

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 234
5410111

BETWEEN JEFF LOPAS
 Applicant

A N D SABEMA LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: David Beck, Counsel for Applicant
 Penny Shaw, Counsel for Respondent

Investigation meeting: 10 and 18 October 2013 at Christchurch

Submissions Received: 18 October 2013 from Applicant;
 18 October and 1 November 2013 from Respondent

Date of Determination: 13 November 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed due to procedural flaws.**
- B. The respondent did not reduce the applicant's hours as a punishment. The applicant did not raise his personal grievance for unjustified disadvantage arising from a lack of explanation for the reduction in hours within the 90 day statutory time limit.**
- C. Remedies are awarded to the applicant for unjustified dismissal subject to a 25% reduction for contribution.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Jeff Lopas has raised a personal grievance that he was unjustifiably dismissed from his employment with Sabema Limited on 1 February 2012. He argues

that the decision was predetermined because he had had run-ins with management about sums being deducted from his pay. Mr Lopas seeks remedies under s.123 of the Employment Relations Act 2000 (the Act) together with his legal costs.

[2] Mr Lopas also raised a personal grievance on the second day of the investigation meeting that he had been unjustifiably disadvantaged when his hours were reduced without consultation in around November 2011. This personal grievance was raised only at this stage because Mr Lopas relies upon evidence given by the operations manager, Mr Cao, during the first day of the investigation meeting that he reduced Mr Lopas' hours partially because of Mr Lopas' performance.

[3] The respondent denies that Mr Lopas was dismissed unjustifiably, and asserts that the dismissal was procedurally and substantively justified due to Mr Lopas repeatedly failing to follow company policies and procedures. It also resists the raising of the disadvantage personal grievance on 18 October 2013 relating to the reduction in hours, and denies that Mr Lopas was unjustifiably disadvantaged in his employment when his hours were reduced, citing a clause in the employment agreement that states that minimum hours of work are not guaranteed.

Brief account of the events leading to the dismissal

[4] The respondent company operates service station sites in Christchurch under licence to Z Energy Limited, formerly Shell New Zealand. The petrol stations currently operated by the respondent number eight, one of which is the Curletts Road service station at which Mr Lopas primarily worked. Mr Lopas has undertaken a number of employments over his working life, including as a maths teacher, and is in his 60s. He started working for the respondent company in February 2011, very shortly before the major Christchurch earthquake, as a customer service representative and, after an initial period of training *on-the-job* at other sites in the respondent's Christchurch cluster, transferred to the Curletts Road branch. It was Mr Lopas' preference to work the night shift, which commenced at 10pm and continued until 8am the following morning. During this period, Mr Lopas was in sole charge of the petrol station.

[5] There are a number of elements involved in working as a customer service representative for the respondent and there is a comprehensive training programme in place which is intended to ensure that new staff members are trained in all aspects of

operating a petrol station. These areas include customer service, product management, shop merchandising, console operations, cash handling, food safety, handling hazardous materials, dealing with armed robberies and other related areas.

[6] Mr Lopas claims that, in April 2011, he was effectively forced to sign a form saying that he had received training in a number of areas relating to *till buttons, transactions and cash management*. He said that it was signed under duress because his manager at that time (Kris) “*maintained repeatedly John [Allen] or Isaac [Cao] needed it back immediately. I maintained I didn’t know what I didn’t know. I was overridden by Kris*”.

[7] In May 2011, Mr Lopas was spoken to by the Operations Manager, Mr Cao, for allowing a customer to leave without paying for some products. Mr Cao believed that this was the second time this had happened, but Mr Lopas denies this. In any event, Mr Cao wrote a letter to Mr Lopas following his discussion which was headed *confirmation of recent discussion* and which contained the following paragraphs:

Due to the nature of the business, the approach above taken by you can be seen as a negligent action which can potentially cause the loss to the company, it effects [sic] the level of customer service and general operation of the business along with effecting [sic] the business’s long term sale and profitability.

I expect to see improvements in the above and any further breach in above will be dealt with by moving to a formal performance management process. This letter is intended to ensure you are clear about my expectations.

If you think you need any additional assistance or training please let me know. If you require any assistance or clarifications on the above matters please do not hesitate to contact me.

[8] Mr Cao wrote another letter to Mr Lopas on 5 July 2011 headed *confirmation of recent discussion*, which addressed a number of issues which Mr Cao viewed as serious breaches of the company’s policy and procedures. Briefly, these issues related to a breach of the company’s locked door policy relating to the external door, failing to keep an internal security door locked, failing to keep the cigarette cabinet locked, breaches of the cash handling policies, using his mobile phone during the working shift and failing to communicate issues through the site’s diary.

