IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 221
3061273

	BETWEEN	BRIAR LECKIE Applicant
	A N D	ALLIANCE GROUP LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Mary-Jane Thomas and Katherine McDonald, counsel for the Applicant Janet Copeland and Hoyoun Lee, counsel for the Respondent
Investigation Meeting:	26 and 27 February, 16 March 2020 at Invercargill
Date of Determination:	5 June 2020

DETERMINATION OF THE AUTHORITY

A. Alliance Group Limited is to pay Briar Leckie $15,000.00 without deduction, pursuant to s 123(1)(c)(i) of the Act.

B. The claim for lost remuneration is reserved.

C. Costs are reserved.

Employment relationship problem

[1] Briar Leckie worked for Alliance Group Limited at its Mataura Plant from January 2016 until her employment ended in February 2018. Ms Leckie was a member of the New

Zealand Meat Workers Union and doing work covered by the collective agreement applicable between the Union and Alliance.

[2] On 21 February 2018 there was an incident between Ms Leckie and another worker Kennedy White in the work area. Bruce Caughey was the beef slaughterhouse supervisor at the time. Mr Caughey was called to the offal room. Mr Caughey required Ms Leckie to go to the office. The plant personnel manager, Ricky Gutsell, was called. Warren Peterson was a Union delegate in the beef slaughter department at the time. He became aware that Ms Leckie had been sent to the office. Soon after, Ms Leckie was told by Mr Gutsell that her employment was suspended on pay and she left the plant.

[3] There was a meeting on 26 February. Present were Ms Leckie, Grant Pearsey (Union secretary), Mr Peterson, Mr Caughey and Mr Gutsell. What was said by Mr Gutsell to Ms Leckie initially and when the meeting resumed after a break is disputed. The meeting ended and Ms Leckie left the plant. The next day, Ms Leckie returned to the plant. Ms Leckie saw Tere Ngu who as the production manager held overall responsibility for the offal department. Alliance has a printed form headed up "TERMINATION ADVICE" to record the type of termination of the employment. The exchange between Ms Leckie and Mr Ngu resulted in them both signing the form recording the termination as effective from 27 February 2018 with a tick in the box alongside the printed words "Voluntary". Ms Leckie then left the plant, returning the next day again to get copies of witness statements which Mr Gutsell had referred to during the 26 February meeting.

[4] On 16 March 2018, counsel for Ms Leckie wrote to Alliance requesting a copy of her employment file including notes relating to her "suspension and dismissal". Alliance provided some file material. The letter also stated that Ms Leckie was not dismissed but requested voluntary termination after being told that Alliance had made a preliminary decision to dismiss her and inviting her to provide any further comment. Later, Ms Leckie's lawyer requested notes taken at the meetings with her. By letter dated 5 April counsel raised Ms Leckie's personal grievances of unjustified disadvantage concerning the suspension and unjustified dismissal concerning the termination of Ms Leckie's employment. The letter sets out Ms Leckie's account of events. Alliance responded on 23 April repeating its view that Ms Leckie voluntarily terminated her employment and setting out its account of events.

[5] Although there was mediation, these problems were not resolved. Ms Leckie lodged her personal grievance claims with the Authority in May 2019. Alliance then lodged its statement in reply. During a case management conference in August 2019, Ms Leckie's claim was amended to include reinstatement.

[6] The issues are:

(a) Was Ms Leckie disadvantaged by being suspended?

(b) If yes, was Alliance's suspension decision justified?

(c) Did Alliance dismiss Ms Leckie?

(d) If yes, can Alliance justify dismissal?

(e) If Ms Leckie has any personal grievance:

i. Should reinstatement be ordered?

ii. Should compensation be ordered?

iii. Should reimbursement be ordered?

iv. Should the nature and extent of remedies be reduced?

Was Ms Leckie disadvantaged by being suspended?

[7] There is an applicable Code of Conduct. It says that if an allegation of misconduct is made against an employee, the company "shall" do various things. To paraphrase, the company is to advise the employee about the allegation and if it is considered serious, advise that it will be investigated and that the employee has a right to be represented, investigate the allegation, formally meet with the employee and give the opportunity to respond and establish whether the alleged misconduct occurred. The Code goes on to say that the employee may be suspended with or without pay while an allegation of misconduct is investigated.

[8] Ms Leckie's employment was suspended on 21 February around 10 am. Ms Leckie did not perform any work after then although she was on normal pay until 26 February 2018.

[9] Alliance says[1] that Ms Leckie must show that her employment or one or more of the conditions of her employment was affected to her disadvantage before the statutory test of justification for the decision applies. Alliance says that there is no evidence of disadvantage from Ms Leckie or her witnesses.

[10] Ms Leckie says she was "shocked", retrieved her belongings and was driven home by an administrative employee, after being told that she was suspended with pay and was to be escorted off the premises.

[11] While Ms Leckie says she was driven home by an administrative employee on 21 February, Mr Gutsell and Mr Caughey say this happened as part of an earlier, unrelated matter. There is no evidence from this employee. This point does not need to be resolved as it is not suggested that there was any resulting disadvantage and its resolution does not assist me to resolve relevant evidential disputes.

[12] It is undisputed that Ms Leckie was accompanied by Mr Peterson as she left the premises. However, Mr Peterson does not say he was instructed by Alliance to escort Ms Leckie from the premises and Mr Gutsell denies saying that Ms Leckie would be escorted off the premises. Mr Caughey says that they did not say Ms Leckie would be escorted off the premises. There are no contemporaneous notes or records of what happened at the time. When Ms Leckie's grievances were raised, it was not suggested that Ms Leckie was escorted off the premises, but the May 2019 Statement of Problem does include this assertion. Given the evidence, I find that Ms Leckie was not escorted off the premises in a way that might contribute to or cause disadvantage to her in her employment.

[13] Ms Leckie says she was told by Mr Caughey to "…get to the fucking office now." When this was put to Mr Caughey, he said he could not recall what he had said. I find that Mr Caughey used these words when instructing Ms Leckie to go the office. Upstairs, Ms Leckie was directed by others to an adjacent smoko room and was joined there by Mr Peterson a short while later. Soon after, Mr Caughey and Mr Gutsell entered the room. Neither Mr Caughey nor Mr Gutsell suggest in their evidence that Ms Leckie was alerted to suspension as a possibility before Mr Gutsell told her she was suspended. Neither Mr Caughey nor Mr Gutsell suggest in evidence that anything was said to Ms Leckie about

[1] I am referred to *Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand Ltd* (1989) 2 NZILR 883 (LC) and to the statutory definition of a disadvantage personal grievance.

the reasons for her suspension at the time, other than saying they would undertake an investigation. Ms Leckie says she was told she was suspended while Mr Caughey and Mr Gutsell investigated what had happened between her and Ms White. There is no reason to doubt this evidence. Ms Leckie says, correctly, that Alliance did not provide her with any written correspondence confirming the decision to suspend or the reasons for it. In short, Ms Leckie was excluded from her work a short while after being told to "get to the fucking office now". Given that context, I accept Ms Leckie's evidence that she was shocked, very upset and saddened by her suspension. I find that these reactions establish that Ms Leckie's employment or a condition of her employment was affected to her disadvantage by the suspension decision. Alliance must establish that its decision was justifiable.

