IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 101

5160934

	BETWEEN	LAXMAN KERAI
	AND	STEVENSON ENGINEERING LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	David Flaws for applicant Geoff White for respondent
Investigation Meeting:	7 July 2010
Further information received	14 July 2010
Submissions	30 July, 19 August 2010 from Applicant 13 August 2010 from Respondent
Determination:	16 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Kerai is a qualified fitter and turner who was employed by the respondent in 2007 to operate a CNC Milling machine. Shortly before Christmas 2008 he was verbally warned about alleged unsafe work practices. He raised a disadvantage grievance about this on 14 January 2009. In February 2009, he was placed on a performance management plan and received a final warning about an allegedly unauthorised purchase. On 16 April he raised a further disadvantage grievance in relation to these matters. After review by the respondent's human resources department the warnings and the performance plan were confirmed.

[2] The respondent says the common element in the situations that gave rise to the warnings and the plan was that Mr Kerai showed a disregard for authority and was

unwilling to take direction. In the period from March to May 2009 there were further concerns of a similar nature, prompting yet more disciplinary proceedings. The outcome, on 25 May 2009, was Mr Kerai's termination on notice. This led Mr Kerai to raise a final grievance of unjustified dismissal.

Issues

[3] Mr Kerai continues to assert that he was unjustifiably disadvantaged by the warnings and by the performance management plan. He also says that his dismissal was unfair. The respondent denies all the allegations against it.

[4] In relation to the first warning, the principal issue for determination is whether Mr Kerai had been properly informed about the relevant safe work practices, and if so, whether his conduct departed from those practices in a way that warranted a first warning.

[5] The issues in relation to the second warning are similar to those arising in relation to the first. The Authority must determine what Mr Kerai could be expected to know about the respondent's requirements in relation to purchasing procedures and, taking into consideration what he had been told, whether he departed from them to the extent that a final warning was justified.

[6] As for the imposition of the performance management programme, Mr Kerai considers this a separate grievance in its own right. Issues therefore arise about whether it was justified and whether it disadvantaged him. However because the evidence on these issues is linked with the evidence relating to the alleged unjustified dismissal this determination will address them together with the issues relating to the termination.

[7] As for which, the respondent says that three specific matters led to the final disciplinary proceedings and ultimately to the dismissal. The first was an alleged failure by Mr Kerai to arrange for his doctor to be provided with a Restricted Duties form in a March consultation regarding a back injury. The second was an allegation that Mr Kerai misled a doctor about the cause of the injury in question. The final allegation was that he had disrupted the workforce and undermined management by

telling a co-worker that "*the Company treats you like a nobody*." In addition the company formed the view that there had been an overall break down in trust and confidence between the parties.

[8] Determining whether the dismissal was justified will require assessment of whether there was a reasonable basis for the respondent's conclusion that each allegation was established and whether, in all the circumstances, one or more of them amounted to justification for dismissal.

(i) First warning

[9] The first warning related to an incident on 11 December 2008 when Mr Kerai injured his back changing one of the heaviest tools used with the CNC Milling machine. After an incident investigation by the health and safety manager, John Hamley, it was decided to proceed to a disciplinary meeting with Mr Kerai. The allegation was that despite having been instructed that two people were required for the safe changing of heavier tools, Mr Kerai had attempted to change one by himself, thus breaching health and safety protocols and causing injury.

[10] The respondent's General Manager, David Young, conducted the meeting with Machine shop supervisor Andrew Blank and John Hamley in attendance. Mr Kerai was not represented but confirmed that he was willing to proceed. Mr Kerai did not dispute that he had changed a tool by himself. The existence of a foot switch made it possible for one person to use two hands to change a tool and this was what he did on the day he hurt his back. He explained this to them in the same way that he later did to me: he denied having been told that that he must always have assistance when changing this tool or any other. He asserted that he had frequently done so alone and in view of his supervisor without attracting comment from him. He said that to manage risk associated with tool handling the respondent had undertaken to fit a tool changing device to the milling machine but this never got done.

[11] Mr Young and Mr Blank rejected this explanation because they both recalled telling Mr Kerai to seek assistance when installing and removing "heavier tools." They acknowledged that they did not specify which tools they meant by this. They told the Authority that they left that up to common sense. They also told the Authority

that they gave this instruction to the whole team at "toolbox" meetings and repeated it to Mr Kerai individually during discussions about the proposed tool changing device.

[12] Mr Kerai was originally employed to fill a vacancy that arose because the person in the role had injured his back changing a tool. A co-worker who filled the position in the interval between that incident and Mr Kerai starting work said he had been accustomed to changing tools by himself and could not recall what he did during his stint on the milling machine.

[13] After December 2008 tools which were to be changed by two people were labelled and information about the correct procedure was provided in the workshop. However none of this was in place at the time of Mr Kerai's injury. The respondent's managers acknowledged that prior to the disciplinary process they had not specified the weight threshold at which two people would be needed to change a tool. There is also no dispute that the weights of the various tools used on the machines had not been identified.

[14] In short, the evidence is that Mr Blank and Mr Young told Mr Kerai that he should get someone else to help him change heavy tools, but did not otherwise identify which tools they were referring to. There is no evidence that they told Mr Kerai (or anyone else in the workplace) that this instruction was to be followed on pain of disciplinary action. I conclude that Mr Kerai was advised to call on workmates to help him when he needed this. He was not issued with a clear and formal directive about a safety protocol to be followed at all times.

[15] It cannot be said therefore that he was fully and properly informed about the relevant safe work practices. For this reason I conclude that the first (verbal) warning was unjustified.

(ii) Second warning

[16] On the 13th of January Mr Kerai requested a new pair of work boots from Mr Blank who agreed to the request and completed the required supply schedule. Mr Kerai then complied with the correct purchasing procedures by getting an official order from the purchasing department before heading to the safety supplier to get the

boots. Once there, he noticed a thermal belt and tried it on. Although the respondent had already supplied him with a back support belt, this one had a different function and Mr Kerai decided he wanted it. The person who served him added the item to the invoice for the boots and (because the purchase order said nothing about a thermal belt) asked Mr Kerai to sign the packing slip. Mr Kerai left with both the boots and the belt.

[17] On his return to work Mr Kerai handed the invoice in to the purchasing department. Payment was processed in the normal way. The additional purchase was not picked up until Mr Blank went through his expense report a week later and (partly because he was going on leave) referred the matter to Mr Young to follow up.

[18] The expense report did not identify the purchaser but Mr Young discovered from the paper trail that it was Mr Kerai and called him to a disciplinary meeting. Mr Kerai (who was represented this time) did not deny purchasing the belt in the circumstances outlined above. He says he did not tell Mr Blank what he had done when he returned to work because Mr Blank was not in his office. Mr Kerai's leading hand, Mr James, was at work at the time but Mr Kerai said he did not think of asking him to authorise the purchase. Nor did he think to bring his old belt back in to work. He said when he handed the invoice in to the purchasing officer he told him that there was an additional item on the invoice and the purchasing officer said "*he would deal with the matter.*"

[19] Mr Kerai's view was that by bringing the matter to the attention of the purchasing officer he had done all he needed to do. He said he assumed that the purchasing officer would check with Mr Blank before putting the additional item into the system. During the Authority meeting he said that what he had done in relying on the purchasing officer to clear the purchase with Mr Blank was "*not uncommon practice*" but he was unable to give an example to support this assertion.

[20] Mr Young told the Authority that (at the time of the disciplinary process) he had asked the purchasing officer concerned what Mr Kerai had said to him. He could not recall the conversation. The purchasing officer gave evidence to the Authority. He said that whether or not a packing slip and schedule match he processes the paperwork. He was not empowered to authorise purchases and it was not his job to

chase up or obtain authorisation on behalf of others. Apart from anything else hundreds of invoices were processed on a daily basis and he was simply too busy.

[21] Mr Young believed Mr Kerai was well aware that the purchasing officer was not responsible for getting authorisation just as he was aware of the relevant purchasing procedures having used them on a number of occasions before. He also said that Mr Kerai would not have been authorised to buy a new belt when he already had one (with the implication that Mr Kerai should have known that authorisation was not likely.) He therefore rejected Mr Kerai's explanation and concluded that Mr Kerai simply disregarded the need to have the purchase approved by his supervisor. He concluded that this was a serious matter and issued a final written warning.

[22] Unlike the previous matter, this was not a situation where Mr Kerai could be in any doubt about what he was expected to do or the importance of doing it. As a mature and experienced member of the workforce he could be expected to understand the obvious need for authorisation. Even if this were not the case, there is no dispute that he had complied with the relevant procedures in respect of other purchases including his boots. He knew the procedures required. Finally it was not credible for Mr Kerai to say that he expected the purchasing officer to do what he should have done himself when the purchasing officer was not even in a position to do so.

[23] I accept that Mr Young's conclusions about the alleged unauthorised purchase were fair and reasonable. So was the decision (given the seriousness of the conduct) to impose a sanction. However because of my conclusions regarding the December warning I consider that the February warning should properly have been a "first warning."

(iii) Performance management and dismissal

[24] As early as September 2008 Mr Blank and leading hand Dave James talked to Mr Kerai, informally, about issues relating to the way he interacted with them and other staff. However neither this issue nor any other performance concern was formally identified (before the process commenced) as forming part of the February disciplinary proceedings. Mr Kerai says it was therefore a shock to him when, during the meeting of 10 February, Mr Young raised a range of allegations including failure

to follow instructions and procedures, poor timekeeping, and spending too much time on tea breaks and personal telephone calls.

[25] The February disciplinary process had run over three meetings on separate days. It was Mr Young's evidence that as this process unfolded he became aware that:

> *"there were performance issues with Laxman which was creating problems within the machine shop workshop and…had got …worse from the initial informal discussion in September…it was clear Laxman had an issue with authority."*

[26] Mr Young decided that these matters should be dealt with outside the disciplinary context. He said that human resources manager Geoff White recommended a performance management programme and Mr Kerai and his representative agreed to the proposal. Mr Kerai has subsequently disputed this assertion.

[27] The first of a series of planned performance management meetings took place on 19 February 2009 when a document outlining the performance issues and expectations was presented to Mr Kerai. Mr Young was in attendance at the meeting and told the Authority that:

> *"I wanted to make sure all parties were happy with the document and process. Laxman agreed with the process and key points of review and I left the room."*

[28] The document in question was brief. It read as follows:

> *"Identify issues:*
>
> - *Criticism of Managers, Supervisors, Leading hands and Co-worker*
> - *Timekeeping*
> - *Health and Safety procedure and instructions*
> - *Inattentive to work instructions*
> - *Remain in control re temper i.e. throwing tools etc*
> - *Concentration on your role- Don't be concerned with matters that don't relate to you.*

Set expectations:

- *Eliminate criticism of above people especially where it doesn't relate to your role*
- *Address any concerns to Andrew Blank in private manner not in the workshop environment*
- *Accept decisions of Management etc*
- *Follow health and safety procedure and instructions*
- *Follow correct procedure for purchasing of equipment*
- *Eliminate phone calls during work time unless previously you have sort [sic] permission from your Supervisor*
- *If you don't understand or need clarity please ask. If you feel you need written instructions for complicated tasks please ask?*

[29] Mr Kerai told the Authority that he asked for instances of what he called his 'performance deficits' since the only specific examples he had been given were those which had formed the basis of the disciplinary proceedings against him. However he said Mr Blank and Mr James were unable or unwilling to give him the information he wanted.

[30] The document had concluded with the advice that a second meeting would be held in two weeks time. As of Monday 9 March, this had yet to be arranged, even though Mr Kerai had annual leave booked and was due to go overseas on Friday 13 March.

[31] Later that day Mr Kerai experienced pain where he had previously injured his back. By the Tuesday morning, on his way to work, it was severe. Mr Kerai was concerned about his ability to work and (given his holiday plans) his ability to fly. He went straight to his doctor who thought this was a recurrence of problems associated with the injury in late 2008. Noting as much, he certified Mr Kerai unfit to work for two days and prescribed medication and physiotherapy. Mr Kerai phoned Mr Blank and advised him of this before proceeding to collect his medication and head to the physiotherapist.

[32] While Mr Kerai was in the physiotherapist's waiting room Mr Blank rang him with the instruction that he should come in to work to get a restricted duties form to take back to his doctor. Mr Kerai responded that his doctor's advice had been that after seeing the physiotherapist he should return home to rest. Later that day Mr Blank rang Mr Kerai at home and reiterated that a restricted duties form needed to be completed by Mr Kerai's doctor. Mr Kerai responded by supplying his doctor's details so that a form could be faxed to him.

[33] Still later on 10 March Mr Blank phoned again to say that the doctor had now approved light duties for reduced hours the following day and that Mr Kerai should therefore come in to work. On 11 March Mr Kerai did go in and complete some light duties at work before leaving early for a further physiotherapy session.

[34] Meanwhile, Mr Blank told him that the company planned to treat his absence on 10 March as sick leave. Mr Kerai responded that sick leave was not normally applied to absences caused by work related injury, as he understood this to be. Mr Kerai's evidence was that on either 11 or 12 March he called ACC to check what was happening with his claim. He said he was told that because the file on the earlier claim had already been closed, his doctor would need to fill in another form.

[35] On 13 March Mr Kerai returned to the doctor to seek advice about managing his back problem while travelling and also to report that ACC required another form. Because his own doctor was not on duty he was examined by another member of the same practice. He said that this doctor reviewed the notes of the consultation a few days before and then went on to ask questions about what Mr Kerai had been doing in the period before the onset of symptoms. Before he left Mr Kerai was also provided with a prescription for pain relief medication.

[36] Meanwhile, knowing that Mr Kerai was due to go on annual leave, his managers had arranged for the follow up performance meeting to be held that day, immediately before he left. The same list of issues and expectations was presented but this time, with a specific example of allegedly inappropriate behaviour. Mr James and Mr Blank told Mr Kerai that a co-worker had complained that Mr Kerai had said to him: "*they treat you like a nobody*."

[37] There seems to have been a mutual understanding that "*they*" meant the company and its managers. All Mr Kerai was told was the name of the co-worker concerned and the fact that the comment was made when he was working "*on the mud gun job.*" He denied the allegation (later he told the Authority that in fact his view was that the company treated the person in question "*like a star")* and reminded Mr Blank of an incident where things had been the other way around. He said that on an occasion when Mr Blank had been present the co-worker had called Mr Kerai "Mr Nobody" and when Mr Kerai had queried this, he had been told it was "nothing."

[38] The person in question was called in to the meeting but did not tell Mr Kerai anything more about when or in what circumstances the comment was alleged to have been made. Mr Kerai continued to deny it.

[39] The meeting also discussed the fact that Mr Kerai had not taken a light duties form when he visited the doctor that week. Mr Young was later to return to that matter, and to the matter of the "nobody" comment, however the meeting ended without any further action being taken at that time. That night Mr Kerai flew out on his overseas holiday.

[40] On 16 March Mr Blank received a copy of a new ACC patient declaration form issued by the doctor whom Mr Kerai had seen on 13 March. It recorded that Mr Kerai "*was hand tapping a part of machine and twisted and hurt lower back."*

[41] Mr Young told the Authority that Mr Kerai had originally told him that he did not know what caused the injury. Mr Blank said he understood from the first medical certificate (which cited the earlier injury as the reason that he was not fit for work) that this was what he had also told the first doctor. He considered that Mr Kerai must have changed that story when he saw the second doctor. All this mattered greatly to Mr Blank because now the March problem would be recorded as a new lost time injury in the company's statistics.

[42] Mr Kerai does not dispute saying, originally, that he did not know what caused his injury. Mr Kerai said the reason for seeking medical advice (on both occasions) was to find out what was causing his problems and what to do about them. He

maintains that all he did, in the Friday consultation, was tell the doctor what he had been doing before the symptoms began again.

[43] Mr Kerai returned from his holiday on 20 April. Either that day or the next Mr Blank queried with him the fact that the second doctor's note contained something different from the first. Mr Blank said he pointed out to Mr Kerai that on 10 March he had said there was nothing specific to pin point what had caused his injury and that he understood this was why the doctor had originally put it down to a flare up of the old injury. In response, he said, Mr Kerai said that:

> *"all that the injury could have been caused by was the tapping of the holes even though at the time he felt…no pain."*

[44] From his side, Mr Kerai remained concerned that the company refusal to treat the 9 March incident as a work related injury had affected his pay. At the time of the events being described this and other pay related issues were an additional source of dispute between the parties, but they have subsequently been resolved and do not form part of this employment relationship problem.

[45] On 30 April Mr Kerai was interviewed by John Hamley and Andrew Blank about the "lost time injury incident" on 9 March. He first reported, and then demonstrated, exactly what he had been doing at work that day. He also went over the sequence of events which occurred over the next few days.

[46] On 1 May ACC confirmed to Mr Hamley that Mr Kerai's claim in respect of 9 March had been accepted by ACC. Andrew Blank then met with Mr Kerai on 4 May and again took him through the sequence of events up to and beyond the 9 March, asking him to account for the "different diagnoses" on the two medical certificates.

[47] After this information gathering exercise, Mr Hamly prepared a report relating to the incident. Mr Kerai was asked to sign off on the report and declined to do so. Instead, in a four page written response dated 9 May, he added to and corrected the detail of the report.

[48] On 12 May Mr Kerai experienced yet another onset of back pain. Once again he required time off, pain relief and physiotherapy.

[49] On 14 May Geoff White wrote to Mr Kerai calling him to a disciplinary meeting to respond to three specific allegations: that he had failed to take a restricted duties form to the doctor on 10 March, that he had told a co-worker that "*the company treats you like a nobody*" and:

> *"Doubt over the genuineness of your injury and the subsequent claim to ACC. This relates to you initially claiming your back injury on 10 March was a continuation of a previous injury. After your ACC claim was denied, you claimed the injury was unrelated to your previous injury in order to have your claim processed by ACC."*

[50] The letter also noted that there had been "ongoing disruptions" to the employment relationship, including the warnings, the performance management, the personal grievances and a pay dispute, and expressed the view that:

> *"we have reached a significant breakdown in the trust and confidence that is required between employer and employee. I would like to get your response to this issue also."*

[51] Meanwhile, on 18 May Mr Kerai had a full assessment by a company approved doctor who provided a copy of his report to Mark Dexter (Employment Health and Safety Manager for the Stevenson's group.) After recording that Mr Kerai's Xray and MRI showed marked degenerative changes of the lower lumbar spine the report contained the following information:

> "*I believe the incident described in December would suffice as a reasonable injury mechanism particularly as he was already "compromised" due to …pre-existing degeneration…It appears that the injury never completely resolved as he was still symptomatic in March. I do not think that the events in March and May were new injuries.*

[52] After noting Mr Kerai's "*significant symptoms*" and his age the report went on to conclude that there were two options to manage the situation: a comprehensive rehabilitation programme with a graduated return to work overseen by an occupational therapist or a move to a different, lighter role. The report concluded:

> "*with appropriate rehabilitation and professional oversight it should be possible for Laxman to return to his role but there will always be some concern of further injury should something untoward happen. It may thus be more logical to look at other vocational options.*

[53] The claim in respect of the May incident was accepted by ACC which classified all three episodes as the result of lumbar sprain.

[54] The disciplinary meeting eventually took place on 27 May 2009. Mr Kerai had a new representative who attended the meeting with him. Mr Kerai also tabled a detailed written response to the allegations. The key points of his responses were as follows:

i. Regarding the failure to take the restricted duties letter to the doctor, he said he thought it unreasonable to expect him to carry one with him at all times and noted *"when I headed for the doctor's clinic early that morning thought of the restricted duties form did not even come to mind, the unbearable pains in my back was the concern…"*

ii. He continued to deny making the "nobody" comment to a co-worker and pointed out that because he had never been given any specifics of when and where it occurred it was difficult to respond, and

iii. Finally he said that although he provided additional detail to the doctor on the second visit he did not change his story about what had happened on 9 March. He noted: *"whether it was aggravation or a flare up of recent or prior injury or whatever else is not for me to decide…"*

[55] As for the general assertion that there was a breakdown in trust and confidence between the parties, Mr Kerai argued that he was entitled to raise grievances with the company.

[56] On 27 May Mr White informed Mr Kerai in writing that he was dismissed. The letter noted that he had been told on many occasions that if he did not have the restricted duties form when visiting the doctor he should ring his supervisor and arrange for one to be faxed to the surgery. As well, the company believed he did comment as alleged to a co-worker, and that he did change his story about what had happened on 9 March. In conclusion Mr White said that the termination of Mr Kerai's employment was based on:

> 1. *"a failure to follow health and safety procedures which resulted in a LTI*
>
> 2. *you changing your ACC claim so that you could become eligible for ACC compensation, resulting in a LTI for the Company,*
>
> 3. *Unsatisfactory progress on lifting your performance as required by the performance management plan you are on. This includes disrupting the workforce.*
>
> 4. *Loss of trust and confidence in you*
>
> 5. *The fact that you are on a Final Written Warning."*

Determination

Performance management programme

[57] As noted already, Mr Kerai regards the imposition of the performance management plan as an unjustified disadvantage in itself. He told the Authority he did not feel the performance plan document provided enough information for him to

know exactly what he was doing wrong or what was expected of him, and was concerned that he was being "managed out of" his job.

[58] I am satisfied that the decision to implement a performance plan was fair and reasonable. The second warning was justified for the reasons set out above, and the respondent's managers reasonable in their view that the underlying issue was Mr Kerai's failure to acknowledge their authority. Against this background it was prudent to put some follow-up in place.

[59] On the other hand, I share Mr Kerai's view of the performance plan itself. The plan gave only an outline of his manager's concerns. Without specifics of the problems and of the improvements required it was unlikely to be effective in addressing those concerns. To the extent that it was not supported by examples it was unjustified and insofar as it was unlikely to deliver useful performance management it disadvantaged Mr Kerai. However since the justification for the dismissal rested in part on matters discussed during the performance management meetings, these matters are effectively subsumed in the termination. It will not therefore be dealt with as a separate cause of action.

Dismissal

[60] Respondent witnesses clarified that the first bullet point in the list in the dismissal letter referred to Mr Kerai's failure to take the restricted duties form to his doctor on 10 March.

[61] There is no dispute that Mr Blank's intervention (by calling Mr Kerai at home on the afternoon of 10 March) was needed before a restricted duties form was provided to Mr Kerai's doctor. It is also the case that the respondent's Code of Conduct requires staff members to take a restricted duties form with them when seeing a medical practitioner.

[62] Dr Andreas' report also makes it clear, however, that Mr Kerai was in severe pain on the day in question. After seeing the doctor he had to visit a physiotherapist and get started on his analgesic medication. In the absence of evidence to the contrary I accept that it was unlikely that the pain would have settled in time to permit any

return to work that day. It cannot be said therefore that the failure to provide the form led to lost time. Also, in circumstances of genuine health problems causing severe pain, it was unreasonable for the respondent to expect the requirements of the Code of Conduct to be uppermost in Mr Kerai's mind. Mr Kerai's failure to arrange for the form to be provided to the doctor is not a matter which, viewed objectively, can be said to go to trust and confidence.

[63] The next allegation is that Mr Kerai changed his ACC claim so that he would be eligible for compensation.

[64] The respondent has not been able to explain how changing his story, as alleged, might have affected Mr Kerai's eligibility for cover. ACC cover must of course relate to personal injury by accident but as demonstrated by the fact that his claim was accepted, Mr Kerai was eligible for cover for further problems associated with the original accident.

[65] We now know (from Dr Andreas's report) that the work Mr Kerai was doing on 10 March was unlikely to have caused fresh symptoms and so the Friday certificate might be said to be in error. However there is no evidence that misconduct by Mr Kerai led to that error. There is no dispute that in the period before he experienced the onset of fresh symptoms, Mr Kerai *was* engaged in "hand tapping." He was not lying or misleading his doctor by reporting that. Finally there is no evidence that it was Mr Kerai (rather than the doctor) who drew the connection.

[66] Mr Kerai was entitled to talk feely with his doctor about his health issues and was not required to jeopardise his own health care (or his ACC cover) in order to protect the respondent's accident record. It follows that the respondent has not established that Mr Kerai's actions on March 13 damaged the relationship of trust and confidence.

[67] The third of Mr White's bullet points relates to the alleged "nobody" comment. When this allegation was put to Mr Kerai he asked to be told when, where and in what context it was said to have been made. He got very little information back and I am not satisfied that he was given enough to be able to respond meaningfully. The third element of justification also fails.