[9] In August 2011, Mr Lopas was responsible for a miss-sale amounting to \$91.34 and was asked by Mr Cao to sign a form authorising a deduction from his next

wages of that sum. Mr Lopas' evidence is that he very reluctantly signed this form, feeling that he did so under duress because of *stand over bully tactics by Mr Cao*.

[10] On 7 November 2011, Mr Lopas was issued with a formal warning following an investigation into a deficit in Mr Lopas' till on 13 October amounting to \$185. Following three meetings between Mr Cao and Mr Lopas into this issue, Mr Cao concluded that Mr Lopas had failed to account for why his till was down by \$185, had left cash outside of the till in breach of cash handling procedures, had left too much cash in the till at the end of his shift, rather than depositing it in the safe, and had failed to follow basic service steps when a *miss-sale* had occurred, including failing to complete an incident report. The letter concluded with the following:

The above offence[s] are all in breach of the companies' [sic] policy and procedures as it effects [sic] the level of customer service and general operation of the business along with effecting [sic] the businesses [sic] potential long term sales and profitability.

This letter is intended to ensure you are clear about my expectations and we also wish to advise that any further breaches of the above may be deemed as misconduct and a formal disciplinary process may follow which may include termination of your employment.

If you think you need any additional assistance or training please let me know.

If you require any assistance or clarifications on the above matters please do not hesitate to contact me.

[11] Mr Cao admitted during the Authority's investigation meeting that he did not write to Mr Lopas prior to the investigation meetings setting out his concerns, that the areas of concern other than the till shortfall emerged during the meetings, that he did not offer a support person to Mr Lopas during the meetings (as it was not company policy to do so, he said) and that he did not advise Mr Lopas prior to the meetings that he could end up being given a formal warning. I comment below on the effect these deficiencies has on the overall fairness of the dismissal.

[12] Mr Lopas refused to agree to the \$185 that had gone missing from his till being deducted from his salary. This made Mr Cao angry, he says. He also says that, around this time, Mr Allen spoke to him on the telephone and said that *he did not know that Mr Lopas felt like this* about not agreeing to staff wages being deducted.

[13] Mr Lopas also states in evidence that, from around 6 November 2011, his shifts were changed to 30 hours per week (three days on, four days off) from a

previous arrangement of four days on, four days off). This resulted in around a 25% drop in his income he says. He believes this was in retaliation for him refusing to allow the company to deduct the \$185 from his salary. The respondent company does not deny that it changed Mr Lopas' hours, but relies upon a clause in the employment agreement to which Mr Lopas was subject which makes clear that company does not guarantee minimum hours.

[14] Around the time of the formal warning being issued in November 2011, Mr Lopas had crossed out sections of an updated page of the staff policy and procedure manual dealing with miss-sales. The policy provided that a miss-sale occurred when the customer service representative either fails to ask or substantiate if the customer has fuel or incorrectly charges the customer the wrong pump. The policy stated that, in this situation, the customer service representative is responsible for the error and must pay for the fuel. The policy also stated that the company would attempt to contact the customer provided details were available and, if the customer made payment, that payment would be refunded to the staff member in his or her next pay.

[15] Mr Lopas had annotated this part of the updated page stating:

*This is nonsense!!, not acceptable. Business risk!!! Not staff risk.
Sabema or Shell must install cameras that can identify vehicles
otherwise Sabema's attempt to contact customer is meaningless.*

[16] It would appear that Mr Lopas was confusing a miss-sale situation, which, by definition results from a failure of the staff representative, with a situation of a customer either being unable to pay for fuel or driving off without attempting to pay. In neither of those situations, which could not be attributed to the fault of the customer service representative, did the company expect the staff representative to make good the lost revenue.

[17] On 2 December 2011, Mr Lopas completed an application for leave form requesting leave between 23 December 2011 and 13 January 2012. However, in signing the form he had also crossed through two statements on the form. The first was an acknowledgment that, if his application for leave was declined, any unauthorised absence from work during the whole or any part of the period that was declined, would result in disciplinary action. The second sentence that had been crossed through by Mr Lopas stated that, where the application was for leave without

pay, he authorised a deduction for such unpaid leave of absence from his wages. Mr Lopas' evidence was that he had crossed through these sentences because he believed they did not apply to him. He also did not wish the company to deduct any money from him.

[18] Mr Lopas' application for leave was declined. The reason given by Mr Cao is that Mr Lopas did not have 12 months' employment service with the respondent and so had not yet become entitled to take annual leave under the Holidays Act 2003. He also said in his evidence that he also rejected the leave application because the respondent does not normally grant leave during the Christmas and New Year period, especially for a long holiday such as three weeks, and because Mr Lopas had crossed out a number of statements on the application form without any discussion with the management team.

[19] It is my finding on this particular issue that Mr Cao's rejection of Mr Lopas' application for leave was primarily because Mr Lopas had deleted two of the clauses on the form. However, even if Mr Cao did this in a spirit of petulance, as is asserted by Mr Lopas, the form was the means to apply for leave, the granting of leave on requested dates was discretionary, and agreement with the clauses crossed out by Mr Lopas was a reasonable condition of the leave being granted. His deleting them without discussion with his managers signalled that he would not be bound by the conditions in accordance with which leave was to be granted. Therefore, the rejection of the application for leave was justified in my view.

[20] On 20 December 2011, Mr Lopas was given a final written warning, issued by Mr Allen, the sole shareholder and director of the respondent company. This warning was issued after Mr Allen had concluded that Mr Lopas had breached the company's cashier and console operation procedure in failing to undertake a manual safe drop correctly; a failure to report a variance in his daily till reconciliation to ensure that the next staff member would be aware of an error; and a failure to follow the direction of the site manager to ensure that pies were available on site ready for customer demand.

[21] The final written warning informed Mr Lopas that he would be given further training on manual safe drop procedures and how to find a previous transaction on the point of sale and that, if, in the future, he breached any of the company's policies, procedures or expected standards, he could be dismissed.

[22] On 19 January 2012, Mr Allen wrote to Mr Lopas (a letter erroneously dated 9 December 2011), inviting him to a meeting to discuss an alleged breach by Mr Lopas of the company's cashier and console operations and drive-off procedures. The letter explained that the company was concerned that, on 13 January 2012, Mr Lopas allowed a customer to leave the store with shop product (a packet of chewing gum) when the customer was unable to pay for the product and the fuel that had been provided because his card had been declined at the till.

[23] The letter set out that Mr Lopas had been spoken to by the site manager on 13 April 2011 about this practice and again on 14 May 2011 when the company had provided him with a letter that outlined that removal of product from the store without the customer having the ability to pay is a breach of company policies. The letter also referred to the final written warning issued on 20 December 2011 for breaches of the company's policies and procedures.

[24] Mr Lopas was advised that he was to attend a disciplinary meeting, that he could bring a representative to it, that he would be given an opportunity to respond to the allegation and provide any explanation. Finally, the letter made clear that, whilst no decision had yet been made, due to the serious nature of the allegation it was possible that disciplinary action could result, up to and including dismissal.

[25] Mr Lopas attended two investigation meetings with Mr Allen, one on Wednesday, 25 January 2012 and one on Wednesday, 1 February 2012. On each occasion he was accompanied by his partner as support person. Mr Allen concluded that Mr Lopas did breach the company's cash handling procedures by not ensuring that company stock that leaves the store was paid for. Mr Allen concluded that, due to the number of breaches of company policy and procedure that Mr Lopas had been responsible for, "*there was no indication that things were not going to change from this point*".

[26] Mr Allen stated in his written evidence that he decided to dismiss Mr Lopas because he felt that the company had continued to invest significant time and effort in him, coaching him about the company's policies and procedures and how important it was that he follow them. Mr Allen said that the company had tried to emphasise to Mr Lopas the importance of following the company's procedures and had taken steps to see that he was familiar with these or given him the resources to become more familiar with them if he needed to. In Mr Allen's view, none of these steps had seen

any results, and the same issue, his inability to follow processes and procedures, continued to arise.

[27] The letter of termination addressed to Mr Lopas dated 1 February 2012 advised Mr Lopas that his employment with the respondent was terminated with immediate effect but that he would be paid two weeks pay in lieu of notice.

[28] It is Mr Lopas' belief that:

Sabema or members of their staff, primarily John Allen and Isaac Cao carried out a process of premeditated termination which included subtle and not so subtle actions that were designed to obtain my resignation, hopefully on a voluntary basis. These actions included outright denial of holiday leave after 11 months of service (requested formally in the presence of Kris and Isaac) and a unilateral reduction of weekly working hours without explanation or request on my party by Isaac Cao and probably John Allen.

The process of termination was set in motion with some real intent only after I had clearly stated that I would not accept any further deduction from my pay for miss-sales or similar financial errors that arose in the normal course of business operations.

[29] Effectively, Mr Lopas claims that the dismissal was premeditated and therefore unjustified.

Issues

[30] The Authority must decide whether:

- a. Mr Lopas' dismissal was unjustified and, in particular, whether it was premeditated or predetermined; and
- b. Mr Lopas suffered an unjustified disadvantage in his employment when his hours were reduced to 30 hours a week without explanation.

Was Mr Lopas' dismissal unjustified?

[31] In considering whether an employee has been unjustifiably dismissed, the Authority must apply the test of justification set out in s.103A of the Act. This states as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- (2) *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.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[32] The issues that Mr Lopas points to in arguing that the dismissal was predetermined were as follows:

- (a) His refusal to agree to deductions from his salary;
- (b) The refusal to grant him leave over the 2011/12 Christmas/New Year period;
- (c) Inconsistency between his treatment and the treatment of a staff member who was allegedly reported to have been sleeping on duty.

Determination*Substantive fairness*

[33] Turning first to the issue of whether the dismissal was substantively justified, it is my finding that it was. Having heard evidence from Mr Allen, I do not believe that the dismissal was premeditated or improperly motivated. Although Mr Lopas refused to have the \$185 deducted from his salary, and although this may have frustrated Mr Cao at the time, I do not believe from the evidence I heard that it had any bearing on Mr Lopas' dismissal.

[34] I also do not believe that there is any evidence to suggest that the refusal to grant Mr Lopas leave over the Christmas/New Year period had any bearing on the decision to dismiss Mr Lopas. Finally, the respondent said that some enquiries were made to investigate whether a staff member had been sleeping on duty, but that no definitive evidence was found. I do not believe that Mr Lopas' situation can be compared with the allegations of sleeping on duty, of which there were no direct eye witness evidence available in any event.

[35] It is my finding that the respondent had genuine reasons for the dismissal. There was discussion during the Authority's investigation meeting whether Mr Lopas was dismissed for misconduct or poor performance. During cross examination of Mr Allen by Mr Beck, Mr Allen ended up stating that Mr Lopas had been dismissed for serious misconduct. However, I do not accept that. Mr Allen did not appear to understand the legal significance of that term, and his letter of termination dated 1 February 2012 does not indicate that Mr Allen regarded Mr Lopas as having committed serious misconduct.

[36] The notes of the disciplinary meeting indicate that Mr Allen's concerns were primarily that Mr Lopas had been trained and counselled a number of times in respect of the respondent's policies and procedures, but continued to breach them. In addition, after Mr Lopas had stated a couple of times that he felt that the customer would return and pay for the fuel and gum, Mr Allen expressed the view that this was not Mr Lopas' judgement to make, inferring from Mr Lopas' statements that he had chosen to let the customer to leave with the gum.

[37] Having heard evidence from Mr Lopas, I am satisfied that he did not deliberately let the customer leave with product which had not been paid for. Mr

Allen did not appear to understand fully the difference between sustained poor performance, and wilful misconduct. However, I accept Ms Shaw's submission that the legal label put on the reason for dismissal is not particularly important, given that Mr Lopas was dismissed for repeated breaches of company policy.

[38] I have no doubt that Mr Lopas tried to perform the role to the best of his ability. He is clearly a conscientious person. However, he also clearly made a series of errors in various parts of his role during his employment, and did not improve as his experience increased. Mr Lopas had explanations for each error. I accept that, in some cases, he believed he had not been trained on certain areas. However, the evidence shows that he was asked on several occasions whether he needed extra training and on at least two occasions he was given training in addition to that given to all staff.

[39] The policies and procedures that the company has in place are detailed and elaborate and exist to protect its assets and revenue. This is particularly important in an industry which handles a lot of cash and which operates at night, serving customers from a very wide social demographic. It is general knowledge that petrol stations attract robberies, and attempted thefts, and the only way to minimise that risk is for the company to implement detailed processes which are strictly abided by. In doing so, they rely on their staff heavily, especially during the night.

[40] In my view, the company gave Mr Lopas ample opportunity to reduce his errors to an acceptable level. It was not until October 2011 that he was subject to a disciplinary process. Prior to that, he had been coached by his manager and by Mr Cao on several occasions. It is my view from the evidence given by Mr Lopas that he found the night shifts particularly tiring, and that this led to his errors. However, he wanted to work nights and never asked to work day shifts.

[41] In respect of the actual incident that led to the dismissal, Mr Lopas' counsel has said that Mr Lopas cannot be blamed because he did not see the customer *conceal* the gum and that the customer had started to drive away when Mr Lopas noticed that the gum had been taken. However, Mr Lopas scanned the barcode on the packet of gum only a few moments before the customer's card had been declined and, according to the respondent, would have seen it on the screen in front of him as a transaction. Mr Lopas was looking at the screen in order to complete the *unable to*

pay form. He says that he only realised the gum had been taken once he printed out the receipt, by which time the customer had left the shop.

[42] Arguably, Mr Lopas should not have let the customer depart until he had finished the *unable to pay* transaction; for most of the time, the only other person in the shop was the customer's passenger. In any event, Mr Lopas should have known about the packet of gum because he scanned it. He forgot about it within a space of a few moments. Whilst he may have been tired, the company needed to be able to rely upon him to follow correct cash handling and asset protection processes.

[43] Ultimately, the company needed to have confidence in Mr Lopas to operate the petrol station at night without failing to follow its key procedures. The point was reached when they believed that Mr Lopas would not improve, and this led to his dismissal. From a substantive point of view, I believe that that was a reasonable conclusion to reach, and that dismissal was an action that a fair and reasonable employer could have done in all the circumstances that the dismissal occurred.

Procedural fairness

[44] However, I do not believe that a fair procedure was followed by the company in dismissing Mr Lopas. The primary flaw was that, at some point between the two investigations meetings that led to Mr Lopas' dismissal, Mr Allen viewed CCTV footage of the transaction that had taken place between the customer whose card had been declined and Mr Lopas, but did not, in my view, show this footage to Mr Lopas.

[45] Mr Allen's evidence was that he believed that the footage was shown to Mr Lopas during the final meeting, but that he could not guarantee it. He said that the notes of the final meeting suggest that the footage had been viewed by Mr Lopas, but I do not agree that that is an inference that can be comfortably drawn. Indeed, the fact that the notes of the final meeting record Mr Lopas asking Mr Allen if he had looked at the footage strongly suggests that Mr Lopas had not done so, as one would have expected Mr Allen and Mr Lopas to have viewed the footage together, if Mr Allen's evidence was correct.

[46] Mr Lopas and Ms McHerron, his partner and support person at the final meeting, were adamant that the footage was not shown to them. Mr Cao's evidence on this was equivocal. On balance, I am not satisfied that Mr Lopas was shown the footage before his dismissal.

[47] Part of the evidence given by the respondent is that Mr Lopas looked at the screen of his console several times when he was completing the *unable to pay* form. Mr Allen and Mr Cao derive this knowledge solely from viewing the relevant footage. This fact was used by the respondent to partially justify the decision that Mr Lopas had no reasonable excuse for allowing the customer to leave with the gum as the screen showed the gum as having been scanned, they say. The footage (which was seen by the Authority) confirms that Mr Lopas looked at the screen several times.

[48] In his written evidence Mr Allen also refers to the CCTV footage to justify his conclusion that Mr Lopas had not tried to use the intercom system to get the customer's attention after the customer had left the shop, despite what Mr Lopas told him in the disciplinary investigation meeting. Mr Allen also says that the footage showed that there were not a number of customers in the shop, despite Mr Lopas' assertion that there were.

[49] Furthermore, Mr Lopas referred to the footage himself three times in the first meeting (when no one had yet viewed it), and stated at one point that he would like to see it.

[50] Whilst Mr Allen was entitled to use the footage to check assertions made by Mr Lopas, he was not entitled to keep the footage to himself, especially when Mr Lopas asked to see it. Mr Allen's written evidence says that he discussed the footage with Mr Lopas. However, the sales transaction and the completion of the *unable to pay* form took around 5 minutes, and there was a lot of detail captured in the footage, which required some scrutiny to discern, and which Mr Lopas may have wished to comment on. It is not sufficient for Mr Allen to share with Mr Lopas his interpretation of parts of the footage without giving Mr Lopas and his support person a chance to view it too. That creates an unsafe process, which could result in significant unfairness.

[51] Section 4(1)A(c) of the Act makes clear that the duty of good faith:

.....requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
(i) access to information, relevant to the continuation of the employees' employment, about the decision; and
(ii) an opportunity to comment on the information to their employer before the decision is made

[52] The failing of the respondent to show Mr Lopas the CCTV footage was not the action that a fair and reasonable employer could have done in all the circumstances. Therefore, it renders the dismissal unjustified.

[53] A further flaw that occurred was the failings referred to above when Mr Cao issued Mr Lopas with a verbal warning, confirmed in writing by way of his letter dated 7 November 2011. The letter does not say how long the warning was to be in place, but it is reasonable to assume that it would still be in place in February 2012, if it had been validly issued. However, because of the flaws identified above, I do not believe that it was validly issued.

[54] Mr Allen indicated in his evidence to the Authority that he relied on the final written warning when dismissing Mr Lopas, and that he also relied, in turn, on the warning issued by Mr Cao when giving the final written. In view of this, a question is raised as to whether the reliance was justified when the process followed by Mr Cao was unfair.

[55] Ms Shaw asserts that there is no mandatory requirement upon an employer to warn an employee that the meeting they have been asked to attend is a disciplinary one, which could result in a disciplinary sanction, and that there is no mandatory requirement to tell an employee that they can have a support person present at that meeting. However, the duty of good faith does require an employer to forewarn an employee that he is facing a disciplinary sanction, especially when that sanction could be built upon, as here, in the giving of further warnings and dismissing an employee.

[56] As an interesting side issue, the Authority heard that Mr Allen had decided to take out of the policies and procedures manual prior to Mr Lopas' dismissal the four page section headed up *Disciplinary Procedure*. I accept the evidence of Mr Allen that this decision was unconnected with Mr Lopas, and understand that it was, essentially, because that section created too much of a procedural obligation upon the company. Nothing replaced the section and Mr Allen said he relied on principles of fairness when disciplining staff. However, notwithstanding the absence of the detailed section on disciplinary procedures, the respondent, like all employers, still had to comply with the tenets of fairness set down in the Act.

[57] In summary, I find that the procedural flaws identified above, and in particular the failure to show the CCTV footage to Mr Lopas during the disciplinary process, were not minor and did result in Mr Lopas being treated unfairly. I also find that these failures, both jointly, and separately, are not the actions that a fair and reasonable employer could have done in all the circumstances at the time they occurred. Accordingly, the dismissal was unjustified.

Did Mr Lopas suffer an unjustified disadvantage in his employment when his hours were reduced?

[58] Mr Beck raised a personal grievance on behalf of Mr Lopas in his submissions given on 18 October 2013, relying on evidence given by Mr Cao at the Authority's investigation meeting on 10 October 2013, that Mr Lopas' hours had been reduced by Mr Cao partly because of Mr Lopas' performance.

Has the personal grievance been validly raised?

[59] First, I must consider whether the personal grievance has been raised in time. Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the attention of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[60] Mr Beck submitted that Mr Lopas discovered during Mr Cao's evidence that Mr Cao had reduced Mr Lopas' hours *in an unjustified and ill motivated fashion*. He says that the hours were reduced primarily as a punishment for poor performance, and no full explanation was given at the time.

[61] Ms Shaw submits that, in accordance with *Paul v Capital Coast Health Board* [2005] ERNZ 197, time begins to run in relation to s114(1) when the employee becomes aware that both the action and the reasons for it are unjustified. The actual relevant passage in *Paul* is at [42], which states:

Therefore, in discrimination claims, time only begins to run under s 114 when both the action which gave rise to the personal grievance and the alleged reasons for that action have come to the notice of the employee. [Emphasis added].

I cannot agree, therefore, that *Paul* expresses a general principle that applied to all personal grievance claims.

[62] In *Silver Fern Farms Ltd v North* [2010] NZEmpC 79, [2010] ERNZ 172 His Honour Chief Judge Colgan stated, at [23], *that section* [114(1) of the Act]

focuses..... not on a cause of action coming to the employee's notice but, rather, the coming to notice of the action (or, by necessary implication, omission) alleged to amount to a personal grievance. This confirmed the judgement of the Employment Court in Warburton v Mastertrade Ltd [1999] 1 ERNZ 636, in which the Court affirmed that the 90-day period begins to run from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.

[63] His Honour Chief Judge Colgan in *North* also agreed with the analysis and interpretation of s 114(1) expressed in the Employment Court case of *Wyatt v Simpson Grierson* [2007] ERNZ 489, in which the Judge found, construing s 114(1), that :

... the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[64] Ms Shaw submits that Mr Lopas had believed for some time that the respondent had deliberately reduced his hours with an ulterior motive, and did not raise any personal grievance in relation to this. It is correct that Mr Lopas believed that the reason for the reduction was because he had refused to have the \$185 till shortfall taken out of his pay. This is stated in his brief of evidence. He seems to have believed that it was an unjustified action well before 10 October 2013, because he referred to it during his disciplinary meeting on 25 January 2012, although there is no suggestion that, in doing so, he raised a personal grievance about it during that meeting. In any event, I am not satisfied that the references Mr Lopas made in the meeting to the reduction satisfies the specificity requirements set out in *Creedy v Commissioner of Police* [2006] ERNZ 517

[65] There seem to be two aspects of the personal grievance raised by Mr Beck on behalf of Mr Lopas on 18 October 2013. First, that no full explanation was given to Mr Lopas at the time of the deduction, and second, that the deduction in hours was done as a punishment for poor performance. Dealing first with the first aspect of the grievance, it is clear that this was Mr Lopas' complaint from the very start; he refers to this lack of explanation in his brief of evidence and also in the meeting of 25

January 2012. Therefore, Mr Lopas was always aware of this cause of concern from the date when he first asked Mr Cao why his hours had been reduced and (Mr Lopas asserts) he did not get a satisfactory reply. It is from this point that the 90 day period started to run in respect of the lack of an adequate explanation. To raise a personal grievance about this now is therefore significantly out of time. No application under s. 114(3) of the Act has been made for the Authority to grant leave to raise the grievance after the expiration of the 90 day period and so I conclude that the Authority has no jurisdiction to consider this aspect of the grievance.

[66] Turning to the second aspect of the grievance, that the hours were reduced *as a punishment for poor performance*. I believe that this element is *an essential element of the personal grievance* and that Mr Lopas did not become aware of it until 10 October 2013. Therefore, this is the date from which the 90 day time limit begins to run, and so it has been raised in time, by Mr Beck, Mr Lopas' agent.

Did Mr Cao reduce Mr Lopas' hours as a punishment for poor performance?

[67] Mr Cao's evidence to the Authority was that he reduced Mr Lopas' hours because he did not want to pair a trainee with Mr Lopas; that he wanted to avoid going over budget; that Mr Lopas was getting tired; that Mr Lopas was not the only one whose hours were reduced but that he did not reduce Mr Lopas' hours due to Mr Lopas' objection to salary deductions. During cross examination on the issue, Mr Cao also said he reduced Mr Lopas' hours partly because of his performance, and that that was to be a temporary measure. He also said that it was not a punishment. Mr Cao decided to reduce Mr Lopas' hours prior to 31 October 2011. He said he did not explain the reasons for this to Mr Lopas but had intended to have another meeting with him. It appears that the reduction in hours was not permanent.

[68] Mr Allan's evidence was that he needed to maintain the minimum contracted hours of a longstanding existing co-worker of Mr Lopas, and that he did this by swapping his hours with Mr Lopas' when the co-worker transferred to the Curletts Road site.

[69] I believe that Mr Cao's evidence was candid and that he did reduce Mr Lopas' hours at least partially because he perceived Mr Lopas as getting tired and because he was making mistakes. I believe that Mr Cao's assessment of Mr Lopas' tiredness and consequential mistakes was probably correct. However, I am not satisfied that

sufficiently cogent evidence was adduced to enable me to conclude that Mr Cao reduced Mr Lopas' hours as a punishment. There appeared to be a mix of reasons for the reduction, but punishment does not appear to feature amongst them. I therefore do not find that this element of the personal grievance is satisfied.

[70] As for the actual reduction in hours itself, Mr Lopas did not raise a personal grievance in respect of the reduction within 90 days of it occurring. Furthermore, the employment agreement to which Mr Lopas was subject makes clear at clause 7.1 that the hours of work the employee is required to work each week will vary depending on the company's business needs. It also states that:

The company will endeavour to provide the Employee with regular work but cannot guarantee any minimum hours. The Employee acknowledges that the Company employs other Employees to do the same work and the allocation of available work as between employees shall be at the absolute discretion of the Company.

[71] This clause makes clear that Mr Lopas had no legitimate contractual expectation of work, four days on, four days off. Even if, as he said in evidence, that this had been the understanding he had had when he had first spoken to Mr Allen when the job had been offered to him, I believe Mr Allen's evidence that he would have made clear that those hours could not be guaranteed. Even if he did not make that clear, the terms of the employment agreement spell that out.

[72] Taking all these issues into account, I do not agree that Mr Lopas suffered an unjustified disadvantage in his employment with respect to the reduction in hours, and I do not agree that he is entitled to reimbursement of the wages he would have earned if his hours had not reduced to 30 a week.

Remedies

[73] Having found that Mr Lopas was unjustifiably dismissed by reason of material procedural flaws, I now turn to the appropriate remedies. Section 123(1)(b) of the Act provides that the Authority may provide the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to s. 128(3) and s. 124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. Section 128(3) provides that, despite subsection (2), the Authority may, in its discretion, order the employer to pay a sum greater than

provided in subsection (2). Section 124 deals with contribution, which I shall address below.

[74] Mr Lopas seeks reimbursement of lost remuneration greater than three months' ordinary time remuneration, in the amount of \$25,802.07, although he does not explain why he seeks that sum. In my view, there is no compelling reason for the Authority to exercise its discretion and award a sum greater than the standard set out in s. 128(2). I have found that the dismissal was substantially justified. Given the number of times over his employment that the respondent had legitimate reasons to raise concerns about Mr Lopas' departures from its standard policies and procedures, and given the conclusion of the respondent that Mr Lopas was not improving, there is a reasonable chance that the respondent would have had to have raised these concerns again, if it had not dismissed him when it did. There is at least a reasonable chance that it would have been faced with such a situation within a further three months, and that dismissal could have occurred.

