IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 74
5387504

	BETWEEN	BRENDAN KELLERMAN Applicant
	AND	STONEWARE 91 LIMITED t/a SWITCHED ON GARDENER Respondent

Member of Authority:	Michele Ryan
Representatives:	Applicant in person Mark Nutsford, Advocate for the Respondent
Investigation Meeting:	26 February 2013 at Wellington
Submissions:	Oral submissions received from Applicant & Respondent
Further information	On 12 March from the Applicant
Determination:	1 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stoneware 91 Limited t/a Switched On Gardener, (Switched On) is a medium sized enterprise with 15 retail garden supply outlets throughout New Zealand.

[2] Mr Brendan Kellerman claims he was unjustifiably dismissed by Switched On. He also says he was not supplied with detailed payslips, and that he was not paid as agreed.

[3] Switched On says Mr Kellerman was justifiably dismissed following an extensive process to address his many allegations against it and its Branch Manager. It says trust and confidence in Mr Kellerman became irreparably broken. Switched On denies Mr Kellerman's claims.

The relationship between Mr Kellerman and Mr Allan

[4] Mr Kellerman began his employment on 25 March 2011 as a duty manager in Switched On's Upper Hutt store. He reported to Branch Manager, Mr Andrew Allan.

[5] Prior to his appointment Mr Kellerman and Mr Allan were acquaintances and Mr Allan had recommended Mr Kellerman to Switched On.

[6] Within three months the relationship between the pair began to deteriorate. The trigger for the disharmony was Mr Kellerman's perception that Mr Allan had *"stolen half an hour"* by not recording half an hour's overtime on his timesheet. Mr Kellerman says that Mr Allan falsified the timesheet.

[7] Mr Kellerman referred to a range of issues occurring between July and November 2011 which further aggravated the discord between himself and Mr Allan.

[8] Mr Allan sent an email to another staff member which made reference to ensuring bar codes are fixed to products. The email noted it was *"a bit confusing and easy to mistake one for the other for the new boy"*. Mr Kellerman was offended by the reference to him as the new boy.

[9] Mr Kellerman also says Mr Allan, without permission, drank half a carton of his milk and refused to replace it and that Mr Kellerman had to *"steal"* back a book he had brought for Mr Allan to read as he feared Mr Allan was going to take it home. Mr Kellerman told the Authority that Mr Allan was dishonest with the float and stock take.

[10] Mr Kellerman says that when he tried to raise these concerns Mr Allen's response was to ask him if he wanted to work at Switched On. Mr Kellerman says he regarded Mr Allan's responses as a threat although it does not appear that he told Switched On that until April 2012.

[11] Mr Allan did not provide evidence to the Authority. I note that one of the few areas of agreement between Switched On and Mr Kellerman is that Mr Allan's style of communication was direct and spartan. These personality traits were not characterised negatively by either party.

[12] Switched On's senior management is based in Auckland and communication with the Upper Hutt outlet was largely through telephone and email.

[13] Operations Manager, Mr Brendon Marsh, says from July 2011 onwards Switched On's senior management became increasingly inundated with emails from Mr Kellerman. The emails were predominantly about minor operational matters and frequently contained undertones of criticism about Mr Allan although no concerns were raised concerns about the overtime issue, milk, or Mr Allan's honesty. He reports that says Mr Kellerman was told on several occasions not to communicate with senior management about local matters unless they could not be resolved.

KiwiSaver and wage and time records

[14] Before starting work Mr Kellerman had been given an individual employment agreement for his perusal. 'Schedule Two, Remuneration and Special Conditions' attached to the agreement recorded his hourly rate of $14.00. Although the exact date is unclear, Mr Kellerman returned Schedule Two to Mr Allan within a fortnight or so of commencing work, having written at the bottom of the Schedule that he wanted to opt out of KiwiSaver.

[15] It appears Mr Kellerman became concerned he was not being paid correctly. In the second half of 2011 he made two separate inquiries with senior management about his remuneration. The first was to ensure KiwiSaver deductions were not being made and that he was on the right tax bracket. The second was to question how overtime was paid. Mr Kellerman says he was not happy with management's explanation with respect to overtime payments but concedes he did not advise senior management of his specific concerns.

[16] On 25 November 2011 Mr Kellerman then wrote a tersely worded email to Mr Allan stipulating all pay slips including backdated pay slips be provided to him. He alleged that Mr Allan's actions had affected his holiday pay but did not elaborate what the actions were or how he had been affected. Switched On promptly provided a detailed account of all wages paid. Mr Kellerman says he was dissatisfied with the information given to him although he did not take further action as regards this matter until early 2012.

2012

[17] By mid-January 2012 Mr Marsh says the relationship between Mr Allan and Mr Kellerman needed to be addressed. He says Mr Allan had attended a management course but the relationship between them had not improved.

[18] On 23 January 2012 Mr Marsh wrote to Mr Kellerman and advised that Switched On had concerns that he was undermining Mr Allan's authority by his continual disparagement to management and staff about him, and his apparent refusal to carry out Mr Allan's instructions and undertake duties relevant the stores day to day management. Mr Marsh advised that it wanted to discuss how the disharmony between the two could be resolved and requested the parties meet on 8 February 2012.

[19] Mr Kellerman responded saying he planned to be at work on 8 February 2012 but did not have sufficient time to arrange representation and would not attend the meeting. He requested that the meeting take place within the confines of the then Department of Labour's mediation service.

[20] Mr Marsh replied stating amongst other things that the meeting was scheduled to occur in 12 working days and advised there was an expectation that Mr Kellerman would attend.

[21] On 24 January 2012 Mr Kellerman obtained a trespass order against Mr Allan. In evidence Mr Kellerman said he was offended by Mr Allen's perceived doubt as to the genuineness of recently taken sick leave, and Mr Allan's behaviour towards him generally. He conceded that the purpose of the trespass order was to punish Mr Allan.

[22] On 27 January 2012 Mr Kellerman wrote to General Manager, Mr Peter Bennett, and Mr Marsh and advised:

> *This e-mail is to inform both of you that I am taking a personal grievance against Switched On Gardener for unfair treatment, including intimidation.*
> *SOG has refused my request for mediation and suggestions of mediation.*
> *Mediation will now be dealt by The Employment Relations Authority at my own expense, $71.56.*
> *I will have nothing to say until that meeting occurs.*

[23] Mr Kellerman also said that there had been problems with his pay since he began working at Switched On and with his KiwiSaver and again requested copies of wage and time records including leave entitlements. He did not expand on what the problems were.

[24] Switched On responded, reiterating its view that it wished to resolve its internal issues before escalating the need for mediation. The letter further stated:

> *Brendan, you need to be aware that, although this is a serious issue we are not threatening you with dismissal. Quite the contrary, we wish to hear your explanations and suggestions regarding our concerns, hear your concerns and work towards creating an amicable working relationship between you and Andy.*
> ...
> *I need to be clear that this is a minor matter which we will need to address for the sake of harmony in our workplace. Although there is a possibility that disciplinary action up to and including a final written warning could result, that is yet to be determined.*

Meeting on 8 February 2012

[25] The meeting was attended by Mr Marsh, Mr Bennett, Mr Allan and Mr Kellerman. Switched On says it provided wage and time records, Mr Kellerman says they were not.

[26] Mr Kellerman says the meeting of 8 February 2012 was unlawful. He states he was not given documentation relevant to the allegations against him. Further, he was not advised that Mr Allan would be present at the meeting and says his attendance was inappropriate.

[27] I accept that in many circumstances it may be improper to have two employees attend a disciplinary meeting where the functionality of their working relationship is the primary concern and where one of the attendees is not notified that the other will be present. I note the letter of 23 January 2012 states: *"We see no easy way to resolve these issues that are creating disharmony…without discussions with you and [Mr Allan]*. I am satisfied on the evidence that the focus of the meeting was to proactively remedy the relationship between Mr Kellerman and Mr Allan and I do not consider Mr Kellerman was unjustifiably disadvantaged by Switched On's approach to resolving matters between them.

[28] I am also not persuaded that Mr Kellerman was unjustifiably disadvantaged by the way Switched On provided information to him. Mr Kellerman's evidence in regards to this aspect of his claim was fixed on Switched On's failure to provide email documentation prior to the meeting and that the omission was unlawful.

[29] The purpose of requiring an employer to provide relevant information to an employee prior to an investigation meeting is so the employee is properly appraised of the employers concerns and is then able then to respond to these. The letter setting out Switched On's concerns was 5 pages long and set out in considerable detail the events Switched On wished to discuss. The relevant specific emails were available

for Mr Kellerman on the day of the meeting. Mr Kellerman was unable to provide any evidence to lead me to conclude that Switched On's failure to provide emails prior to the meeting resulted in an unjustifiable disadvantage to him. I am satisfied that Mr Kellerman was provided with sufficient information to fully respond to the matters raised by Switched On and in fact did so in the meeting of 8 February 2012.

[30] The parties agree that a significant portion of the meeting centred on Mr Kellerman's complaint that Mr Allan had not recorded the disputed half hour of overtime. Switched On says this was the first time that this matter had been raised with it. It proposed Mr Kellerman take a half hour of leave on pay. Mr Kellerman then raised concern about how accrual of holiday pay associated with the half hour would be paid. Senior management offered to resolve this matter by placing a $2 coin on the table as payment.

[31] It is apparent that the matter of the trespass order was discussed, and that Switched On reiterated that KiwiSaver deductions were not being made.

[32] Following the meeting Switched On communicated with Mr Kellerman by letter on 14 February 2012. The letter records Switched On's expectation that Mr Allan was the primary point of contact in the chain of command and Mr Kellerman would treat Mr Allan with professional courtesy. It noted that it considered that the matters discussed at the meeting had now been resolved. The letter stated, inter alia:

> *In regard to your request for pay printouts, how often would you like these, weekly, bi-weekly or would you prefer them monthly. How would you like to receive them, email, faxed to the shop or posted to your home address.*
> *…*
> *As requested…you are to send him an email in two weeks' time explaining how you intend to assist in restoring a harmonious working relationship between you and your manager. Included in this email should be any problems/issues that still remain and cannot be resolved between you and Andy.*
>
> *On a more formal note, this communication should be regarded a verbal warning in regard to the improvement in your attitude towards [Mr Allan's] position and the chain of command we have referred to. The reason for this caution is to register our concern for the past issues and hopefully to ensure no repeat of them.*

[33] Mr Allan was also requested to provide information as to how he intended to restore the relationship with Mr Kellerman.

[34] On 1 March 2012 Mr Kellerman emailed Mr Marsh and Mr Bennett and stated:

> *Your compensation package offered to me has been declined. Refer Andrew Allan's unacceptable behaviour to me. The package including a verbal warning and $2. The $2 is on the table in the office. You can pick it up next time you are in Wellington. A copy has been made of this email.*

[35] Mr Bennett responded to the email and expressed disappointment that Mr Kellerman did not regard the matter as finally concluded. He proposed Mr Kellerman take an extra paid hour of leave to resolve the overtime issue and asked if Mr Kellerman had any further suggestions as to how the issue could be resolved.

[36] Mr Kellerman told the Authority that the offer to have paid time off was an unacceptable solution and says Mr Allan should have been disciplined.

The first statement of problem

[37] On 16 April 2012 Mr Kellerman filed a statement of problem at the Employment Relations Authority. Mr Kellerman raised a multitude of issues[1]. He included a fulsome list of concerns with respect to Mr Allan, and Switched On's refusal to attend mediation. He stated that he had not been paid at the rate agreed prior to commencing his employment and that he had not been provided with payslips, wage and time records, or holiday and leave records. He said the meeting of 8 February was *"illegal",* and he did not accept the warning he had received. He alleged Switched On had forged his fireworks examination[2] and that this was a criminal offence.

[38] Mr Kellerman requested a range of remedies from the Authority including orders that Switched On explain in writing why it *"did not follow New Zealand tax laws, for example KiwiSaver*", written apologies from both Mr Allan and Switched On, wages backdated at the rate of $15.00 per hour and an opportunity *"to give management his opinions".*

[39] The Authority responded to Mr Kellerman on 17 April 2012 and advised that it was unable to process his application. Mr Kellerman had listed Switched On's management as respondents. The Authority advised that the employer's name must

[1] Many of the claims made in the statement of problem were not progressed at the Authority's investigation and have not been referred to as these are not relevant to the determination.
[2] An examination required to obtain certification to sell, store and dispose of fire-works.

be cited correctly and noted that the Authority did not have jurisdiction to order many of the remedies requested.

[40] Shortly after, Mr Kellerman sent senior management a copy of his statement of problem.

15 May 2012

[41] On 15 May 2012 Mr Kellerman emailed Switched On's Managing Director stating he had not received previously requested wage and time records. He asked the information be provided no later than the following afternoon.

[42] Mr Marsh sent Mr Kellerman an email in reply. He asked Mr Kellerman to confirm his postal address as copies of payslips had previously been sent to the contact address Mr Kellerman had supplied to Switched On. Mr Kellerman responded stating his residential address was not his postal address. He made reference to having a PO Box but did not provide details as to its number. There was also an exchange of correspondence as regards to Switched On's requirements regarding future sick leave.

[43] Later in the day, by letter, Switched On requested Mr Kellerman attend a disciplinary meeting with it on 22 May 2012. The letter advised that Mr Kellerman was to respond and address the following concerns as summarised below:

- his unfounded allegations that Mr Allan was spying on Mr Kellerman and the trespass order against him;
- claims that he been offered a higher rate of pay than stipulated in the employment agreement
- continued absences from work on Saturdays which were not supported by a doctors certificate as requested
- obstructive behaviour preventing Switched On from providing wage and time records and payslips
- allegations that his employer had forged fireworks handling results
- refusal to follow the chain of command
- claims that Switched On was non-compliant with its IRD obligations.

[44] The letter further advised that *"when viewed in totality these concerns impact on the compatibility of your continued employment and the trust and confidence of your employer"*.

Meeting of 22 May 2012

[45] The meeting was attended by Mr Kellerman, Mr Marsh and Switched On's representative.

[46] It is not disputed that Mr Kellerman would not accept copies of full wage and time records proffered by Switched On's representative. Mr Kellerman says he was not required to receive the documents as the matter was not recorded as an item on the meeting's agenda. He advised that another meeting would need to be arranged for that purpose. Mr Kellerman provided a 3 page handwritten document which contained his responses to the various matters and advised *"that is all I have to say"*.

[47] Mr Kellerman's written response to the concerns is summarised as follows:

- In regards to the trespass order Mr Kellerman advised he had *"never stated [Mr Allan] was spying on me. I do not want [him] at my home. He has been trespassed.*
- In reference to claim that he had been offered a higher rate of wages: *Refer to [Mr Allan.] You calling me a lyer[sic]is vexatious."*
- Sick leave: *"I believe Mr Marsh and Mr Bennett have made an error not sending the letter earlier than 15.05.2012. Also they have shown no sympathy for me, just threats*."
- Wage and time records: *"I have requested detailed wages and time records including tax payment and weekly accumulation of holiday pay for each week…numerous times and numerous months. I have only one piece of rubbish I cannot understand…it was not posted"….* Mr Kellerman said he had never been asked for a postal address.
- Allegation of forgery with fireworks exam: *"On the 17.05.2012 the NZ Police said your fireworks handling exam is very dishonest and illegal."*
- Chain of command: *"The chain of command had not worked. I have gone through the chain of command. Some of my complaints have been against Mr Bennett and Mr Marsh."*

- Allegations about compliance with IRD: *"I have rung the NZ Tax Department a few times. Why don't you? On the 15.05.2012 I sent a written complaint to the Tax Department about KiwiSaver and my payslips. On an email dated 16 May 2012 I asked [Switched On] if they wanted a copy. I was ignored. No copy included".*

[48] Switched On's representative read through Mr Kellerman's statement and sought to have Mr Kellerman elaborate further on its contents. It is accepted that Mr Kellerman's only response was to say *"no comment"* to each of the allegations.

[49] In the course of the meeting Mr Kellerman stood up, removed his sweat shirt, and revealed his company issued T-shirt with the slogan *"No Comment".*

[50] Towards the end of the meeting Switched On's representative produced a copy of a determination[3] issued by the Authority in April 2012 involving Mr Kellerman and a previous employer and asked him to comment on the similarity of claims. Mr Kellerman did not respond. I note that determination involved allegations by Mr Kellerman that his employer had forged a document. However no finding was made on the matter.

[51] The meeting was adjourned to allow Switched On to consider Mr Kellerman's responses. Switched On returned approximately one hour later and advised Mr Kellerman that his behaviour at the meeting and in particular his refusal to communicate or discuss the concerns did not evidence good faith and made it impossible for Switched On to resolve the ongoing issues of concern.

[52] Mr Kellerman was told that Switched On found that trust and confidence in him had broken down and in these circumstances he was dismissed. Mr Kellerman was advised that he would be paid out two weeks' wages in lieu of notice.

[53] The parties attended mediation but were unable to resolve their differences. The Authority is required to determine the matter.

The Authority's investigation meeting

[54] Mr Kellerman was self-represented throughout the Authority's investigation. Switched On was represented by an experienced advocate. Both Mr Kellerman and Mr Marsh gave written and oral evidence to the Authority.

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[3] *Kellerman v Trade Staff Group Limited* [2012] NZERA Wellington 46

[55] Mr Phill Kidd, an associate of Mr Kellerman, provided written and oral evidence in support of Switched On. He provided information about his understanding of Mr Kellerman's previous employment engagements and evidence about conversations held with Mr Kellerman after his dismissal from Switched On.

[56] I accept that Mr Kidd sought to assist the Authority with its investigation however I consider the prejudicial effect of the evidence outweighs its probative value and is it not directly relevant to the Authority's inquiry as to the justification or otherwise of Switched On's decision to terminate Mr Kellerman's employment at the time he was dismissed. I have disregarded this evidence as a consequence.

[57] Mr Kellerman provided the Authority with extensive documentation. As permitted by s. 174 of the Act, this determination has not set out all information and evidence obtained but has stated the Authority's findings of facts and law and expressed conclusions on matters requiring determination.

Was Mr Kellerman's dismissal justifiable?

[58] At the beginning of the Authority's investigation Mr Kellerman advised that his dismissal was unjustified pursuant to the *"Whistle Blower Act"*. I understand Mr Kellerman to refer to s. 17 of the Protected Disclosures Act 2000 which provides that an employee may have a personal grievance if he or she has made a protected disclosure and the employer has retaliated by dismissing the employee.

[59] Section 6 of the Protected Disclosures Act describes the type of disclosure to which the Act applies and subsection (1)(d) includes a requirement that, *"the employee wishes the disclosure to be protected"*. There is no evidence to indicate that Mr Kellerman's complaints to IRD and/or the police were disclosures that he wished to make pursuant to the Act or that he wished the disclosures to be protected. Mr Kellerman advised that it was only after he was dismissed that he considered the Act was relevant to his claims against Switched On. I find that the Protected Disclosure Act is not relevant to this matter.

[60] As with any dismissal, pursuant to section 103A of the Employment Relations Act 2000, the test that the Authority must apply is whether the decision to dismiss Mr Kellerman was what a fair and reasonable employer could have done in the circumstances.

[61] The test requires two considerations, what the employer did (the substantive dismissal and the grounds for it) and how the employer acted (the process leading to those outcomes)[4].

Were there substantive grounds to dismiss Mr Kellerman?

[62] An assessment of what the employer did requires consideration of the substantive grounds for dismissal. In this matter the issue is whether it was (a) fair and reasonable for Switched on to conclude that Mr Kellerman had not acted in good faith during the meeting of 22 May 2012 and (b) that in all the circumstances it no longer had trust and confidence in Mr Kellerman to an extent that his dismissal was justified.

[63] Section 4(1) of the Employment Relations Act requires parties to an employment relationship are to treat each other in good faith. Parties are mutually obliged to be responsive and communicative and must not directly or indirectly, do anything to mislead or deceive each other.

[64] Within all employment relationships the law implies reciprocal terms of trust and confidence.[5] No statutory definition is given to the phrase *"trust and confidence"* however the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd*[6] referred to the kind of conduct that will justify dismissal, as follows:

> *Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship.*

[65] Although relatively rare, the courts have recognised that there may be occasions where a dismissal is justified on the primary basis that trust and confidence between an employer and employee has irretrievably broken down. The Employment Court has held[7]:

> *...an employer may justifiably dismiss an employee other than by pointing to and establishing a breach or breaches of contract (serious misconduct). …irreconcilable conflicts between an employee and the employer between an employee and other employees as adversely affect employment relationships may cause the employee to be in breach of obligations of trust and confidence and thereby justify dismissal.*

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[4] *X v Auckland District Health Board* [2007] ERNZ 66
[5] *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250
[6] [1992] 3 ERNZ 483 at p 487
[7] *NZ Fire Service Commission v Reid* [1998] 2 ERNZ 250 at 276

[66] In a relatively recent case[8] Judge Ford reiterated the Court of Appeal's approach in *Reid v New Zealand Fire Service Commission*[9] that there is a requirement that the employee must be shown to have been substantially responsible for the irreconcilable breakdown.

[67] It became apparent following extensive questioning during the Authority's investigation that Mr Kellerman believes he was not automatically enrolled in KiwiSaver as statutorily required. Switched On did not provide evidence on the matter, but to be fair it was not until the Authority's meeting that the exact nature of the claim was identified. I accept that Mr Kellerman had not particularized his concerns to Switched On in this way before. If Switched On is in breach of the KiwiSaver Act as Mr Kellerman alleges, the Authority has no jurisdiction to determine the matter or award remedies pursuant to that Act. Mr Kellerman accepted during the Authority's investigation that no deductions had been made from his pay and that he had not been disadvantaged. He remains adamant that Switched On is in breach of the legislation. Had Mr Kellerman properly stated what his concerns were during his employment (for example, at the meetings scheduled to discuss concerns) this matter may have been addressed and resolved.

[68] Mr Kellerman says that when he was interviewed for employment Mr Allan had verbally offered him a rate of $15.00 per hour and/or that he was advised he would receive $15.00 after 6 months' service. In contrast Switched On produced an email sent to senior management by Mr Allan the day before Mr Kellerman commenced working. The email evidences Mr Allan recommendation to Switched On that it employ Mr Kellerman at the rate of $14.00 per hour, despite the usual starting rate of $13.50 per hour. Mr Kellerman was unable to explain why he signed an employment agreement expressly stipulating his remuneration at $14.00 per hour or why he did not advise Switched On during the meeting of 22 May 2012 of the existence of a verbal agreement about his pay if that was not the case. I am not persuaded that there was an agreement to pay Mr Kellerman $15.00 per hour.

[69] Mr Kellerman says he was not given wage and time records. His evidence contradicts his agreement that he received summarised records in or about 29 November 2011. Those records may not have been in a format that he could

[8] *Walker v Procare Health Ltd* [2012] NZEmpC 90
[9] [1999] 1 ERNZ 104 (CA94/98)

understand but there is no evidence that he told Switched On of the matter. I find on balance that Mr Kellerman was provided with wage and time records on at least three occasions. He acknowledges that the records were placed on the table at the beginning of the meeting of 22 May 2012 and that Switched On's representative offered to go through these with him if required. It remains unclear why Mr Kellerman refused to accept the documents. I note there is no evidence that Mr Kellerman responded to Switched On's request of 14 February 2012 to have him advise when and where he wished to receive regular payslips. I find that Mr Kellerman's behaviour as regards wage and time records was obstructive.

[70] Switched On says it only became aware of Mr Kellerman's allegations of forgery in April 2012 when it received Mr Kellerman's first statement of problem. On 26 October 2011 Mr Kellerman had sat an open book examination for handling and storage of fire-works and emailed the paper to Switched On's management. Sometime later Mr Kellerman received a fire-works handling certificate dated 21 October 2011 and a test paper not written by him. Mr Marsh's evidence is that a mistake had been made in placing the correct cover sheets on Mr Kellerman's and another employee's papers when Switched On sent the examination papers to the relevant authority for assessment. Mr Marsh says the mistake was reported to the examination authority. He says the authority was unconcerned as each applicant had passed the exam and the issued certificates were correct. During the Authority's investigation Mr Kellerman remained adamant that Switched On had engaged in forgery. He produced evidence of letters sent by him to the Commissioner of Police, the Minister for Police and the Environmental Protection Agency on the matter. I do not consider those documents evidence anything other than Mr Kellerman's complaints about the issue.

[71] I accept Mr Marsh's evidence that Mr Kellerman's failure to provide any further information or discuss any matters during the meeting of 22 May 2012 as well as his orchestrated use of the *"No Comment"* slogan led him to believe the relationship was unsalvageable. Mr Kellerman said he did not respond to Switched On's appeal to discuss matters because the letter of 15 May 2012 did not specify he was required to verbally respond. He says also that he had received advice that he *"should not let the employer control the meeting"*. I find Mr Kellerman's purposeful plan to impede progress of a meeting scheduled specifically to discuss both his and his employer's concerns was wholly inappropriate in a modern day employment

relations setting. His behaviour was a wilful breach of his obligations of good faith to be responsive and communicative.

[72] Given the nature and breadth of Mr Kellerman's complaints against Switched On, and his resolute refusal to meaningfully engage with Switched On about these or Switched On's concerns, I consider it was reasonable for Switched On to conclude in all the circumstances that trust and confidence, as a substantive ground for dismissal, no longer existed and that there was no realistic alternative but to terminate Mr Kellerman's employment.

[73] I find that the employment relationship was irretrievably broken and that Mr Kellerman was substantially the cause.

Was Mr Kellerman's dismissal procedurally fair?

[74] An assessment of how an employer acted requires the Authority to consider whether the employer observed that minimum standards of procedural fairness as set out at s. 103A(3). It has been accepted by the Employment Court[10] that the statutory procedural requirements do not always sit easily against an examination of the employer's actions at the time of dismissal. However in all the circumstances of this case I am satisfied that Switched On:

(a) properly raised its concerns with Mr Kellerman in the letter of 15 May 2012;

(b) gave Mr Kellerman a reasonable opportunity to respond to the concerns during the meeting of 22 May 2012;

(c) genuinely considered Mr Kellerman's explanations during the adjournment to the meeting on 22 May 2012.

[75] Mr Kellerman says that the meeting of 22 May 2012 was unfair. He says he was not provided with sufficient information to answer the allegations against him. I do not accept Mr Kellerman's submission in this regard. The allegations contained in the letter of 15 May 2012 largely reflected the issues he himself raised in the first statement of problem. In this regard the purpose of the meeting scheduled for 22 May 2012 was predominantly to have him explain what his concerns were and why. I consider the letter of 15 May 2012 was sufficiently detailed to enable Mr Kellerman to address the issues raised and it is unclear from Mr Kellerman's evidence what further information he considers should have been provided.

[10] *Angus v Ports of Auckland* [2011] NZEmpC 160

[76] I accept that the matter of the trespass order had been dealt with at the meeting of 8 February 2012 and should not have been raised again as an issue requiring Mr Kellerman's explanation in the meeting of 22 May 2012. However Mr Kellerman was not dismissed for obtaining a trespass order and I do not consider that raising the matter for further examination materially affected Switched On's decision to dismiss Mr Kellerman. I am not persuaded that he was unjustifiably disadvantaged by the action or that his dismissal was unjustified because of it.

[77] Having considered all the circumstances of this matter I am satisfied that trust and confidence in the employment relationship between Mr Kellerman and Switched On was irretrievably destroyed. I find Switched On's decision to dismiss Mr Kellerman was a decision it was entitled to make[11] and was justifiable in the circumstances.

[78] I find that Mr Kellerman was paid according to the terms of this employment agreement, that he was provided with wage and time records and that his dismissal was justified. His claims are dismissed.

Costs

[79] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

[11] *Angus v Ports of Auckland* [2011] NZEmpC 160