[68] As for the alleged general loss of trust and confidence the respondent has explained this by saying that Mr Kerai had brought several personal grievances that the company felt were baseless and had spoken repeatedly of feeling that he was victimised and unfairly targeted. His managers essentially felt that it had become impossible to work with him. It follows from the findings that I have made so far that not all Mr Kerai's personal grievances were baseless. The fact that Mr Kerai raised personal grievances cannot be used to support an assertion that all trust and confidence had broken down.

[69] In summary the respondent's actions were not what a fair and reasonable employer would have done in all the circumstances. The dismissal was unjustified, and Mr Kerai has established that he has a personal grievance.

[70] It did however become apparent from the Authority's investigation that some aspects of Mr Kerai's behaviour have been very damaging to the employment relationship. This will now be discussed under the heading of contributory conduct.

(iv) Remedies

Contributory conduct

[71] Although Mr Kerai has been largely successful in making out his claims of personal grievance I am satisfied that he must share some of the responsibility for the breakdown of the employment relationship.

[72] I have already noted that the respondent's managers believed that Mr Kerai showed a disregard for authority and was unwilling to take direction. The evidence, and Mr Kerai's conduct before the Authority, bore that assertion out. Mr Kerai demonstrated a very inflexible attitude and a complete inability to accept any wrong doing on his part. He refused to acknowledge that the conduct which led to the first warning was even unwise and persisted in the view that there was nothing wrong with taking it upon himself to buy an expensive piece of safety equipment.

[73] Despite having a poor working relationship with several different co-workers, he felt all the problems lay with their behaviour. I do not think it is inferring too much for the Authority to say that at the end of the day, the fundamental reason for Mr Kerai's dismissal was that he was a very difficult person to work with.

[74] I therefore set Mr Kerai's contributory conduct at 30%. Given the views he expressed, not just of one or two managers, but about many of the people he worked with, I accept that reinstatement is not practicable in this case. I note also that even if this impediment did not exist there is also the further matter: the medical advice that it might be "*more logical to look at other vocational options.*"

Compensation

[75] Mr Kerai has made out two separate grievances, in relation to the first warning and to the dismissal respectively, although because this was a dismissal for alleged performance issues the warning formed part of the justification for the dismissal. I consider it appropriate in this case to make a global award to compensate Mr Kerai for the effects of the first warning (which marked the start of his deep distrust of his employer) and the eventual loss of his job. In the absence of contributory conduct I would set this at $12,000.00 however with 30% reduction for contribution this becomes $8,400.00.

Lost earnings

[76] Section 128 provides for reimbursement of remuneration lost as a result of the personal grievance.

[77] At the time of lodging closing submissions (over a year after he was dismissed) Mr Kerai advised the Authority that he had not been able to find any work (either in his field or in lower skilled areas) apart from one job in the South Island which he declined because it would have required him to relocate his family. Mr Kerai provided evidence of having made a number of job applications and I am satisfied that he made some effort to mitigate his loss.

[78] Mr Kerai believed his difficulties in finding work were a result of his age, the fact that his skills were narrowly focussed (as a specialist in CNC milling work) and because he had been dismissed. He said he did not feel he could trust the respondent to provide him with a work reference and so had not been offering anyone from Stevensons as a referee.

[79] As well, his difficulties were compounded by the fact that he was looking for work in the middle of a recession. Against this background I am not satisfied that it can be said that Mr Kerai's losses are indefinitely attributable to the personal grievance. I therefore limit the award of lost earnings to reimbursement for a period of six months, further reduced by 30% for contributory conduct.

[80] Mr Kerai was a full time worker on an hourly rate of $29.70. He was also in receipt of "tool money" but this was a reimbursing payment, not remuneration. His weekly remuneration (rounded off) was therefore $1,200.00 per week and over a period of 26 weeks his losses amounted to $31,200.00 gross. After 30% reduction for contribution he is therefore entitled to $21,840.00 gross reimbursement of lost wages.

Summary of orders

[81] **The respondent, Stevenson's Engineering Limited, is ordered to pay to Mr Kerai the following sums:**

i. **$8,400.00 compensation for hurt and humiliation, and**

ii. **$21,840.00 reimbursement of lost earnings.**

Costs

[82] Costs are reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority