum of \$4000 subject to any assessment about contribution would be an appropriate award for compensation.

#### *Contribution*

[92] It is not until this point that I need to reach a conclusion on the balance of probabilities about whether Mr Higgs did what it is alleged he did because I have been considering objectively the actions of Monro Limited. Section 124 of the Act requires that I must now in deciding the issue of remedies consider whether the actions of Mr Higgs contributed toward the situation that gave rise to the grievance and if so reduce the remedies that would otherwise have been awarded.

[93] Mr Higgs in his evidence says that he simply pushed or bumped Philip Monro with his shoulder because Philip Monro over-reacted and blamed him for the damage to the truck and threw a crowbar onto the truck towards him. Having heard from Philip Monro I did not conclude he would have raised a complaint about a light push or bump by Mr Higgs. There would I find have been no need to apologise had that been the case. I find the evidence of Philip Monro more likely than not that his mother, a doctor, found on examination of his sternum area some two days after the incident evidence of the impact. Peter Monro was also advised of this by his wife.

[94] Mr Higgs is a body builder and Philip Monro of a smaller build and I do not find that the assault was merely a bump as Mr Higgs said his evidence. I accept Mr Thompson's submission that there was not in this case a proper assessment of the relevant circumstances and there was insufficient investigation before Mr Higgs was dismissed. I do take that into account in determining contribution. Mr Higgs did though I find assault Philip Monro and not simply in a technical manner. It was an angry reaction by Mr Higgs and quite inappropriate in the workplace. I find that the remedies should be reduced by 50% in the circumstances.

### **Orders**

[95] Taking contribution into account I order Monro Limited to pay to James Higgs the sum of \$1199.77 gross being three weeks lost wages. Mr Thompson and Mr Mackenzie are to try to agree a figure for the remaining ten week period less the contribution figure. Failing agreement leave is reserve to return to the Authority.

[96] Taking contribution into account I order Monro Limited to pay to James Higgs compensation in the sum of \$2000 without deduction

### **Costs**

[97] I reserve the issue of costs. Failing agreement being reached Mr Thompson has until 17 July to lodge and serve submission as to costs and Mr Mackenzie has until 31 July 2015 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority