



# Employment Court of New Zealand

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## Kaipara v Carter Holt Harvey Limited [2012] NZEmpC 40 (5 March 2012)

Last Updated: 16 March 2012

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2012\] NZEmpC 40](#)

ARC 45/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ARTHUR (HATA) KAIPARA Plaintiff

AND CARTER HOLT HARVEY LIMITED Defendant

Hearing: 20-22 February 2012 (Heard at Rotorua)

Appearances: Stan Austin, advocate for plaintiff

Daniel Erickson and Mere King, counsel for defendant

Judgment: 5 March 2012

### JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The issues in this challenge from a determination<sup>[1]</sup> of the Employment Relations Authority are whether Arthur (Hata) Kaipara was disadvantaged unjustifiably in, and/or dismissed unjustifiably from, his employment with Carter Holt Harvey Limited (CHH). If Mr Kaipara has a personal grievance or grievances, the issues for decision include the remedies for these and costs.

[2] Until his dismissal, Mr Kaipara had been a long-term employee at what is now CHH's timber and wood products mill at Kawerau although it was owned by other entities during his period of employment.

[3] When saw mill machinery breaks down or is otherwise not operating normally, the process for ensuring that people are not injured or otherwise

endangered whilst repairing or maintaining the machines involves physical

ARTHUR (HATA) KAIPARA V CARTER HOLT HARVEY LIMITED NZEmpC AK [\[2012\] NZEmpC 40](#) [5

March 2012]

disablement of that machinery by padlocking of isolation switches. Each person working in a potentially dangerous area applies his or her individual padlocks. Integral to the effectiveness of this safety system is the requirement of staff to comply with procedures. Under no circumstances are they to use or rely on others' isolation equipment. Staff training also emphasises the uncompromising need to follow safe procedures on all occasions and makes it clear that a failure or refusal to do so may subject an offending employee to the company's disciplinary procedure which might, in some cases, result in the most serious sanction of dismissal.

[4] Although Mr Kaipara had been employed at the mill since 1981 and had been a shift supervisor since 2003, he nevertheless attended an annual health and safety start-up/re-introduction training course on 11 January 2010 following the

mill's shut-down over the Christmas/New Year period in 2009/2010. At the conclusion of his training, Mr Kaipara signed off, as supervisor, confirmation that all employees and contractors under his direction had demonstrated that they understood the correct machinery isolation procedures. He likewise acknowledged that he had himself retrained in these safety procedures.

[5] A matter of a little over a week later, on 19 January 2010, a wood jam occurred in the milling machinery supervised by Mr Kaipara. Although two other employees applied their own single padlocks to isolating switches which nevertheless required two locks for each worker, Mr Kaipara failed to do so at all or to ensure that other persons working on the machines had their isolation locks correctly in place. Mr Kaipara supervised the clearing of the wood jam. This involved him and other employees under his supervision climbing into an area known as „the bird's nest“ to clear wood. None of the three staff, including Mr Kaipara, followed the correct isolation procedures before climbing into the bird's nest. Mr Kaipara then instructed one of the two employees, who had used their isolation padlocks, to remove these to enable the machine to be re-started so as to enable jammed wood to be „jogged“ free.

[6] After the jam was removed, and although he and one of the other employees stood clear, Mr Kaipara gave the instruction for the line to be re-started while one employee (Uka Osooso) was still sitting on a cross-beam which was part of the machinery. The plaintiff did so without ensuring, by visual inspection, that all staff were clear of the machinery. After the machine had started up, Mr Osooso attempted to leave the bird's nest area through a small opening but his legs became jammed between moving timbers. The machine was then stopped immediately and he was freed after a short time. Mr Osooso was treated on site with first aid before being taken by ambulance for medical assessment and treatment. Fortunately, the injured employee suffered only minor contusions to his legs. There was, nevertheless, potential for a much more serious injury to Mr Osooso.

[7] Mr Kaipara partially completed an incident report about these events in which he recorded that the incident could have been prevented by „communications and isolation“. The scene was „frozen“ in the sense that everything was left for inspection in the condition in which it was immediately after Mr Osooso was extricated from the machinery.

[8] At an initial investigation meeting (held only a few hours after the accident) at which Mr Kaipara was asked to explain to the saw mill's manager, Brett Vincent, and the site manager, Paul Trow, what had happened, Mr Kaipara admitted failing to comply with CHH's isolation procedures when clearing the birds' nest area. In particular, he accepted that he did not have any isolation in place. He also conceded that he had not communicated to others sufficiently about the situation.

[9] After speaking with other employees about the incident, Messrs Trow and Vincent again met with Mr Kaipara to discuss whether he should be stood down from work pending an investigation into the incident. A decision was made to suspend him and this was confirmed to Mr Kaipara in writing on 21 January 2010.

[10] In the course of his paid suspension, Mr Kaipara attended another meeting with CHH management (Mr Trow, Mr Vincent and Kay Mead, the company's health and safety manager) on 26 January 2010. He was accompanied by a support person. Further investigation was conducted at that meeting after which Mr Kaipara was requested to attend yet a further meeting with the company on 29 January 2010. Its concerns or allegations were set out in the letter calling the 29 January meeting and

Mr Kaipara was advised expressly that his dismissal was a possible consequence and he was recommended to have a representative or support person with him.

[11] Mr Kaipara was dismissed shortly after the conclusion of the meeting on 29

January 2010. The grounds for his dismissal were set out in a short letter to him dated 30 January 2010 and were as follows:

...

Your failure to apply your personal lockout tag to mechanical equipment whilst you were working in an operational area to clear a timber jam.

Your failure to comply with the Company and Kawerau Site lock out/isolation policy and procedures.

You allowed your direct reports to put themselves at risk by failing to ensure they applied their own personal lockout tag to the

equipment whilst clearing the timber jam up.

...

### **The legal tests**

[12] The test for determining justification for both Mr Kaipara's suspension and his subsequent dismissal is that which was, at the time, set out in [s 103A](#) of the [Employment Relations Act 2000](#) It is not the current [s 103A](#) test which has only been in

operation since April 2011.

[13] CHH must satisfy the Court that both the suspension, which is accepted as a disadvantageous action, and the dismissal were what a fair and reasonable employer would have done in all the relevant circumstances at the time and that the way in which CHH went about those actions were how a fair and reasonable employer in all the circumstances at the time would have done so.

### **The Authority's determination**

[14] The Authority decided, for reasons given in its written determination of 23

May 2011, that CHH suspended Mr Kaipara justifiably. It said that removing him from the workplace ensured no further health and safety incidents occurred during the company's investigation and that it was fair and reasonable for the employer in all the circumstances to have done that.

[15] As to the justification for Mr Kaipara's dismissal, the Authority noted that the essential facts of what occurred in January 2010 had always been conceded by Mr Kaipara and that his challenges to the justification for his dismissal were aimed at procedural elements allegedly not addressed by the company or at least inadequately addressed. In particular, Mr Kaipara said that CHH's decision to dismiss him was determined before it had concluded its investigations, that it failed to provide him with documentary information upon which it relied in dismissing him, and that the company's Regional Manager, Arnie Federink, was involved in the decision to dismiss Mr Kaipara but had not provided him with an opportunity to be heard.

[16] The Authority rejected the allegations of predetermination. As to the lack of disclosure of documents, the Authority concluded that this would not have made a difference because Mr Kaipara admitted the failings upon which the company relied in justification for its dismissal of him. Addressing Mr Federink's role, the Authority concluded that he was not so involved in the decision to dismiss that fairness required that Mr Kaipara should have had a chance to persuade Mr Federink personally not to dismiss him. It concluded that the dismissal decision was that of Mr Trow who had been involved in all relevant interviews with Mr Kaipara. The Authority determined that Mr Kaipara was dismissed justifiably.

### **Particular grounds of challenge**

[17] Mr Kaipara asserts generally that his suspension and subsequent dismissal were not what a fair and reasonable employer in all the circumstances would have done, and how those sanctions were gone about by the employer were not how a fair and reasonable employer in all the circumstances would have done so. He also advances in his statement of claim the following 10 specific particulars of absence of

justification:

that at the first meeting called immediately after the incident, he was not advised of possible disciplinary consequences to him and was not advised that he could have representation at that meeting;

that the notes of the initial meeting made by managerial representatives were not provided to him before his dismissal;

that the company failed generally to provide him with investigation

material relied on by it to dismiss him, being a breach of good faith;

that he was not informed at the time of his suspension of his liability to

dismissal;

that he was unfairly assured by managerial representatives from time to time during the investigation of his alleged misconduct that matters were

not as serious as it subsequently transpired they were;

that he was subjected to inconsistent and disparate treatment when compared to other employees involved in the same incident and when compared to other employees in respect of other incidents that took place

before and after his dismissal;

that there was an inconsistent emphasis upon his failure of leadership when compared to previous examples of management leadership at the

mill;

that the defendant failed to follow its relevant policies and, in particular, failed to consider and apply to him a sanction of demotion for misconduct

rather than dismissal;

that he was subjected unfairly to the unilateral imposition of higher standards of work conduct than had previously applied under custom and

practice at the mill; and

that his dismissal, if it was not predetermined, was nevertheless made with undue haste.

[18] It will be necessary to deal with each of these particular grounds of challenge individually and, if appropriate, to consider their individual and cumulative effect later in this judgment.

### **Procedural fairness generally**

[19] The plaintiff's attack on the justification for his dismissal is based upon alleged procedural failings or other irregularities which he says, individually and collectively, should cause his dismissal to be held to have been unjustified.

[20] Fair and reasonable procedures are a statutory requirement of justified dismissal, not only under [s 103A](#) as it applied at the time, but again under the new [s 103A](#) in effect since April 2011, albeit with previously statutorily unexpressed qualifications now being referred to in the section.

[21] Compliance with fair and reasonable procedures is not, and never has been, a requirement simply for its own sake. For it to constitute a personal grievance of unjustified dismissal, it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was also unfair or unreasonable. Put another way, if the procedural failing nevertheless led to the same substantive outcome as would have occurred if the process had been correct, then, whilst in some cases it may amount to an unjustifiable disadvantage in employment, it should not usually cause an otherwise justified dismissal to be declared unjustified.

[22] It is correct that CHH did not furnish Mr Kaipara with copies of several documents prepared by it after the incident and in the course of its investigation of his misconduct. It follows, therefore, that Mr Kaipara did not have an opportunity to try to contradict any of these documents. CHH was obliged, pursuant to [s 4\(1A\)\(c\)](#) of the Act to do that which it did not, and that its failure was a breach of its statutory obligation of good faith in this respect. But it is another matter whether this breach should cause Mr Kaipara's suspension and/or dismissal to be found to have been unjustified.

### **Disparate treatment?**

[23] Mr Kaipara's strongest argument is that his summary dismissal was so different from the sanctions applied to others of similar culpability in the incident and/or when viewed against CHH's history of unsafe practices at the mill, that a fair and reasonable employer would not have acted so inconsistently as to have dismissed him summarily.

[24] The first point to be made about this argument is that it was not taken up by Mr Kaipara or his representative before his dismissal, although that sanction was clearly on the cards and had been made known to Mr Kaipara. So CHH cannot be criticised for failing or refusing to address a parity of sanction issue before it dismissed Mr Kaipara because this had not been raised by him.

[25] Mr Kaipara's apparently strongest argument concerning unjustified dismissal arises from his assertion that he was treated significantly more harshly than were other employees who had failed to adhere to the same isolation requirements in the course of the same incident but none of whom was dismissed summarily. Although Mr Kaipara also asserts a broader disparity argument, that his dismissal was harsh when compared to the sanctions imposed on others for similar misconduct at other times, that fails for several reasons.

[26] First, to the extent that this relates to the alleged failures or refusals to comply with safety requirements by his former manager, any such events took place after Mr Kaipara had been dismissed. [Section 103A](#) requires the Court to focus on the question of justification in the circumstances as they existed at the time of his dismissal. Subsequently discovered misconduct by others and the consequences (if any) of that cannot affect the decision about justification for Mr Kaipara's dismissal. In respect of other allegations of safety breaches by the same manager and others, which may have taken place before Mr Kaipara's dismissal, the evidence advanced was weak, non-specific and, in some cases, double-hearsay which, although not inadmissible, was unverified in spite of the availability to give evidence of the

persons to whom it was attributed. In these respects, Mr Kaipara did not make out a sufficient case of disparity of treatment that would call upon CHH to rebut it.

[27] I turn now to the apparent disparity of treatment and sanctions applied to the other employees who failed to adhere to the safety standards in the same incident. The defendant's case is that this is explicable and justifiable by reference to Mr Kaipara's supervisory role as the leader of the shift on which those other employees were all engaged. It says that, whereas they failed to follow appropriate isolation procedures themselves, Mr Kaipara not only failed to do so for himself but also failed to ensure that those other employees for whom he was responsible had followed the procedures. CHH says that not only did Mr Kaipara not lead by example, but that, in effect, he misled by example so that his failures were the more culpable

justifying his dismissal as against the final formal employment warnings issued to the other employees.

[28] There is no reference in the Authority's determination to this argument, although counsel and advocate who appeared in the Authority assured me that this argument had been advanced during the Authority's investigation and, indeed, some emphasis was placed upon it by both parties. Although it is remarkable and regrettable that, in these circumstances, the Authority did not mention this aspect of the case, Mr Kaipara's has been a challenge by hearing de novo so that the issue has been well ventilated on its merits in this Court.

[29] It is correct that Mr Kaipara says that he could not have ensured that his shift employees for whom he was responsible followed isolation procedures before going into the bird's nest area because he was attending to maintenance elsewhere in the plant when they first did so. However, the plaintiff did fail to ensure, when he returned to the bird's nest area, that there were isolation locks in place for all of the employees working to free the wood jam. Instead, I find that a frustrated, perhaps even mildly angry Mr Kaipara, intent upon returning the mill to production as soon as possible, joined in the efforts to free the wood jam without ensuring that proper safety requirements were in place, and then directed the machinery to be re-started before ensuring that all employees were safely out of danger.

[30] I accept the company's case that these additional supervisory responsibilities for the health and safety of other employees differentiates his circumstances from theirs and justifies a disparity of treatment by the company. In evidence, and while acknowledging his own failings, Mr Kaipara attempted to sheet home the responsibility for the failings of others to those other employees themselves and thereby sought to downplay his own responsibility for the danger to which they were put and, in particular, for the injury that occurred to one of them. He was not justified in doing so in my assessment.

[31] CHH has explained satisfactorily why Mr Kaipara was dismissed but others, who were guilty of similar failings in the same incident, were not. His dismissal was not thereby unjustified.

[32] A variation on the disparity ground advanced by Mr Kaipara is that his dismissal was the unfair and unjust implementation of a new attitude to safety enforcement at the plant. It is common ground that until late 2009, the mill's safety record had been deteriorating, enforcement of safety obligations was not stringent, and consequences for staff safety breaches were seen as lenient. A petition of substantial numbers of staff was circulated and sent to company management and a new mill manager, Mr Trow, was appointed at about the same time, determined to focus on these issues. Mr Trow was a new broom in the sense that he set out to change the mill's safety culture.

[33] In one sense it may be said that Mr Kaipara was the first casualty of this emphasis on safety and CHH's determination to enforce its standards. But this was made clear to all staff (including Mr Kaipara) in a variety of ways and repeatedly in the weeks leading up to the incident that resulted in his dismissal, including by training, testing, and with staff (including Mr Kaipara) acknowledging expressly their safety obligations. The emphasis on safety was promoted through managerial and supervisory staff (including Mr Kaipara).

[34] The company was not only entitled to insist upon adherence to high standards in its safety requirements, but arguably obliged to do so. In these circumstances, it

cannot be criticised for making good on its word, including, in the cases of Mr

Kaipara and his team who may be seen to have continued to act in old lax ways.

#### **Disclosure of documents during investigation**

[35] Next I address in detail the information Mr Kaipara says he ought to have been given before dismissal but was not. There were seven separately identified documents that Mr Kaipara did not receive before his dismissal but which can be said to have related to it generally. It is appropriate to deal with each briefly as follows.

[36] The first was an email (with attachments) sent by Mr Trow to a number of other CHH wood products managers at 12.06 pm on 19 January 2010, that is about six hours after the incident. The attachments included summaries of the preliminary statements about the accident made by five employees including Mr Kaipara and the injured employee. The purpose of the email was to inform Mr Trow's manager of the preliminary position and, in particular, to assist in determining whether and when the plant should be restarted. It had been „frozen“ from the time of the accident to preserve evidence. No issue was taken by Mr Kaipara about the summary of his preliminary account given that morning. Nor does he suggest that any of the other employees' statements as recorded was inaccurate or incomplete or otherwise disadvantageous to him.

[37] The second document in this category is the Kawerau Sawmill Incident Report, part of which Mr Kaipara completed immediately after the accident, and the balance of which was completed by someone else who was most probably his manager. The contents of this document are likewise not challenged as to their accuracy or completeness or otherwise as putting Mr Kaipara at a disadvantage by his non-receipt of it.

[38] The third document is described as an "Incident Flash Report" which appears to be a standard form of brief report completed following incidents such as occurred in this case including brief details of what happened and immediate plans for

making

the workplace safe. In this case, also, nothing in this document affected Mr Kaipara in the inquiry that led to his dismissal, whether adversely or otherwise.

[39] Next is a copy of the handwritten questions prepared for the management team to ask of Mr Kaipara at his meeting with it on 26 January 2010. This is in the form of some 33 open-ended questions about the incident and, as such, did not amount to information that CHH was obliged to disclose to Mr Kaipara. More significant, however, is the next document, handwritten notes of the 26 January 2010 interview with Mr Kaipara. When, however, the plaintiff was taken through these notes in detail by Mr Erickson in cross-examination, the plaintiff was unable to identify any part of their content which was either inaccurate or may have otherwise disadvantaged him by not receiving the documents until after his dismissal.

[40] Penultimately, Mr Kaipara says that he should have been provided with what are known to the parties as exhibits 28 and 31, documents entitled "Incident Investigation report" and "Incident Investigation Summary" which both dealt with the incident rather than with the contemporaneous disciplinary investigation in respect of Mr Kaipara. Nevertheless, had those incident summary documents contained relevant information which, if disclosed to Mr Kaipara before his dismissal, might have enabled him to better address the risk of dismissal, then they should have been so provided. Again, however, the plaintiff is unable to point to any such relevant content of those documents.

[41] Finally, Mr Kaipara says that he should have been provided with the company's handwritten notes of the meeting on 29 January 2010 (exhibit 20). These are notes of a meeting at the end of which he was dismissed. So it is unrealistic to suggest that he should have had copies of these notes before his dismissal. There is no suggestion that these were asked for after the dismissal, at least immediately and during the period that the parties discussed Mr Kaipara's transition to the role of former employee, including the provision of employee assistance by the company. But, most significantly in my assessment, this document does not contain any inaccurate or otherwise disadvantageous material which, even if it had been disclosed to Mr Kaipara, might have assisted him in persuading his employer to deal with his negligence other than by dismissal.

[42] I have concluded that if his suspension was disadvantageous to Mr Kaipara in his employment, it was nevertheless justified. That is for the following reasons. Mr Kaipara's employment permitted suspension to take place. From an early stage of its inquiries, literally within hours of the incident having taken place, it was clear to CHH that Mr Kaipara had failed to follow safety requirements. These failures had been a significant factor in another employee being injured in an accident that was both preventable and, fortunately, not more serious. Mr Kaipara acknowledged his faults in this regard from the outset.

[43] Following an appropriate period of suspended operations after the accident, CHH understandably wished to recommence production. As things then stood, it justifiably lacked confidence in its shift supervisor adhering to the safety requirements he had admitted he had failed to follow. It was justified in concluding that it could not risk the safety of employees again until its more detailed inquiries had been concluded. Mr Kaipara's suspension was on full pay and he was required to participate in several important meetings with company management about the incident over that period. Mr Kaipara worked in a very noisy and physically demanding environment on 10½-hour shifts and could not reasonably have been expected to have participated in the company's investigations either during those working periods or when he was off work.

[44] Mr Kaipara was to be the supervisor in charge of one of two effectively continuous shifts at the mill, essentially a day shift and a night shift. The company's inquiries were to take place during business (daytime) hours. Had he not been suspended, Mr Kaipara would either have been supervising the shift, absence from which would have been problematic, or he would have been recuperating. Either way, suspension of Mr Kaipara, on full pay as it was required to be, was the sensible and fair way to deal with the situation while CHH's investigations took place. These occurred promptly so that the suspension was not protracted.

[45] Mr Kaipara does not have a personal grievance that he was disadvantaged unjustifiably in his employment as a result of his suspension before dismissal.

[46] I return to the 10 specific grounds relied on by Mr Kaipara in asserting that his dismissal was unjustified and which are set out as bullet points at [17] of this judgment. I deal with them in the same order.

[47] First, I find that CHH was not at fault in not advising Mr Kaipara of possible disciplinary consequences and/or that he was entitled to representation at the first meeting following the incident. That meeting took place within a couple of hours of the incident at a time when the mill remained stopped. The company's very general inquiries of Mr Kaipara and other staff involved were directed towards whether the mill could be re-started safely. To make that decision, the company needed to know broadly how the accident had happened. The purpose of the meeting was also to initiate what was subsequently a much more detailed and long-running health and safety investigation. I accept that at the time of this first meeting, company management knew very little, if anything, about how Mr Osooso had come to be injured and could not have been in the position of making even preliminary determinations about the culpability of others. In these circumstances, it would not have been appropriate to have advised Mr Kaipara of possible disciplinary consequences or, pursuant to its disciplinary policy, of his right to representation. Even if the company had been so obliged, Mr Kaipara was not disadvantaged in giving

his preliminary account to the company. There is no suggestion that he made admissions that he ought not to have made or that he might have been advised not to have made if he had been represented. The necessarily brief account that he gave the company at that stage is consistent with his subsequent accounts and evidence in these proceedings.

[48] Second, although a fair and reasonable employer in all the circumstances *may* have subsequently provided Mr Kaipara with its notes of the initial meeting before he was dismissed, I am not satisfied that a fair and reasonable employer in these circumstances *would* have done so. That is because there is no challenge to the accuracy of those notes and, as just confirmed, Mr Kaipara's account of relevant events has been consistent throughout and accepted by CHH as an honest account.

[49] Third, and similarly, any failure by the company to provide Mr Kaipara with documented material compiled in the course of its investigation may have been, in the circumstances, a breach of good faith by it but does not cause the dismissal to have become unjustified. Again, there has never been any controversy about Mr Kaipara's role in the incident. Rather, the question of his dismissal is dependent at all times upon whether that was a fair and reasonable response to an undisputed account of events.

[50] When each of the documents identified by Mr Kaipara, which related to CHH's investigation and which were only received by him after his dismissal, are scrutinised, nothing contained in them could be described as controversial. Nor were their contents unknown to him, or could otherwise have assisted him in his explanation of what happened and in support of his contention that he should not have been dismissed. That is perhaps not surprising because the relevant events which led to Mr Kaipara's dismissal were uncontroversial. He conceded frankly that he had not done what he should have done. His argument was essentially one for leniency for a variety of reasons. The documents not made available to Mr Kaipara did not deal with, or otherwise affect, those controversial considerations. Put another way, if Mr Kaipara had received copies of those documents from CHH before his dismissal, and had an opportunity to address their contents, there was nothing that he could or would have added or done differently to avoid being dismissed.

[51] Next, Mr Kaipara complains that he was not informed at the time of his suspension that he might be liable to dismissal. Even if he may not have been aware at that point that dismissal was a possibility, any arguable failure by the company to so inform him expressly did not disadvantage him. Indeed, he does not claim that any absence of such advice at that time caused him to act any differently than he would have if he had received such advice. The evidence establishes that Mr Kaipara and his representative said all that they could have said to avoid dismissal but were unsuccessful in persuading CHH. Mr Kaipara was not disadvantaged by any failure to tell him, at the time of his suspension, that he might be liable to dismissal.

[52] Next, and more strongly, Mr Kaipara said that he was assured unfairly by his immediate manager, and repeatedly, that matters were not as serious as they subsequently transpired to be. In the absence of any evidence from Mr Vincent, who was available to be called as a witness but was not, I am obliged to accept Mr Kaipara's evidence, corroborated by his representative at the time, that Mr Vincent did tell Mr Kaipara on two occasions immediately before significant investigation meetings that he should not be too worried about the outcome.

[53] I accept, also, that Mr Kaipara was led thereby to believe at the early stages of CHH's inquiries that he would not be dismissed. Despite CHH seeking to distance itself from any responsibility for Mr Vincent's advice on the basis that he was not authorised to give such assurances, Mr Vincent was, as a managerial representative investigating the incident and as Mr Kaipara's immediate manager, the company's representative. Niceties such as his authority to make such representations do not save CHH from having to accept that, in this respect, he spoke on behalf of the company.

[54] However, this misleading assurance is a matter of fact and degree. Set alongside my acceptance that it was conveyed to Mr Kaipara and, as he says, led him to believe that his position was not as serious as it turned out to be, CHH nevertheless clearly spelled out in its formal communications with Mr Kaipara that dismissal might be the outcome of its disciplinary inquiry. Ultimately, however, Mr Kaipara has not been able to point to any actual disadvantage to him of relying on Mr Vincent's assurances. Mr Kaipara's representative argued strongly and appropriately for a sanction less than dismissal and said why that should be so. At least at the final meeting on 29 January 2010, it is clear that both Mr Kaipara and his representative were aware that he faced the prospect of dismissal.

[55] Next, I have already dealt in some detail with the arguments advanced for Mr Kaipara that his dismissal was unjustified because it was so disparate when compared to outcomes for others. It was not.

[56] Seventh, the plaintiff argues that the company acted unjustifiably by emphasising Mr Kaipara's failure of leadership in a way that was inconsistent with

other leadership failures at the mill. Although this was not clearly advanced as a matter of evidence during the hearing, I understand this to be an allegation that Mr Vincent had not been called to account for similar failures in his leadership on health and safety issues at the mill.

[57] The first point here is that this can only relate to Mr Vincent's conduct before the date of Mr Kaipara's dismissal. That is because [s 103A](#) focuses upon events that were known or ought reasonably to have been known at the date of dismissal. Mr

Kaipara's allegations about Mr Vincent's alleged misconduct post- date the plaintiff's dismissal and so are irrelevant.

[58] In respect of those allegations of misconduct levelled against Mr Vincent by Mr Kaipara which are alleged to have occurred before 29 January 2010, I accept CHH's case that these were not known to it at that time. That was because, as Mr Kaipara confirmed, neither he nor others had brought these allegations to the company's attention. Without underestimating the difficulty of an employee such as Mr Kaipara making a serious complaint about his immediate manager, the evidence establishes that there were mechanisms within the company by which this could have been done in a way that protected genuine complainants. Although the evidence establishes that Mr Vincent resigned from his mill manager position in the course of a disciplinary inquiry later in 2010, which was instituted following complaints to CHH instigated by Mr Kaipara's advocate, it cannot be said that the defendant failed or refused unjustifiably to treat seriously questions about Mr Vincent's leadership before Mr Kaipara's dismissal.

[59] Next, the plaintiff says that CHH failed to follow its relevant policies and to demote Mr Kaipara instead of dismissing him. It is correct that the relevant CHH policies provided for a range of sanctions for serious misconduct (including, it is admitted, safety breaches) which were short of summary dismissal and included demotion. The evidence establishes that this outcome was considered but rejected by Mr Trow. Demotion of Mr Kaipara from his role as supervisor of a team of production workers to a member of that team that he once supervised would not have itself addressed adequately Mr Kaipara's non-compliance with safety requirements. That is because, as the facts of this case show, all employees (and others) working in the production side of the business, must, from time to time, isolate machinery and otherwise comply with safety rules. It would not have been realistic to have demoted Mr Kaipara to a position in the company's site office where machinery isolation would not have arisen: I accept the company's evidence that Mr Kaipara's skills and experience would not have transferred easily, if at all, to such a position even if one had existed.

[60] Mr Kaipara's failures had not only been ones of leadership in safety matters but of his generic responsibility as an employee at the plant to ensure his own safety and that of his colleagues. Demotion would not necessarily have addressed sufficiently the company's concerns about maintaining and improving safety standards. Again, although a fair and reasonable employer in all the circumstances *might* have demoted Mr Kaipara as the sanction for his serious misconduct, I am not satisfied that a fair and reasonable employer *would* have done so rather than dismiss.

[61] Penultimately, the plaintiff argues that he was subjected unfairly to higher standards of work conduct than had previously been expected of mill employees and that this was unfair. It seems clear that, until late 2009, safety standards at the mill had been followed less than rigorously and that unsafe practices had occurred without sanction. Indeed, that appears to have prompted a complaint petition signed by substantial numbers of employees expressing their very real fears and concerns to company management.

[62] Mr Trow was appointed to his mill management position in late 2009. He had previously held a similar position at one of CHH's other mills and deliberately brought to his new role an expectation of significantly higher safety standards. In this sense Mr Trow was a proverbial new broom. He did not, however, impose those new safety expectations without fair notice or warning. His intention to insist upon higher standards and a better safety culture were made known to the workforce including Mr Kaipara and not least in the two-day safety re-induction that took place at the start of the 2010 working year and in which Mr Kaipara played a significant part. That Mr Kaipara may have been the first casualty of that new regime does not make it unfair and indeed where serious safety issues are involved as they were here, it is difficult to argue against the strict implementation of existing procedures where

these have been enforced in a previously lax manner. Case law supports such an approach.[\[2\]](#)

[63] Finally, Mr Kaipara argues that his dismissal was predetermined and made with undue haste. I do not accept either of those contentions. What was determined at an early stage of Mr Trow's inquiries was both what had occurred in the lead up to the accident, and Mr Kaipara's role in this. That inquiry was able to be concluded promptly and inarguably because of the plaintiff's frank admissions about his failures. But that is not the same as a predetermination of the outcome which I am satisfied did not occur. It was not until after Mr Kaipara and his representative had exercised their opportunity to influence that outcome that Mr Trow's decision was made. Nor was this done with undue haste. The company's inquiry into Mr Kaipara's involvement ran in parallel with a broader health and safety inquiry but both were conducted by largely the same people and there is a commonality of a number of issues.

[64] By 29 January 2010, when Mr Kaipara was dismissed, detailed investigations had been conducted. It was fair for CHH to have concluded by that date that Mr Kaipara's negligence amounted to serious misconduct in employment. What had to be determined on that date was the consequence of this and although that decision was taken within a relatively short time, I am not satisfied that it was unduly hasty to the point of unfairness. Mr Trow was advised and guided by experienced managers and his decision, while decisive and very significant so far as Mr Kaipara was concerned, was not thereby unfair or unreasonable in all the circumstances.

## **Decision - dismissal**

[65] Mr Kaipara was dismissed justifiably for the following reasons.

[66] First, under [s 103A](#) of the Act, his dismissal was what a fair and reasonable employer would have done in all the circumstances at the relevant time. Mr

Kaipara's was a multi-faceted breach of important safety directions which

contributed to one of the employees supervised by him being injured in circumstances that would have been avoided by Mr Kaipara's compliance with the company's safety rules. Such failures were specified and known to be categorised as serious misconduct for which the known sanctions included dismissal.

[67] Although Mr Kaipara's employment agreement provided expressly for lesser sanctions, including demotion coupled with warnings and performance assessment, a fair and reasonable employer, in all the circumstances which then faced it, would not have so responded.

[68] Although, prima facie, the sanction of summary dismissal was significantly disparate to the sanctions imposed upon other employees who were guilty of similar failures, that disparity has been explained adequately by the defendant. That justification lies in the difference that Mr Kaipara was the shift supervisor who failed, not only to comply with the safety requirements for himself, but also failed to ensure that the staff whom he supervised complied or, to the extent that they had not complied, that this was corrected and that an unsafe situation was secured. Further, in giving the instruction to start the timber conveyor again, Mr Kaipara failed to check that no person was within the danger area and, in particular, failed to ascertain (as he should have) that Mr Usooso had not left the bird's nest.

### **100 percent contribution to dismissal?**

[69] Because it arose in this case, it is appropriate to comment here on the position where, despite dismissal being justified on the merits of the case, procedural failings are so numerous and/or substantial that it is argued that the second leg of the [s 103A](#) test is not met and that dismissal should therefore be declared to have been unjustified. In such circumstances it is often argued (as it was as a fall-back position for CHH in this case) that the grievant's contributory conduct was so substantial in terms of [s 124](#) of the Act that even though the Court might find dismissal to have been unjustified procedurally, no remedies should be granted. This is sometimes termed, especially by the Authority, as a 100 per cent deduction from remedies for contributory conduct.

[70] There may, however, come a point where an employee's contributory conduct is so significant that it is simply not appropriate to make a finding of unjustified dismissal, however infelicitous may have been the procedural defects leading to the dismissal. Rather than pursuing a convoluted path of declaring a pyrrhic victory of unjustified dismissal but then awarding no remedies for that, the better course may be to simply conclude that dismissal was justified in spite of process failures.

[71] As it has transpired in this case, however, it has not become necessary to choose between the arguable charade of declaring a dismissal unjustified but without a remedy or, on the other hand, determining that justification for it has been established in spite of procedural shortcomings.

### **Decision – summary**

[72] For the reasons set out above, I conclude that Mr Kaipara's suspension and his subsequent summary dismissal were justified in terms of [s 103A](#) of the Act. Although on expanded grounds, the Authority's determination was correct and the challenge to it is dismissed. Because of the provisions of [s 183](#) of the Act, the Authority's determination is nevertheless set aside and this judgment stands in its place.

[73] The question of costs is reserved and if it cannot be settled between the parties, the defendant may have the period of six weeks from the date of this judgment to apply by memorandum for an order, with the plaintiff having the period of one month thereafter to respond by memorandum.

[74] Without determining either whether an award is warranted and, if so, the amount of that award, it may assist the parties in their negotiations on this issue if I indicate that there are two elements that have arisen in the course of the case that may affect costs. The first is Mr Kaipara's impecuniosity. Very unfortunately, the evidence establishes that the circumstances of his dismissal, his age, his relevant experience, and where he lives, have all combined to make it very difficult for him to obtain any more than occasional casual work since his dismissal. The other relevant factor is that, although I have concluded that Mr Kaipara was suspended and then

dismissed justifiably, CHH's compliance with its obligations of good faith information sharing (and in particular under [s 4\(1A\)](#) of the Act) were less than they should have been and the result might not have been the same for the company had Mr Kaipara's position been disadvantaged thereby.

Chief Judge

Judgment signed at 10 am on Monday 5 March 2012

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[1] *Kaipara v Carter Holt Harvey Ltd* [2011] NZERA Auckland 219.

[2] *Fuiava v Air New Zealand Ltd* [2006] ERNZ 806; *Samu v Air New Zealand Ltd* [1995] NZCA 504; [1995] 1 ERNZ 636 (CA).

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