Was Alliance's suspension decision justified?

[14] The statutory test is whether Alliance's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the suspension.

[15] Alliance is a long-standing, large enterprise operating across a number of sites, experienced in dealing with employment relationship issues such as suspension in the context of alleged misconduct. It has sufficient resources for "…maintaining high standards of employment, ensuring …fair dealings with employees…"[2]

[16] Before the Authority, Alliance referred to the workplace health and safety risks, Ms Leckie's state of agitation, the need to diffuse the situation between Ms Leckie and Ms White, the inability to have them working together in the same situation and Mr Caughey's information that Ms Leckie was "verbally abusive" towards and had "threatened" Ms White. None of these concerns was raised with Ms Leckie and she did not have a reasonable opportunity to respond to the concerns before being told that she was suspended.

[17] There was no immediate health and safety risk or other circumstance which might have affected Mr Gutsell's ability to raise these concerns and give Ms Leckie an opportunity to respond before deciding to suspend Ms Leckie.

[2] Employee Information Handbook 2017 – 2018 Season, p 14.

[18] The failure to raise these concerns with Ms Leckie and give her an opportunity to respond are not minor process defects. The requirements are central to the statutory test of justification and more broadly to the maintenance of fair dealing and good faith in the employment relationship.

[19] The situation differs from *Gazeley v Oceania Group (NZ) Ltd*[3] where the Authority considered suspension was inevitable due to unusual circumstances, whatever might have been said by the employee if she had been consulted, finding that the circumstances did not require consultation. The present case is not one of the relatively rare cases where the employer is justified in deciding unilaterally to suspend without advice to or input from the affected employee.[4]

[20] Ms Leckie and Mr Peterson did not dispute matters when Mr Gutsell told Ms Leckie that she was suspended. As explained above, Ms Leckie just left the premises accompanied by Mr Peterson. The absence of any protest by them at the time is not a factor which assists Alliance. Alliance simply announced the suspension without allowing an opportunity for Ms Leckie to respond. The argument that Ms Leckie breached an obligation to be responsive, having been told of the decision, lacks substance. I find that Ms Leckie has a personal grievance in that her employment, or her conditions of employment, were affected to her disadvantage by Alliance's unjustified action in suspending her.

Did Alliance dismiss Ms Leckie?

[21] Alliance asked others present in the work area to write an account of the incident between Ms Leckie and Ms White. There are statements dated 21 February from Karen Munro and Ianeta Fuatavia. There is a statement from Mr Caughey dated 21 February. At some point Ms White wrote an undated statement describing her recollection of events of Wednesday 21 February. There is also a letter dated 21 February from Mr Gutsell setting a meeting for Thursday 22 February to investigate allegations of "Threatening, Intimidating and abusing an employee" and "Deliberately or recklessly causing economic loss to the company". The latter allegation is based on the claim that Ms Leckie forcefully pushed a box of kidneys along the belt to the point it fell onto the floor. The kidneys were then condemned.

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[3] [2012] NZERA Christchurch 178.
[4] *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [38]. *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)* [2000] 686 (EmpC) also cites *Graham v Airways Corp of NZ Ltd* [2005] 1 ERNZ 587.

Following this, Ms Leckie is alleged to have verbally abused and threatened Ms White. The letter refers to the plant handbook which categorises both allegations as types of serious misconduct which may result in disciplinary action including dismissal. It says that Ms Leckie's employee profile with her disciplinary record and "witness statements gathered" are attached. Ms Leckie is strongly advised to obtain representation for the meeting.

[22] Mr Gutsell says in his prepared evidence that the two workers' statements were provided to Ms Leckie. He also states that the letter and attachments were "provided to Briar [Leckie] and Grant [Pearsey] by me down in the Union office" prior to the meeting. That repeats the assertion in the letter responding to the grievance and the Statement in Reply. He also states that he always makes two copies of such material and has never started a meeting without providing the material beforehand. When questioned, Mr Gutsell repeated that he "did give two copies to Grant." He went on to qualify that, saying that he would have put the documents in the Union pigeon hole prior to the arranged 22 February meeting. Ms Leckie says statements were used by Mr Gutsell when they met but had not been provided to her beforehand. I put this dispute to one side at present, as it only needs to be resolved if Alliance is found to have dismissed Ms Leckie. When questioned, Mr Gutsell said that that he remembers giving a copy of relevant documents to Mr Pearsey and Ms Leckie.

[23] Mr Gutsell sent an email to Ms Leckie at 7.38 am on 22 February about meeting that day, advising her that she should attend at 10.30 am to see the Union before the 11 am meeting. The meeting did not proceed. There were several calls between Mr Gutsell and Ms Leckie that day with Mr Gutsell advising that the meeting would be on Tuesday the following week. The 21 February letter and statements were not referred to in the email, the phone calls or a second email dated 25 February. There was also a txt exchange between Ms Leckie and Mr Gutsell on 25 February which did not mention the 21 February letter and attachments.

[24] Present on 26 February were Ms Leckie, Mr Pearsey, Mr Peterson, Mr Caughey and Mr Gutsell.

[25] Ms Leckie and Mr Peterson did not make any notes of the exchanges and it is not suggested that Mr Pearsey did either. Mr Gutsell produced hand-written notes which he says he made during the meeting. Ms Leckie says that Mr Gutsell took no notes during the meeting. Mr Peterson says he does not recall either Mr Gutsell or Mr Caughey taking notes

during the meeting. Mr Caughey says he recalls that Mr Gutsell used his investigation notebook to take notes during the meeting. There is also a typed record of the meeting which Mr Gutsell says was prepared by him, together with a letter dated 26 February. The letter is in the name of Mr Caughey. When questioned, Mr Gutsell acknowledged that he could not say that the typed notes were done on 26 February. Mr Gutsell said that he could not type up the letter and give it to Ms Leckie on the day as she left. There is no evidence that the 26 February letter was delivered to Ms Leckie, Mr Pearsey or Mr Peterson. It was not seen by Ms Leckie until it was provided to her counsel. In light of the uncertainty about when the typed notes and the letter were generated, those documents cannot be regarded as contemporaneous accounts of what happened on 26 February.

