

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 404  
5618528

BETWEEN                      STEVE LEECH  
   Applicant  
  
A N D                              BIG MAL LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:            Alex Kersjes, Advocate for Applicant  
   Stephen Tee, Counsel for Respondent  
  
Investigation Meeting:     16 and 17 November 2016 at Auckland  
  
Submissions Received:     24 and 29 November 2016 from Applicant  
   25 November 2016 from Respondent  
  
Date of Determination:     9 December 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.      Big Mal Limited (Big Mal) unjustifiably dismissed Mr Leech from his employment.**
- B.      Within 21 days of the date of this determination, Big Mal must settle Mr Leech's personal grievance claims by paying him:**
- (a) \$ 7087.50 gross as reimbursement of lost wages;**
- (b) \$ 10,000 as compensation for humiliation, loss of dignity and injury to his feelings in respect of his unjustifiable dismissal.**
- C.      Costs are reserved.**

**Employment relationship problem**

[1] The respondent, Big Mal Limited (Big Mal) is a property management company based on Auckland's North Shore. Big Mal provides a wide range of property-related services to both commercial and residential customers. Services include fencing, painting, gardening and construction.

[2] The applicant, Mr Steve Leech, was employed by Big Mal as a labourer on 28 October 2015 and signed an individual employment agreement on 8 November 2015. Mr Leech's employment by Big Mal followed a short period of time during which he was contracted to Big Mal through the labour hire company, MH2 Limited.

**Dismissal for serious misconduct**

[3] Mr Leech was dismissed by Big Mal for serious misconduct. The letter of dismissal dated 12 February 2016, but not received by Mr Leech until 22 February 2016, from Mr Malcolm Smith, the director of Big Mal gave two grounds for dismissal. First, for a "serious and repeated failure to follow a reasonable instruction" and secondly for actions "which seriously damaged the employer's reputation".

[4] The first ground for dismissal related to an incident with another workmate, Mr Jason Newland, on 9 February 2016 (9 February incident). There had been a heated exchange between Mr Newland and Mr Leech which ultimately led to Mr Leech's dismissal. The letter of dismissal stated that Mr Leech had shown disrespect "to a senior staff member who was put in place to ensure standards were maintained and inability to follow instructions as requested by that senior staff member. Failure to use the correct electrical circuit breaker on spray painting unit."

[5] Mr Smith says that following his investigation, he formed the view that Mr Leech had failed to follow a reasonable instruction by Mr Newland to work in teams of two and had then become abusive towards Mr Newland. This, Mr Smith says was completely unacceptable conduct.

[6] The second ground for dismissal related to work carried out at Super Lot 27 on 28 January 2016 in which property had been damaged following spray painting (Super Lot 27 incident). The dismissal letter states "- deliberate disregard to property when spraying at Superlot 27- overspray onto concrete block work and back of watertanks not

covered; 'Out of sight, out of mind'. Careless use of spray unit on customers' property in Huapai, resulting in plants covered in paint."

[7] Mr Smith says Mr Leech was careless, had a bad attitude and these factors resulted in an overspray of paint and resulting damage to property. Mr Smith says dismissal for serious misconduct was the action of a fair and reasonable employer in all the circumstances. Mr Leech was dismissed without notice in accordance with clause 13.3 of his employment agreement.

#### **Mr Leech denies serious misconduct**

[8] Mr Leech denies Mr Smith's version of events and denies acting on either occasion in a manner which could have been regarded by a fair and reasonable employer as amounting to serious misconduct.

[9] Mr Leech admits swearing at Mr Newland on 9 February but says this was only after Mr Newland was rude to him, swore, and then refused to listen to his explanation about why the team, which he was in charge of, was not working in pairs. Mr Leech says the swearing was out of frustration and he regretted it.

[10] With regard to the Super Lot 27 incident, Mr Leech says he was not careless. Mr Leech says he had to leave the job early that day as he had a sore back and was not present when the property damage occurred. Mr Leech says the paint provided for the job was not "sprayable" and this was the primary cause of the damage to property at Super Lot 27. No warning was issued to him regarding the Super Lot 27 incident.

[11] Mr Leech says Mr Smith decided following the 9 February incident that Mr Leech was guilty of serious misconduct. Mr Leech says this was without properly hearing his side of the story and without a proper investigation. Mr Leech says he was not deliberately disobeying a reasonable instruction and there was no caution that he may be dismissed at the time of the incident.

[12] Mr Leech says he received a final payslip on 16 February and a letter on 22 February, dated 12 February, from Mr Smith terminating his employment.

[13] Mr Leech says he was not informed he may be dismissed as a result of either the 9 February or the Super Lot 27 incident. Mr Leech says his dismissal was not justified, has affected him very badly and he has taken quite some time to recover and get a new job.

[14] Mr Leech seeks compensation for hurt and humiliation as a result of what he says was a substantively and procedurally unjustified dismissal and also seeks lost wages for the period of time he was out of work.

### **The Authority's investigation**

[15] Mr Leech and his partner, Ms Yvette Dutton, filed written witness statements. Mr Smith, the director of Big Mal filed a witness statement. Mr Newland, Mr Wayne Montgomery, Mr Ben Evans and Mr Noel Reid, all employees of Big Mal, each provided written statements. Each witness affirmed their evidence to be true and correct at the investigation meeting.

[16] The witness statements filed on behalf of the parties were, in my view inadequate. This resulted in an investigation meeting which should have occupied one day only, occupying two days.

[17] As permitted by s.174E of the Employment Relations Act 2000 (the Act), this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The issues**

[18] The issues for determination by the Authority are as follows:

- (a) Was Mr Leech's dismissal by Big Mal substantively justified?;
- (b) Was Mr Leech's dismissal carried out in a procedurally fair manner?;
- (c) If Mr Leech's dismissal was unjustified, is he entitled to remedies? If so, what remedies;
- (d) Did Mr Leech's conduct contribute to his dismissal such as to reduce any remedies awarded by the Authority, pursuant to s.124 of the Act?

**Was Mr Leech's dismissal by Big Mal substantively justified?****Big Mal**

[19] Big Mal employs a number of employees to work on various projects for its customers. The employees who were involved in the matter currently before the Authority were Mr Wayne Godfrey and Mr Jason Newland, Project Managers, Mr Ben Evans and Mr Noel Reid, labourers, and the applicant, Mr Steve Leech, labourer.

[20] As director of Big Mal, Mr Smith is in charge of all jobs. Mr Smith schedules the work and each morning issues instructions to those employees carrying out the work.

**Credibility**

[21] There were conflicts in the evidence between Big Mal's own witnesses as to who took charge, if anybody, when jobs were being carried out.

[22] Mr Smith's evidence with regard to who was in charge on particular jobs and who was ultimately responsible on particular jobs, was inconsistent, vague and often contradicted Big Mal's other witnesses. I prefer the evidence of Mr Leech on this matter.

[23] It is my finding that Mr Smith had ultimate control and responsibility and made the decisions. He allocated work to employees who would undertake the work in small teams. Generally one of the team would be the team leader who oversaw the practical running of the job. How much autonomy and control each team leader had in respect of a job was unclear and varied between witnesses. This lack of clarity, in my view, caused problems and in my view was a key factor in both the 9 February the Super Lot 27 incidents.

[24] There were issues of credibility with Big Mal's witnesses. Mr Smith's evidence was inconsistent and unreliable as was the evidence of the other witnesses for Big Mal, with the exception of Mr Godfrey.

[25] Mr Evans, for example, initially gave evidence at the Authority's investigation meeting that Mr Leech was the aggressor for the duration of the 9 February incident

which he had witnessed in its entirety, and that Mr Newland was a passive recipient of Mr Leech's verbal abuse and swearing. Mr Evans was adamant.

[26] When questioned later, Mr Evans conceded that he had not witnessed the entire exchange between Mr Leech and Mr Newland and had not heard what was said at the outset of the exchange.

[27] Mr Newland was portrayed by Mr Evans as not being aggressive to work with and not being aggressive during the 9 February incident. However, this characterisation contradicted Mr Leech's evidence and the evidence of other of Big Mal's witnesses who recalled other occasions when Mr Newland had had "run- ins" with colleagues.

[28] Mr Newland's evidence was unreliable. Further, Mr Newland was aggressive and defensive during the investigation meeting which contradicted the image that he attempted to portray of himself, that he was not aggressive to work with and was not aggressive during the incident on 9 February.

[29] For these reasons where there were conflicts in the evidence. I prefer the evidence of Mr Leech and on behalf of Mr Leech.

### **Fishing trip**

[30] On 20 January 2016, approximately three months after starting at Big Mal, Mr Leech asked Mr Smith for a "favour" – namely if he could take a day off the following day as it looked good for fishing.