[75] In light of this, it would be unjust on the respondent to award a sum greater than that contemplated under s.128(2) of the Act. Three months' ordinary time remuneration amounts to a gross sum of \$5,655, calculated at \$14.50 an hour, multiplied by 30 hours a week, multiplied by 13 weeks. This is the sum that Mr Lopas is entitled to, subject to any reduction for contribution, pursuant to s.124.

[76] Ms Shaw suggested that Mr Lopas failed to take reasonable steps to mitigate his loss. However, given the evidence of Mr Lopas and his partner that they suffered financial pressure after his dismissal, due in part to the redundancy of his partner at around the same time, I am satisfied that Mr Lopas would have sought to have replace his lost income as soon as possible. I am satisfied that he did fulfil his duty to take reasonable steps to mitigate his loss therefore.

[77] Turning to Mr Lopas' compensation for humiliation, loss of dignity and injury to feelings, I accept his evidence that he suffered these effects and that he found it difficult to go into a Z petrol station afterwards, even one not operated by the respondent. However, I do not believe that \$15,000, which falls within the band of awards typically given for a severe effect, is an appropriate sum to award. I believe that an award of \$7,500 is appropriate.

Contribution

[78] Section 124 of the Act provides as follows:

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[79] Mr Beck argues that it would not be appropriate for the Authority to reduce the remedies pursuant to s. 124 of the Act because Mr Lopas did not intentionally carry out the conduct for which he was dismissed. Furthermore, Mr Beck argues that the wording of s. 124 precludes a reduction in this case, as the actions that must be taken into account by the Authority only relate to those giving rise to the personal grievance, and not previous actions.

[80] In order to be taken into account as contributing behaviour, the actions of the employee must be both causative of the outcome and blameworthy: *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82. In that case, the Employment Court equated blameworthiness with a breach of duty by the employee.

[81] It is not necessary for the blameworthy aspect of the conduct under enquiry to be wilful or intentional, in the nature of misconduct, before a reduction for contribution may take place. Whilst I accept that Mr Lopas did not intentionally fail to take back the gum from the customer on 13 January 2012, it was blameworthy conduct, in that it was contrary to the respondent's policies. Mr Lopas was expected to carry out his duties so as to prevent loss to the respondent, and he failed to do so. I refer to the case of *Mercer v Maori Television Service* [2010] NZEmpC 133, (2010) 8 NZELR 122, in which the Employment Court treated as contributory conduct meriting a reduction the misreading by the plaintiff of a roster causing him to be late for his shift and his declining performance.

[82] As far as Mr Beck's second argument against a reduction for contribution is concerned, I understand that Mr Beck is referring to the fact that the respondent relied upon previous warnings to justify Mr Lopas' dismissal. Mr Beck argues, I believe, that the actions leading to the previous warnings should not be taken into account in deciding upon a reduction.

[83] In one (narrow) sense, it is true that the situation giving rise to the dismissal personal grievance was the dismissal itself. Mr Lopas raised no personal grievances about the previous warnings. However, I am satisfied that the dismissal was substantially fair because of the series of counselling sessions and warnings that had been given in the past, and that the *situation* giving rise to the dismissal was not simply the final action of letting the customer leave with the gum, but all the previous errors and failures to follow the company's policies and procedures as well. It would be artificial to separate the final action of Mr Lopas from his previous actions, just as it would be artificial to separate the dismissal from the previous counselling sessions and warnings.

[84] In other words, when construing the word *situation* in s. 124(a) of the Act, I believe that it is appropriate to treat it as referring to all relevant events that led to the personal grievance. The respondent would not have dismissed Mr Lopas for the gum incident in isolation. Therefore, Mr Lopas' other actions giving rise to concern must be taken into account.

[85] In light of this, I believe that it is necessary to reduce the remedies that would otherwise have been awarded to Mr Lopas for his unjustified dismissal. I reduce them by 25%.

Orders

[86] I order the respondent to pay the following sums to Mr Lopas:

- a. Reimbursement of lost wages in the gross sum of \$4,241.25; and
- b. Compensation under s.123(1)(c)(i) of the Act in the sum of \$5,625.

Costs

[87] I believe it is appropriate to reserve costs. Accordingly, if the parties are unable to reach an agreement between themselves as to how the costs of this matter should be disposed of between them, Mr Lopas may, within 28 days of the date of the determination, file a memorandum by way of his counsel seeking a contribution to his costs. The respondent will then have a further 14 days within which to file a memorandum via its counsel in opposition.

David Appleton
Member of the Employment Relations Authority