[26] The handwritten notes were not disclosed with other file material released to Ms Leckie's counsel. It is possible but not inherently likely that the handwritten notes were created later. In light of the text and layout of the handwritten notes, I find they were written on 26 February during the meeting (including an adjournment) with Ms Leckie. It lists the attendees below the date. There are several bullet pointed lines reflecting comments by Mr Pearsey during the meeting. The notation is very brief and would not have interrupted the meeting so it is unsurprising that Mr Peterson does not recall that Mr Gutsell made some notes. Although there is a dispute which side left the room, it is common ground that the meeting adjourned for a period and then resumed. The last bullet point reads as a scripted and edited statement to be read or to guide what would be said at the resumption of a disciplinary meeting. It reads:

> *With the evidence Presented. ~~We~~ We have a witness that confirms you were responsible for the box of kidneys falling onto the ground. We also have conclusive evidence ~~by~~ via statement that you verbally abused & threatened the other employee in question -*
>
> *due to the seriousness of these combined proven allegations, there is only one course of action to follow.*
>
> *Preliminary ~~decision~~: Preliminary Decision.*
>
> *~~Dis~~ Dismissal,#*
>
> **We have considered your submission but*[5]

[5] Lines indicate the phrase to be placed immediately before "due".

#[6]We will give you ~~till 10 am~~ the opportunity to reply to this decision before it becomes final on ^by Tuesday 27th Feb 10 am

[27] Mr Gutsell and Mr Caughey both say that Mr Gutsell read out what had been prepared by him. They say that Ms Leckie left immediately without anything further being said by them.

[28] Ms Leckie says that Mr Gutsell told her he did not believe her statements and that she was being dismissed. Ms Leckie says that Mr Gutsell did not read from any written notes but told her she was dismissed and had until 10 am the next day to come in and resign or else she was "sacked". Mr Peterson's evidence is that Mr Gutsell said that they had decided that Ms Leckie had been in the situation before, it was a serious charge and they would give her the opportunity to resign or she would be dismissed.

[29] Mr Peterson says that it is a common practice by the employer to tell employees they can resign or be dismissed, telling them they are helping them by not being sacked and they can reapply in the next season. Mr Gutsell says that this is not something the company does. He says it is something initiated by the Union so the worker does not have a dismissal on their record. However, my task is solely to determine what happened in this matter, rather than more generally.

[30] There is no reason to doubt the evidence of Mr Gutsell and Mr Caughey that during the adjournment they tried but were unable to contact Mr Smith, Alliance's group legal counsel.

[31] If a manager during an adjournment scripts something to be said when a meeting resumes, it is likely that those words would be included in what is said by the manager when the meeting resumes. Mr Gutsell did not check his script with Mr Smith but that would not have caused an experienced personnel manager not to say what had been prepared. I find that Mr Gutsell used the words recorded in his handwritten notes when speaking to Ms Leckie after the adjournment. I will return to whether anything else was said shortly. The meeting ended a short while later.

[32] It is common ground that Mr Gutsell phoned Ms Leckie on 26 February after the meeting ended. Ms Leckie says that Mr Gutsell rang to ask when she would clear out her

[6] # A line between these points line indicates the phrase to be placed after "Preliminary Decision. Dismissal,"

locker. Ms Leckie said she could not and Mr Gutsell said he would ask Paul Brown (former Union delegate) to clear it out. However, Mr Gutsell's evidence is that he rang to check up on Ms Leckie. There is a distant family connection. He says he was concerned about Ms Leckie's welfare, as she looked upset when she left the meeting room. Mr Gutsell ringing to ask Ms Leckie about clearing out her locker would support Ms Leckie's account that Mr Gutsell had terminated her employment before the meeting ended. However, the only evidence about the phone call is that of Ms Leckie and Mr Gutsell. I see no proper basis on which I can prefer Ms Leckie's evidence over that of Mr Gutsell.

[33] Ms Leckie returned to the plant the next day before 10.00 am. Mr Ngu was in his office when he saw Ms Leckie. In his statement, Mr Ngu says he was aware that there was a serious misconduct investigation regarding Ms Leckie, but he did not know where the investigation process had got to then. When questioned however, Mr Ngu said that he knew that Mr Gutsell had given Ms Leckie a preliminary decision and he was aware that she "had until 10.00 am". His evidence is that this was the "usual time". It is common ground that Mr Ngu asked Ms Leckie if he could help. Ms Leckie says that she said to Mr Ngu that she had been told to resign. Mr Ngu says that Ms Leckie advised him that she was resigning and requested the paperwork so she could complete the process of voluntarily resigning her employment. Mr Ngu went to get a "TERMINATION ADVICE" form. He could not locate a form so he phoned Mr Gutsell, who was not at work at the time, but who told him where the forms were located. There is no evidence to suggest that Mr Gutsell was surprised by Ms Leckie's "reply" requiring that form. I note that Mr Gutsell had told Ms Leckie her "opportunity to reply to this decision before it becomes final" expired at a time when he knew he would not be at work. Mr Gutsell had not advised Ms Leckie that he would not be at work. No arrangement was made for Mr Caughey to receive a "reply" from Ms Leckie. All this supports the view that Alliance only expected Ms Leckie to "reply" as she did.

[34] When Mr Ngu located the form, there was an exchange between him and Ms Leckie with them both completing parts of the form. Her name and signature were completed by Ms Leckie. Mr Ngu circled that keys were returned and signed as manager. Ms Leckie's evidence is that she wrote the date but Mr Ngu's evidence is that the date looks like his writing. Ms Leckie's evidence is that Mr Ngu handed her the form to sign, which she did, but asked him what to tick for the reason why she was leaving as she was unsure. Mr Ngu said he would tick "Voluntary". Ms Leckie's evidence is that Mr Ngu not her ticked the box

alongside “Voluntary” on the form. Mr Ngu’s evidence is that he cannot recall ticking the box. I find that he did, after Ms Leckie gave the form back to him. Ms Leckie then left. Her evidence is that Mr Ngu told her to apply next year. Mr Ngu did not dispute that so I accept that evidence.

[35] Mr Ngu was specifically asked about his understanding of the resignation. In response, he said that it was because of the disciplinary matter going on, that “She was going to be dismissed and there was that other option.” In the context of the question, Mr Ngu was referring to resignation as the “other option”. Mr Ngu’s knowledge that Ms Leckie had until 10.00 am before she was “going to be dismissed” and “there was that other option” must have come from being briefed by Mr Gutsell or because Ms Leckie told him that as part of requesting the paperwork.

[36] Ms Leckie returned again to the workplace the following day when she asked Mr Gutsell for a copy of the statements gathered by him. Mr Gutsell gave her statements. It is not suggested that anything was said by Ms Leckie or Mr Gutsell relevant to the present issue.

[37] Returning to the meeting on the 26th, Mr Gutsell’s evidence is that he did not recall Mr Pearsey or Mr Peterson suggesting to him that Ms Leckie should be allowed an opportunity to resign. Mr Peterson’s evidence is that it was Mr Gutsell who said that they would give Ms Leckie an opportunity to resign or she would be dismissed. Mr Peterson said that he had not been involved in a Union initiated resignation in the face of a disciplinary process. He also said that he did not recall any discussion with Mr Pearsey after the meeting about Ms Leckie’s best option and that while he did not recall advising Ms Leckie to resign, that “could be right”, meaning he might have said this to Ms Leckie after the meeting. In summary, there is no evidence from Mr Gutsell or Mr Caughey that the Union initiated a discussion with Alliance that Ms Leckie be given an opportunity to resign in the face of Mr Gutsell’s announced “Preliminary Decision”. Mr Peterson’s evidence is that Mr Gutsell said they would give her that opportunity. While the handwritten script read by Mr Gutsell refers to “the opportunity to reply to this decision”, it does not specify what that opportunity was. I will return to this evidential dispute shortly.

[38] I am referred to *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[7] for the applicable legal principles. The Court affirmed the view that "dismissal" covers cases where in substance the employer has dismissed a worker although technically there has been a resignation, expressly approving a line of cases where the Arbitration Court had held that dismissal includes constructive dismissal. In *Wellington Hotel Employees IUOW re Hills v Napier Cosmopolitan Club Inc*[8] the Arbitration Court adopted and applied the principle expressed in another case[9] that "…if an employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."

[39] Counsel cited several cases[10] where the employee resigned during a disciplinary process. In *Riddle* the worker resigned before the employer had made a final decision on disciplinary matters although it had indicated to the worker its preliminary view that the alleged behaviour had occurred, it amounted to serious misconduct and dismissal was the appropriate sanction. In the meeting, the worker was told by the CEO that it was the company's intention to terminate her employment. She then handed the CEO a letter of resignation saying that she had no option but to resign from "this toxic environment" by giving notice. The employer later emailed her, saying it did not accept her resignation. Despite the resignation, the employer completed its disciplinary investigation by confirming its decision to summarily dismiss the worker for serious misconduct. The Authority found that the dismissal was separate from the unilateral action of the worker to resign. There is no suggestion that the employer played any part in the worker's resignation, so it did not amount to a dismissal.

[40] In *A v R*, following an investigation process and a detailed report, the employer wrote to the worker saying that he accepted the investigation findings about an incident, that it constituted a breach amounting to serious misconduct, that the employer had made a preliminary decision to terminate the employment but invited a final submission on "this proposed penalty". There was then a meeting and following an adjournment, the employer was noted as saying "Therefore it is my intention to confirm my preliminary decision and to dismiss". There was a further adjournment as requested by the worker's union representative, following which the worker sought to resign on notice which the employer accepted. There

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[7] [1985] 2 NZLR 372 (CA)
[8] [1982] ACJ 343
[9] *Clerical Workers Union v Barraud and Abraham Limited* 13 M.C.D. 93, 1970 B.A. 347
[10] *Riddle v Hilton Haulage Ltd Partnership* [2019] NZERA 103 and *A v R* [2016] NZERA Wellington 24

was then an arrangement to pay out the notice period. The following day, the employer wrote noting the resignation and saying that "…my final decision would have been to proceed with termination of your employment." Later, defending the personal grievance claim, the employer argued that there was no dismissal. However, the Authority held that the employer's words confirming the preliminary decision "…*and to dismiss*" which preceded the resignation arrangement constituted the dismissal. The Authority went on to say that "If I were wrong about the …actual dismissal, I would find his words were couched in such a manner as to convey to A that he was being given the choice between dismissal and resignation." The Authority referred to *Commissioner of Police v Hawkins*[11] where the Court of Appeal expressly approved the Employment Court's view that the focus of constructive dismissal claims is on the employee's motivation for resignation and whether it arises from a breach of duty or other action by the employer and whether resignation was reasonably foreseeable.

[41] I need to consider what motivated Ms Leckie to return to the workplace on 27 February to sign the TERMINATION ADVICE form. Ms Leckie did not need to do anything unless intending to "reply to this decision before it becomes final on ^by Tuesday 27th Feb 10 am". Ms Leckie's "reply" took the form of telling Mr Ngu that she was resigning and signing the form which was partly completed by him. Ms Leckie's evidence is that she said to him that she had been told by Mr Gutsell to resign before 10.00 am or else "sacked" would be on her work record. Mr Ngu disputes that Ms Leckie told her that she had been advised to resign and says that she appeared entirely comfortable with her decision to resign. It is not necessary to resolve the disputed evidence of demeanour. In Mr Ngu's words, resignation was the "other option" available to Ms Leckie. Mr Ngu knew that either because Mr Gutsell told him or because Ms Leckie said something to that effect.

[42] Turning to consider Ms Leckie's position, there is no reason to think she had contemplated resignation before the meeting with Mr Gutsell. Ms Leckie's evidence is that she had sought a higher graded job. On Ms Leckie's account, those attempts were frustrated by others. The sole point for present purposes is that Ms Leckie persisted with her attempts to advance her skills and grade of work. Before the incident with Ms White, that morning Ms Leckie had asked in the future to be separated from Ms White. These points indicate some commitment to the work opportunities available at Alliance. There is no substantive

[11] [2009] 3 NZLR 381 (CA)

reason to think that Ms Leckie's situation was the same as the young workers of whom Mr Ngu says resignation was relatively common after a brief period of working at the plant. Ms Leckie wrote an account of the incident which is dated "Wednesday 21st". It reflects her contemporaneous account of events, written shortly after her suspension. It also references her attempts to obtain higher graded work and her request to be separated from Ms White. The account does not indicate that Ms Leckie might resign from her employment. I find that Ms Leckie's motivation to return to the workplace on 27 February arose from or after the meeting with Mr Gutsell the day before.

[43] Alliance summonsed Mr Pearsey to appear on 26 February 2020 and again on 16 March 2020, without success. Alliance does not say that Mr Pearsey negotiated with Mr Gutsell to treat an actual or imminent dismissal as a resignation, such as happened in *A v R*. However, Alliance says that this is only ever a process initiated by the Union, which suggests the possibility that Ms Leckie resigned on advice from the Union. I must determine relevant disputes without the benefit of Mr Pearsey's evidence.

[44] The significant dispute, described above, is Mr Peterson's evidence that Mr Gutsell told Ms Leckie that they would give her an opportunity to resign or she would be dismissed, which is denied by Mr Gutsell. Mr Caughey in evidence thought it had not been said, but qualified that by saying he could not recall and was not saying that it was not said. Mr Peterson impressed as a reliable witness without a direct interest in the outcome. His evidence sits comfortably with Ms Leckie's actions the next day and her evidence of what she said the next day to Mr Ngu. It explains Mr Ngu's knowledge of her resignation as the "other option".

[45] Accordingly, I find that during the 26 February meeting Alliance gave Ms Leckie the option of resigning or being dismissed. I find that her resignation the next day was her exercising that option. Alliance by its words strongly induced Ms Leckie to proffer a resignation. I find that the termination of the employment was in reality a dismissal.

Can Alliance justify dismissal?

[46] The test is whether Alliance's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. In applying this test I must consider the factors identified in s 103A (3) and (4) of the Act.

[47] I adopt what I said earlier about the resources available to Alliance. It was obliged to conduct a full and fair investigation of the alleged misconduct before deciding to dismiss Ms Leckie.

[48] Alliance obtained written statements from some of the workers who were present, Ms Munro and Ms Fuatavai. Mr Caughey provided a statement, which included his report that Ms Leckie and Ms White blamed the other person when he asked them what had happened. There is an undated statement from Ms White, but it is unclear[12] whether that was written as a response to the disciplinary investigation against her initiated by letter dated 27 February 2018, or earlier in connection with Ms Leckie's investigation. Ms Leckie presented a statement at the meeting, but it does not refer to the 21 February letter or the other statements. Mr Gutsell concluded that the allegation that Ms Leckie deliberately or recklessly caused economic loss to Alliance was proven. Mr Gutsell's script states that "We have a witness that confirms you were responsible for the box of kidneys falling onto the ground." Ms Munro's statement describes it as "The pushing of the kidney box back and forth between each other" without saying who directly was responsible for the box falling onto the ground. Ms Fuatavai states that Ms White pushed the box with force, that Ms Leckie pushed it back with force, Ms White pushed it back with force and Ms Leckie pushed the box back again, without any description of the force of the last push. The statement then reads "…this time for some reason it fell off onto the ground." Ms Leckie and Ms White in their statements blame each other for causing the box to fall onto the ground. Alliance confirmed in evidence that the scripted comment was a reference to Ms Fuatavai's statement. The investigation which only comprised considering these statements was not sufficient to give Alliance reasonable grounds to conclude that Ms Fuatavai had confirmed that Ms Leckie was responsible for the box of kidneys falling onto the ground. I find that Alliance did not sufficiently investigate this allegation.

[49] Alliance came to the view it had conclusive evidence that Ms Leckie had verbally abused and threatened Ms White. Ms Munro's statement opens with "Yelling + screaming between Briar and Kennedy" without describing it as Ms Leckie being abusive and threatening. Ms Fuatavai's account does not mention this aspect. Ms White's account is that "Briar threatened me with the result of Bruce sending her to the office". Ms Leckie says "… she was yelling abuse at me so I retaliated by yelling abuse back…" None of this is the

[12] Despite being served with a summons, Ms White did not appear at the Investigation Meeting.

"conclusive evidence" relied on by Alliance. Mr Caughey in his statement does not mention whether Ms White was "yelling abuse" at Ms Leckie. It reads "…Briar interrupted and called Kennedy some names, that being slut, nothing but a slut, I will get you bitch, at the end of the day I will get you when you get back of this place." While Alliance might have been entitled to prefer Mr Caughey's account of what Ms Leckie had said, it should still have sought Ms Munro's and Ms Fuatavai's response to Mr Caughey's account and more fully investigated the context at the time Ms Leckie "interrupted" Ms White. I find that Alliance did not sufficiently investigate this allegation.

[50] In the letter dated 5 April 2018, Ms Leckie said she had no written allegations and was not given any witness statements before the 26 February 2018 meeting. Alliance responded that Ms Leckie and her representative were provided with a letter setting out the allegations and copies of witness statements prior to the meeting. Ms Leckie's statement of problem repeats her assertions. Alliance in its reply said that prior to the meeting, Ms Leckie and her representative were given copies of the witness statements. In his prepared evidence, Mr Gutsell said that the allegation letter and witness statements were provided to Ms Leckie and Mr Pearsey by him down in the Union office prior to the meeting. He says that he remembers giving a copy of the relevant documents to Mr Pearsey and Ms Leckie. However, when questioned, Mr Gutsell said that he put the documents in the Union pigeon hole. He accepted that this must have been before the time initially set for the meeting, which was on 22 February meeting. Mr Caughey had no direct knowledge of these arrangements.

[51] I find that Ms Leckie did not obtain the 21 February letter setting out the allegations until after the dismissal. There is no sufficient reason to doubt her evidence to this effect. There is no evidence to suggest that Mr Pearsey had the letter or the witness statements with him at the meeting or had shown them to Ms Leckie beforehand. Mr Peterson's evidence is that he was unaware if Ms Leckie had received any documentation when the meeting started. It probably would have been apparent to Mr Peterson if Ms Leckie had received the letter and witness statements, as Mr Pearsey would probably have had that material with him at the meeting. Mr Caughey says that Mr Gutsell read out the allegations in the 21 February letter "word for word". However, Mr Gutsell says that he asked at the start of the meeting if he needed to read out the allegation in the letter and was told by Ms Leckie that there was no need for him to read them out. I note that the evidence of Mr Gutsell and Mr Caughey on this point differs. Mr Gutsell's notes do not assist. As Ms Leckie did not see the letter until after

the dismissal, it is improbable that she told Mr Gutsell she understood the allegations and they did not need to be read. I therefore do not accept the differing evidence of Mr Gutsell or Mr Caughey on this point. I am left with Ms Leckie's evidence that Mr Gutsell placed witness statements on the table in front of her when the meeting started. I accept that Ms Leckie saw them then for the first time. This explains the absence of reference in Ms Leckie's statement to the parts of the witness statements which support her account.

[52] There are several possibilities that might explain why Ms Leckie had not seen the documents before the meeting. Mr Pearsey might have received the letter and statements without disclosing them or canvassing them with Ms Leckie before 26 February and without Mr Peterson being aware of their receipt. It is not inherently likely that a Union representative would do this, even taking account of the difficulties which appear to have existed between Mr Pearsey and Ms Leckie. Mr Gutsell might not have put the material in the Union pigeon hole but first have produced witness statements at the start of the meeting, contrary to his evidence as to his practice and in this specific case. However, it is not inherently likely that someone in Mr Gutsell's position would act this way. Material left in a pigeon hole might not have found its way to Mr Pearsey. That impresses as the more likely explanation. I find it is what happened in this case.

[53] The statutory test requires Alliance to establish that it raised concerns with Ms Leckie and gave her a reasonable opportunity to respond to the concerns before dismissing her. Additionally, there was a good faith obligation which required Alliance to provide Ms Leckie with access to relevant information and an opportunity to comment on the information before making a decision to dismiss her. On the basis that Mr Gutsell left the letter and witness statements in the Union pigeon hole but they were not received by Mr Pearsey so were not available to Ms Leckie prior to the meeting (and prior to dismissal in the case of the allegations letter), I find Alliance did not provide her with access to the relevant information and did not properly raise its concerns and give her a reasonable opportunity to respond before dismissing her.

[54] Alliance did not disclose to Ms Leckie that several other workers were also interviewed about the 21 February incident. Mr Gutsell's evidence is that he did not interview Ms White as part of Ms Leckie's disciplinary investigation. Mr Caughey's evidence is that he had to release Ms White from work for Mr Gutsell to interview, but this

must refer to 27 February as part of the disciplinary investigation for Ms White. Mr Caughey says that he and Mr Gutsell viewed video footage on 21 February but it did not establish who caused the box to fall onto the ground. Ms Leckie was not alerted to these points before the dismissal.

[55] Ms Leckie did not take witness statements with her when the meeting ended. Mr Gutsell gave her the statements on 28 February. Mr Gutsell does not dispute that Ms Leckie asked for the statements and was told to come back at 2.00 pm to pick them up, so I accept Ms Leckie's evidence on that point. Ms Leckie says that the material provided then by Mr Gutsell did not include a statement from Ms Munro. Ms Leckie says she was only able to read the statement from Ms Munro later when file material was provided on counsel's request. Mr Gutsell says that all the statements were provided to Ms Leckie before the meeting. He says that Ms Leckie "…must not have taken them on her way out…" (emphasis added) on the basis that Ms Leckie left behind the copy that had been provided to the Union for her. However, Mr Gutsell does not specifically say that he recalls gathering up Ms Leckie's copies at the end of the meeting in his office. As explained above, I prefer the evidence of Ms Leckie supported by Mr Peterson that Ms Leckie did not have the statements before the meeting. There is no sufficient reason to doubt Ms Leckie's evidence that the statements she received at 2.00 pm did not include Ms Munro's statement so I find that Ms Leckie first saw that statement after it was received by her counsel. That reinforces the finding that Alliance did not provide Ms Leckie with access to relevant information before she was dismissed.

[56] Ms Leckie raises various issues about having to be represented by Mr Pearsey and supported by Mr Peterson rather than by her choice of representative or support person. Ms Leckie is also critical of Mr Pearsey's conduct towards her prior to the meeting. These matters do not add anything material to the finding that Alliance unjustifiably dismissed Ms Leckie so it is not necessary to canvass them specifically.

[57] The meeting was in Mr Gutsell's office. Mr Gutsell and Mr Caughey say they left the office to go to another room to discuss matters. They say they then returned to the room. However, Mr Peterson says he recalls Mr Gutsell asking them to leave the room. It is agreed that the meeting adjourned and then resumed in the same office. In general, it wold be more likely that a manager would remain in their office while the employee and representative

waited elsewhere during an adjournment. I find that Mr Peterson's recollection is correct and that Mr Gutsell's and Mr Caughey's recollection is not. Ms Leckie says she, Mr Pearsey and Mr Peterson were asked to wait in the corridor during the adjournment. However, it was open for them to find somewhere convenient and private to wait. Mr Pearsey and Mr Peterson would have been familiar with the facilities.

[58] Ms Leckie says Mr Gutsell exhibited an unprofessional demeanour in various ways during the meeting. Mr Peterson does not describe Mr Gutsell's demeanour in the same way. Mr Gutsell and Mr Caughey both reject Ms Leckie's assertions. A manager in Mr Gutsell's position is unlikely to conduct themselves in the way claimed by Ms Leckie. In the absence of evidence supporting Ms Leckie's description, I accept Mr Gutsell's and Mr Caughey's evidence on this point. It is not necessary to canvass the evidence more closely.

[59] Ms Leckie says that at the start of the meeting the witness statements were placed on the desk in front of her by Mr Gutsell. As explained above, I find that this was the first point at which Alliance told Ms Leckie that there were statements. Ms Leckie gave Mr Gutsell a statement she had prepared. Her evidence is that Mr Gutsell read the statement, corrected her grammatical mistakes with a smirk, said that the account did not match the accounts in the witness statements, said he had had a gutsful of Ms Leckie and that no one wanted to work with her. Mr Gutsell denies correcting grammatical errors, smirking and saying that he had had a gutsful of her. His evidence is that he treats all investigations as a formal process. I accept that evidence. The alleged conduct would be inconsistent with that approach and there is insufficient evidence to find that Mr Gutsell departed from that approach in this case. Accordingly, I find that Mr Gutsell did not correct Ms Leckie's grammar, smirk or say he had had a gutsful of her.

[60] Mr Gutsell formed the view that a witness "confirms" that Ms Leckie was responsible for the box falling onto the ground and that there was "conclusive evidence" that Ms Leckie abused and threatened Ms White. Mr Gutsell had the witness statements in plenty of time to consider them. Ms Leckie had not had a proper opportunity to respond to the witness statements and Mr Gutsell did nothing to check Ms Leckie's account with others. It would be consistent with the view Mr Gutsell had of the incident for him to say to Ms Leckie that her account did not match the other accounts, so I accept that Mr Gutsell said this. Ms Leckie's

evidence is that this was said just before she was told that she had until the next day. I therefore find that Mr Gutsell said it after the adjournment.

[61] During the meeting, Mr Pearsey told Mr Gutsell that Ms Leckie had earlier on the day of the incident asked to be separated from Ms White. In evidence, Mr Caughey says that he had not refused Ms Leckie's initial request to transfer but left it open at the time for further investigation. However, I prefer Ms Leckie's evidence that Mr Caughey had refused her request at the time. Mr Gutsell's evidence is that after Mr Pearsey mentioned the earlier request, they considered whether Ms Leckie could be relocated to night-shift or to other work, but ruled out both possibilities. The evidence does not establish that there was further inquiry about these possibilities. If Mr Gutsell considered he could rule out the transfer option without investigation, there is no reason to think that Mr Caughey would have left open a possible transfer when Ms Leckie first raised it. However, the lack of adequate consideration about an alternative to dismissal does not add anything of significance to my determination that Alliance's decision to dismiss Ms Leckie was not justifiable.

[62] For the reasons set out above, I find that Alliance's decision to dismiss Ms Leckie was not justifiable.

[63] An additional process problem should be mentioned. The 26 February letter created sometime after the meeting is in the name of Mr Caughey. Mr Gutsell's evidence is that he typed the letter after the meeting but that it was in Mr Caughey's name as the decision maker. However Mr Gutsell also said that "the final decision was mine but at the end of the day running the department was Bruce Caughey's responsibility". Mr Caughey said that he was part of the discussion with Mr Gutsell but that the decision was not his (Mr Caughey's). Mr Caughey was talking about his involvement in the disciplinary meeting and outcome for Ms Leckie on 26 February. Mr Caughey's evidence was that Mr Gutsell's manager advised that the letter be in Mr Caughey's name as the supervisor. The letter was not available to Ms Leckie until after the dismissal, but it would have appeared to Ms Leckie that both Mr Gutsell and Mr Caughey were involved in the decision making, with Mr Gutsell taking the lead. That is consistent with Mr Caughey's evidence that he was part of the discussion. The difficulty for current purposes is that Mr Caughey was closely involved in deciding whether Ms Leckie should be dismissed, largely based on his own account, even though that was

partly disputed. Mr Caughey's involvement undermines whether Alliance genuinely considered Ms Leckie's explanation.

[64] Alliance's failure to properly raise its concerns and give Ms Leckie a reasonable opportunity to respond prior to the dismissal are not minor defects. Adherence to the good faith requirement about access to relevant information and the opportunity to comment on the information before a decision is made is central to fair treatment. Ms Leckie was not afforded the opportunity to rely on Ms Munro's account and not given a proper opportunity to respond to the other statements before the dismissal.

[65] I turn to consider the remedies claimed.

Should compensation be ordered?

[66] Ms Leckie has not claimed separate compensation for hurt feelings, humiliation or lost dignity for the separate grievances of unjustified disadvantage and unjustified dismissal. Ms Leckie says in evidence that she was shocked by her suspension but does not otherwise describe the effect on her of being suspended, nor does she differentiate it from the effect of being dismissed. I will take a global approach to assessing compensation under s 123(c)(1)(i) of the Act.

[67] There is a claim for $40,000.00 compensation under s 123(1)(c)(i) of the Act. Mr Leckie says the financial effects of the dismissal have been terrifying as she was unable to pay even essential bills such as feeding herself, having to rely on family and friends and borrowing money. Ms Leckie found some replacement work periodically from August 2018 but remains without a permanent job. This work and a benefit have helped her catch up with her bills but Ms Leckie is still in debt. I accept Ms Leckie's evidence that her financial circumstances have contributed to her mental stress.

[68] Ms Leckie's evidence is that she sought medical assistance on many occasions for the physical manifestations and mental distress after losing her job. Ms Leckie says she is on medication for these effects. There is no independent or medical evidence to support Ms Leckie's evidence. While there is no reason to doubt Ms Leckie's description of her experience, I treat the evidence as falling short of establishing a medical illness caused by the personal grievances. Putting that aside, the effects described by Ms Leckie are broad and

their extent is significant. Based on her evidence, the humiliation, lost dignity and injury to feelings suffered by Ms Leckie are restored by an award of $20,000.00 compensation.

Should reimbursement be ordered?

[69] There is a claim for lost wages from the date of dismissal to the date of the investigation meeting. The Act permits the Authority in settling the grievance to provide for the reimbursement of the whole or any part of the wages lost by the employee as a result of the grievance. If the Authority determines that an employee has lost remuneration as a result of the grievance, I must order the payment of the lesser of the lost remuneration or three months' ordinary time remuneration. There is discretion to order a greater sum for lost remuneration.

[70] I find that Ms Leckie has lost remuneration from the date of dismissal until the date of the Investigation Meeting and is entitled to compensation to cover that loss. The evidence shows that Ms Leckie mitigated her loss and obtained some work intermittently. The earnings from this other employment must be taken into account as part of assessing the compensable loss. However, I am not in a position to properly assess the loss. Ms Leckie's earnings at Alliance were variable with uncertain start and end dates for the season and variability of stock availability during the season. The IRD information which was produced during the hearing demonstrates the variability of Ms Leckie's earnings at Alliance during 2016, 2017 and 2018 prior to the dismissal. Using an averaging process as suggested by counsel for Ms Leckie involves a risk that calculations are based on more than the actual loss. Alliance will now know the season dates and stock availability issues from February 2018 until the date of the Investigation Meeting. As requested by counsel for Alliance I reserve the assessment of lost remuneration for further evidence and submission. The Authority will arrange a case management conference with counsel.

Should reinstatement be ordered?

[71] At the date of the dismissal in February 2018, s 125 provided that if the remedies sought include reinstatement, the Authority may provide for reinstatement if it is practicable and reasonable to do so. However, by an amendment effective from 12 December 2018, if the remedies sought include reinstatement, the Authority must provide for reinstatement wherever practicable and reasonable irrespective of whether other remedies are provided.

Ms Leckie's claim was lodged in May 2019 seeking compensation but Ms Leckie amended her claim in August 2019 to include an order for reinstatement. I must apply s 125 in its present form.

[72] I turn to whether reinstatement is practicable and reasonable. Alliance accepts that reinstatement is possible, but mere possibility is not sufficient to engage s 125. Reinstatement must be feasible and capable of being carried out in action with the potential for a successful renewed employment relationship. It includes a broad inquiry into the equities of the parties' cases, balancing their interests and the justice of their cases. [13]

[73] An employer like Alliance should be capable of managing the re-integration of an employee such as Ms Leckie who had been unjustifiably dismissed following an incident such as occurred on 21 February 2018. I note that Ms White is no longer employed at the plant, Mr Caughey is a supervisor in a different area and Mr Gutsell is in a different role. Other employees who gave evidence did not exhibit any opposition to Ms Leckie's possible return.

[74] Ms Leckie was regarded by management as a good worker for the most part. Alliance referred to several other situations where it says there had been difficulties between Ms Leckie and other workers. However, the evidence falls short of establishing fault on the part of Ms Leckie in these situations so as to affect the question of practicability. Overall, I find that reinstatement is practicable.

[75] Turing to reasonableness, there is a minor point about delay. By December 2018 Ms Leckie could have lodged her personal grievance claim seeking reinstatement. Reinstatement was not sought until August 2019. More significantly, Ms Leckie had received warnings in May 2016 and again in April 2017 regarding absenteeism. The second letter says it is a final warning to remain in force for two years. In August 2017 Ms Leckie received a further final warning for an unrelated and different kind of matter. The August 2017 warning was expressed to remain in force for two years. The Code says that the validity of final warnings lapses after two years. Neither final warning was subject to a challenge by way of personal grievance. At the time of the incident which led to her dismissal, Ms Leckie had two final warnings which must be treated as valid. While these were for unrelated matters, Ms Leckie's disciplinary history must be regarded as a factor which significantly undermines

[13] *Hong v Auckland Transport* [2019] NZEmpC 54.

the potential for a successful renewal of the employment relationship. I conclude that it is not reasonable to reinstate Ms Leckie.

[76] I find that Ms Leckie cannot rely on s 125 to make reinstatement the primary remedy. Assuming that reinstatement is nonetheless available as a discretionary remedy, I would decline to order reinstatement for the above reasons.

Should the nature and extent of remedies be reduced?

[77] In deciding the nature and extent of remedies to be provided I must consider the extent to which Ms Leckie's actions contributed towards to the situation that gave rise to the personal grievances and if those actions so require reduce the remedies that would otherwise have been awarded. In a recent case[14] the Employment Court summarised the approach. I must determine whether the employee's conduct was culpable or blameworthy, whether it created or contributed to the situation giving rise to the dismissal/disadvantage, to what extent and finally whether reduction should be applied to all remedies.

[78] Ms Leckie called Ms White a "slut" and swore at her. I find that Ms Leckie told Ms White that she would get her after work in the way which Mr Caughey recorded in his note. Mr Caughey in evidence describes Ms Leckie as having a history of "arcing up" by which he meant reacting with angry words to situations which developed. The two women had been friendly, but tension had developed between them. It was not suggested that Ms Leckie had ever been physically aggressive. There is no reason to doubt Ms Leckie's evidence that these things were said to Ms White in response to Ms White's behaviour, deliberately overloading the kidney box and forcefully pushing it towards Ms Leckie to aggravate Ms Leckie. They need to be understood in this context of friendship but tension. However, it was blameworthy conduct by Ms Leckie that contributed to the situation for both the suspension and the dismissal.

[79] There is a dispute in the evidence about whether Ms Leckie breached procedure by pushing the box back along the rollers towards Ms White. Alliance says that the proper procedure is for the person at the scales (Ms Leckie) to remove product to bring it to the correct weight, rather than pushing back to the person who overloaded it for them to remove product. The evidence for Ms Leckie is that the trainer (Ms Leckie) can get the trainee

[14] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190

(Ms White) to remove product, as part of learning to judge how full a correctly loaded box is. That could involve pushing the box back towards the trainee's work station. While there is no reason to doubt the evidence for Ms Leckie about training, that is not why Ms Leckie pushed the box back towards Ms White. This was not a situation where the trainer used a learning opportunity to improve the trainee's judgment about how much product should be loaded into the box. There is no reason to doubt Ms Leckie's evidence about the weight of the box. Ms White deliberately overloaded the box, well in excess of the target weight. It was not a training situation. I therefore accept Alliance's view that Ms Leckie did not comply with procedure.

[80] The additional element is that Ms Leckie's conduct in pushing the box back towards Ms White on the second occasion contributed to the box falling off the rails, resulting in product wastage and economic loss for Alliance. Recklessly causing economic loss is listed in the Code of Conduct as a form of serious misconduct for which an employee may be dismissed. Considering the evidence now (and the information available to Alliance at the time) I find that Ms Leckie and Ms White contributed in a similar measure to the economic loss suffered. Mr Gutsell's evidence is that the financial loss was minor and not a major concern. On 27 February 2018, Alliance initiated a serious misconduct investigation with Ms White referring to the "toing and froing" of the box. While I accept that Ms Leckie's involvement in the "toing and froing" was capable of being regarded as serious misconduct, Ms White's similar involvement did not result in her dismissal or other disciplinary outcome. For present purposes, there is no reason to distinguish between the culpability of Ms White who initiated the "toing and froing" and Ms Leckie who last pushed the box. The point is that involvement in causing the loss, even if "reckless", was not so egregious that dismissal was an inevitable consequence. It is however blameworthy conduct which must be brought to account.

[81] Overall, I find that Ms Leckie's blameworthy conduct contributed to the situation giving rise to both personal grievances. The Employment Court in *Maddigan* referred to an earlier judgment of the Full Court[15] that reductions of 50% should be reserved for exceptional cases and that a reduction of 25% is of particular significance. Ms Leckie's conduct does not come close to being an exceptional case. There had been recent non-workplace issues between Ms Leckie and Ms White which led to Ms White abusing and threatening Ms Leckie

[15] *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2016] ERNZ 628.

at work. The morning of the incident, Ms Leckie asked to be moved to another work area, referring to that work conduct, but Mr Caughey declined that request. A short while later, Ms White started the toing and froing with the box of kidneys. The second time Ms Leckie pushed the box it ended up on the floor. The two women were yelling and swearing at each other. Mr Caughey then arrived, each blamed the other for the box landing on the floor and Ms Leckie then abused and threatened Ms White while Mr Caughey was present. Ms Leckie should not have engaged in the toing and froing of the product which ended with the product on the floor and should not have abused and threatened Ms White. Both actions were in breach of her responsibilities to Alliance but Alliance did not properly investigate so could not justifiably conclude that Ms Leckie's breaches amounted to serious misconduct warranting summary dismissal. Ms Leckie's contribution is more blameworthy than in *Maddigan*. It can be regarded as of particular significance, leading to a 25% reduction in the extent of remedies.

[82] There is no principled reason to distinguish between compensation and reimbursement. I will reduce each award by 25%. As reinstatement is not upheld as a remedy, it is unnecessary to consider how it might be affected by s 124 of the Act.

Conclusion

[83] I find that Ms Leckie has personal grievances against Alliance Group Limited as follows:

(a) Briar Leckie's employment was affected to her disadvantage by an unjustified action by Alliance Group Limited.

(b) Briar Leckie was unjustifiably dismissed by Alliance Group Limited.

[84] Alliance Group Limited is to pay Briar Leckie $15,000.00 without deduction, pursuant to s 123(1)(c)(i) of the Act.

[85] Claims for lost remuneration and costs will be reserved. The Authority will arrange a conference to further discuss these points.

Philip Cheyne
Member of the Employment Relations Authority