[31] Mr Smith agreed to the request as long as the job Mr Leech was working on was completed. On 20 January 2016, Mr Leech worked for over nine hours to complete the job with another employee, Mr Evans. Mr Leech and Mr Evans were unable to complete the job largely because they ran out of paint stain.

[32] Mr Smith says that if Mr Leech had told him the stain was running out, he would have made sure there was enough for the job. Mr Leech says he and Mr Evans were trying to avoid having to order more stain because it would mean ordering a quantity which would not be needed and this would be a waste. Mr Leech understood this to be in accordance with Mr Smith's instructions.

[33] Mr Smith confirmed that it was not ideal for there to be an over-ordering of stain.

[34] One of the text messages in the text exchange which followed this incident between Mr Smith and Mr Leech indicates a churlish attitude by Mr Smith. The timesheets show that Mr Leech began work on 20 January at 7.00 am and finished at 4.15pm, a total of 9.25 hours. At 4.21pm, Mr Smith texted Mr Leech to say “why not push on a bit tonight and get that fence done?”.

[35] Mr Leech responded:

Mal, have things to do. If it was an hour I would have but I reckon it's about two hours to finish that fence. Top still being cut in. Not sure if there is enough paint to finish that too.

[36] Mr Smith responded:

Okay clearly you and Ben not too interested in getting it done, as you would have called me earlier and sorted more stain. It's okay I will sort and remember the next favour you ask.

[37] Mr Leech took Thursday, 21 January to go fishing as agreed and the day was unpaid. There was no disciplinary meeting held or warning issued to Mr Leech in respect of the matter on 20 January 2016.

[38] However, this event marked, in my view, a change in attitude by Mr Smith towards Mr Leech which ended in Mr Leech's dismissal just over three weeks later on 16 February 2016.

### **Super Lot 27 incident – 25 January 2016**

[39] On 25 January 2016, Mr Leech was working with other workmates including Rhodes at Super Lot 27. The work was spray painting. Mr Leech left the job early as he had a sore back. Later in the day, Mr Leech sent a text to Rhodes asking how they had got on with the job that day. The following is the text exchange between Mr Leech and Rhodes:

Monday 25 January 2016

From Mr Leech: How did you and Ben get on today?

From Rhodes: Got all we needed too, had lil fuck up, over spray went on some chick's car and her house so we have been cleaning it with meths

ha, ha. Its all done now, might have to go back tomorrow and touch it up. How's your back?

From Mr Leech: Oh shit. You got the car clean? Where did you get to? Back not the best but will come in tomorrow and see how it goes. Do we need to order any more paint etc?

From Rhodes: Text you when I'm home – 50 mins.

[40] The text exchange indicates concern and a commitment by Mr Leech with regard to the Super Lot job - not a bad and careless attitude, as it was later described by Mr Smith.

[41] Mr Leech was invited to attend a meeting at 4.30pm on 28 January 2016 to discuss the damage to property at Super Lot 27. Mr Leech was not aware that the meeting was to be a formal meeting and this was confirmed by his partner, Ms Dutton. I accept the evidence of Mr Leech and Ms Dutton.

[42] The minutes of the meeting taken by Mr Smith record Mr Smith saying to Mr Leech “you were in charge Steve. You were responsible ...”. This statement by Mr Smith to Mr Leech is important because, during the Authority's investigation meeting, Mr Smith insisted that Mr Leech was not in charge of any jobs, in particular the job on 9 February.

[43] There was no warning issued to Mr Leech as a result of the damage by the over spraying at Super Lot 27. However, Mr Evans, the colleague with whom Mr Leech had worked until he had to go home with a sore back, was issued with a warning.

### **9 February incident**

[44] The evidence from Mr Newland was that at the toolbox meeting held on the morning of 9 February, Mr Leech had an “attitude” and was being “mouthy and sarcastic”. Mr Godfrey said that Mr Leech “seemed to have an attitude”. No details were provided as to exactly what transpired for each to conclude that Mr Leech had an attitude.

[45] Mr Leech denied having an attitude, being mouthy or sarcastic. Mr Leech says when the issue of safety came up at the toolbox meeting, he commented that he

had seen someone grinding metal the previous week without protection. Mr Leech says he was told to be quiet.

[46] I accept Mr Leech's version of events. He was able to provide specifics about what had occurred at the toolbox meeting whereas neither Mr Godfrey nor Mr Newland were able to do so.

[47] There were conflicts in the evidence about what occurred at the worksite on 9 February. Mr Leech says he understood that he was taking charge of the team that day. This evidence was corroborated by Mr Godfrey.

[48] Mr Leech says upon arrival at the site, he undertook an assessment and felt instead of working in pairs, 3 should work together to clear the retaining wall area before painting started and he would start working in another area. Mr Leech felt, as he was in charge, he had the mandate to make this decision.

[49] Mr Leech says an issue arose with the spray unit/generator. Greg, one of the team, contacted Mr Newland about the issue.

[50] Mr Newland arrived in his truck to check the problem with the spray unit/generator. As he got out of his truck, Mr Leech says Mr Newland asked in a rude manner "is that all you have fuckin' done?".

[51] Mr Newland denies making that comment to Mr Leech and Mr Evans denies hearing Mr Newland make the comment.

[52] Initially, Mr Evans' evidence was:

Every time Jason spoke to Steve or asked him to do something, Steve would just tell him to "fuck off". Every time Jason opened his mouth, Steve was not listening to Jason.

[53] Following further questioning at the investigation meeting, Mr Evans conceded that he was not present when Mr Newland arrived at the site and encountered Mr Leech. Mr Evans was finishing the retaining wall and saw Mr Leech and Mr Newland having a discussion but he did not hear that part of the discussion.

[54] I accept Mr Leech's evidence that it was more probable than not that Mr Newland arrived and rudely asked him, "is that all you have fuckin' done?". The

question and the manner in which it was delivered by Mr Newland, in my view set the tone for what then transpired.

[55] Mr Leech says Mr Newland then stated “you were to work in teams of two”. Mr Leech says he tried a number of times to explain to Mr Newland his reasoning for not working in pairs but Mr Newland refused to listen to him.

[56] At that point, Mr Leech says, in frustration, he told Mr Newland to “fuck off” and he concedes this was repeated by him several times because he was not being listened to. Mr Leech says he was told by Mr Newland to go home.

[57] While this conduct was not acceptable, and Mr Leech regretted it in hindsight, it was understandable given the high level of frustration Mr Leech was feeling as a result of Mr Newland’s interaction with him.

[58] Further, Mr Leech’s conduct was uncharacteristic, whereas Mr Newland was known to have had issues with other staff and had had a “run in” with another work mate, Johnno. Mr Godfrey described Mr Newland as having a “short temper” and as being someone who “flies off the handle”. It is more likely than not that Mr Newland was aggressive towards Mr Leech, would not listen and out of frustration Mr Leech retaliated by swearing at him repeatedly.

### **Events following altercation on 9 February**

[59] After Mr Leech left the worksite on 9 February, he texted his direct manager, Mr Godfrey to inform him that he would not be back at work that day, Mr Godfrey’s response was “OK” and Mr Leech immediately sent a further text saying “nor probably for the rest of the week”.

### **Wednesday, 10 February. Texts from Mr Leech to Mr Godfrey about returning to work**

[60] Mr Godfrey says on 10 February, Mr Leech sent him a text asking whether it was worth him coming in the next day. Mr Godfrey did not respond to that text as he wished to speak with Mr Smith who had been away on holiday, about what had occurred. Mr Godfrey says he did not want to be involved and it was really a matter for Mr Smith. Mr Godfrey’s primary concern was to “get the guys working again”.

**Thursday, 11 February. Mr Leech returns to work.**

[61] Mr Leech says as he had heard nothing from anyone at Big Mal, had cooled down and decided to return to work on 11 February. Mr Leech arrived at about 6.45am. Mr Leech says Mr Smith was there but ignored him. Mr Smith says he was not ignoring Mr Leech, he was busy organising the jobs for the day. Mr Smith also says he was not expecting Mr Leech at work, given his text to Mr Godfrey that he would not be in that week.

[62] Mr Smith's conduct was not constructive. Mr Smith knew from Mr Godfrey there had been an issue between Mr Leech and Mr Newland. Mr Smith failed to make contact with Mr Leech at all about the matter and ignored him when he came to work. In Mr Smith's words, his priority was to assign work for the day.

**Mr Smith's investigation**

[63] After assigning work for the day, Mr Smith spoke to Mr Leech. Mr Leech was not informed that the meeting was a formal meeting and no allegations were put to Mr Leech. Mr Leech was asked by Mr Smith what had occurred and Mr Leech provided his explanation and conceded that he had sworn at Mr Newland.

[64] Mr Smith, in his witness statement, says that he was approached early on the morning of 11 February by Mr Newland, Mr Evans and Greg to discuss the events that had happened on 9 February. I do not accept that evidence. It is inconsistent with the evidence Mr Leech and of Big Mal's own witnesses.

[65] Mr Leech provided the Authority with a copy of a text to Greg in which he asked whether Mr Smith had ever spoken to him about "the clash between me and Jason" and the response from Greg was "nah he never asked me about it".

[66] At the investigation meeting, Mr Evans said there was no discussion on 11 February with Mr Smith about the incident with Mr Newland. Mr Evans says there was no meeting with Mr Smith to discuss the 9 February incident. He says there was a chat after work with Mr Smith a couple of days after the incident. Mr Newland could not recall the date but thought it may have been on Friday, 12 February but he was unsure and could not remember where he met Mr Smith.

[67] Mr Newland says he made a diary note of the incident on 9 February which he gave to Mr Smith.

[68] Mr Leech did not see this diary note until 2 days before the Authority's investigation meeting.

[69] It is my finding that Mr Smith did not speak with Mr Evans, Greg or Mr Newland before work on 11 February about the incident on 9 February. Therefore, he was not aware from them what they say had occurred on 9 February. Mr Smith only knew from Mr Godfrey there had been an incident. Mr Godfrey had not been present and had only discussed the matter with Mr Newland and not Mr Leech.

[70] There was plenty of work available but Mr Smith refused to assign any work to Mr Leech. Mr Leech went home.

#### **Telephone call, Friday 12 February.**

[71] Mr Smith says he telephoned Mr Leech on the morning of 12 February, but was not able to make contact. Mr Leech says he was out biking and did not hear his mobile phone ring. Mr Leech rang Mr Smith back at 2.30pm in the presence of his partner, Ms Dutton, as he had become concerned at the way Mr Smith seemed to be acting towards him and was concerned about his job.

[72] Mr Leech and Ms Dutton say that during the phone call between Mr Leech and Mr Smith, Mr Leech was informed that there was a letter being sent that day and that Mr Leech could respond the following week at a meeting. Mr Leech asked Mr Smith whether he was being given notice and Mr Smith refused to answer saying "I'm not being tricked into saying something". Mr Smith told Mr Leech that there would be no more work for him that week.

#### **Tuesday, 16 February 2016**

[73] Mr Leech did not receive the letter from Mr Smith dated 12 February. On 16 February, Mr Leech received his payslip stating "final pay". Mr Smith confirmed that the pay run usually went through at about 4pm each Tuesday. Mr Leech says he was angry when he received the payslip as he thought it confirmed that he had been dismissed. Mr Leech missed a phone call from Mr Smith at 4.28pm and so sent a text to him at 4.30pm as follows:

Sorry unable to talk atm. Yes I have messaged Kerry just asking to clarify things as I'm uncertain of how it works or for additional information or some paperwork. I asked for electronic copy of the letter you sent as it has not arrived yet.

[74] The response from Mr Smith was:

Not doing text message with regards employment issues. Phone calls only.

[75] There were no further meetings between Mr Smith and Mr Leech. Mr Leech finally received a letter from Mr Smith dated 12 February 2016 but not received by him until 22 February 2016 confirming termination of his employment pursuant to clause 13.3 of his individual employment agreement for:

- Serious or repeated failure to follow reasonable instructions.
- Actions which seriously damage the employer's reputation.

[76] Both of these issues related to the Super Lot 27 incident and 9 February 2016 incident. The letter stated that termination was for serious misconduct and in accordance with the employment agreement Mr Leech's employment was terminated without notice.

### **The law**

[77] Section 103A(1) of the Act provides that employers must justify their decisions to dismiss. Whether a dismissal was "justifiable" must be determined, on an objective basis, by applying the test in subsection (2) which states:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[78] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.<sup>1</sup>

[79] I do not accept that the decision to dismiss Mr Leech was substantively or procedurally justified.

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<sup>1</sup> *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at [22]

**Substantive justification**

[80] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3), as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the complaints, provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses.

[81] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly (s.103A(5)).

[82] In assessing whether a finding of serious misconduct and a consequent outcome of dismissal is fair and reasonable, I must consider whether Mr Leech's conduct was such that it "*deeply impairs or is destructive of that basic confidence or trust*"<sup>2</sup>. This will be a matter of degree in the circumstances.

[83] I do not consider, in reaching the conclusions above, that Big Mal acted in a way that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[84] With regard to the Super Lot 27 incident, I do not consider that a fair and reasonable employer could have reached a conclusion that Mr Leech's conduct was so serious as to justify dismissal. Mr Leech was accused by Mr Smith of being careless and having a bad attitude. The letter of dismissal says his actions seriously damaged the employer's reputation.

[85] Mr Smith conceded the paint used and which caused damage at Super Lot 27, was not "sprayable" and was no longer in use. Mr Leech was not present when the supposed carelessness which caused the damage to property occurred, and even if he was there, it appears that there was a genuine reason for the over-spray which caused damage.

[86] Further, in my view there was no evidence of a proper investigation by Mr Smith in to the matter. Importantly, Mr Leech was spoken to about the matter but did

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<sup>2</sup> *Northern Distribution Union v BP Oil NZ Ltd v* [1992] 3 ERNZ 483 (CA)

not receive a warning. Mr Evans, on the other hand did receive a warning about the incident.

[87] With regard to the 9 February incident, again, I do not consider that a fair and reasonable employer could have reached a conclusion that Mr Leech's conduct was so serious as to justify dismissal. There was a heated exchange during which both Mr Newland and Mr Smith swore at each other. It was agreed during the investigation meeting that swearing in the industry is common and that the employees concerned often swore. Mr Newland often "flew off the handle" and in my view played a significant part in the altercation with Mr Leech.

[88] In any event, the dismissal letter does not mention the altercation on 9 February or Mr Leech's swearing as a factor. Rather, the letter confirms Mr Leech was dismissed for "serious or repeated failure to follow instructions". There was simply insufficient evidence of this. Mr Leech was in charge of the job on 9 February and following an assessment decided teams of two was not the best way to undertake the work. This was the type of decision open to him to make. This was not a situation in which Mr Leech was informed that he was to obey an instruction and failure to do so could lead to disciplinary action, including dismissal.

[89] I consider the dismissal substantively unjustified.

### **Procedural fairness**

[90] Big Mal did not comply with the factors set out in s.103A(3) of the Act. Neither incident was sufficiently investigated. I find the dismissals were procedurally unjustified.

[91] I do not consider dismissal was justifiable and in my view Mr Leech has established his personal grievance in that regard.

### **Remedies**

#### **Reimbursement of lost wages**

[92] Mr Leech gave evidence of his attempts to find work following his summary dismissal. It took Mr Leech 7 weeks to secure another position. From his witness statement and from time sheets filed, I find that Mr Leech most likely worked 45 hours per week at a gross hourly rate of \$22.50. Mr Leech's loss of remuneration

amounts to \$1012.50 gross. I order payment by Big Mal to Mr Leech within 21 days of the date of this determination.

### **Compensation pursuant to s.123 of the Act**

[93] Mr Leech claims compensation for humiliation, loss of dignity and injury to his feelings. Mr Leech gave evidence about the stress he felt as a result of what he thought to be an unjustified dismissal.

[94] Mr Leech gave evidence of feeling humiliated at being dismissed and being without a job when he had childcare responsibilities. I have no doubt that Mr Leech found his summary dismissal hurtful and humiliating. This was confirmed by his partner, Ms Dutton.

[95] I consider compensation of \$10,000 appropriate and order Big Mal to pay Mr Leech this sum within 21 days of the date of this determination.

### **Contribution**

[96] Section 124 of the Act requires that I consider the extent to which Mr Leech's actions contributed to the situation that gave rise to the personal grievance. In the event, I consider that Mr Leech's behaviour contributed to his dismissal, then compensation awarded must be reduced.

[97] Mr Smith conceded that he had sworn at Mr Newland, but as I found, Mr Newland was aggressive and swore at Mr Leech. Mr Newland would not let Mr Leech explain his decision not to work in pairs. This led to the confrontation.

[98] While Mr Leech could have handled the situation better, I do not consider his actions contributed to his dismissal and I decline, therefore, to reduce the award of compensation.

### **Costs**

[99] Costs are reserved. If the parties are unable to agree on costs, Mr Leech has until 13 January 2017 to file a memorandum as to costs in the Authority. Big Mal has until 30 January 2017 in which to file a memorandum as to costs in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**