

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 594  
3150584

BETWEEN                      PAUL MADDOCK  
Applicant

AND                              THE PALLET COMPANY  
LIMITED  
First Respondent

Member of Authority:        Eleanor Robinson

Representatives:             John Wood, advocate for the Applicant  
David Browne, counsel for the Respondent

Investigation Meeting:      27 and 28 September 2022 in Auckland

Submissions and/or further  
evidence                        30 September 2022 from the Applicant and from the  
Respondent

Determination:                14 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Paul Maddock, claims that he was unjustifiably dismissed, and unjustifiably disadvantaged by suspension, by the Respondent, the Pallet Company Limited (PCL).

[2]     Ms Maddock further claims that the Pallet Company breached s 120 of the Employment Relations Act 2000 (the Act) by failing to provide him, as requested, with a statement of the reason for his dismissal.

[3]     PCL denies that Mr Maddock was unjustifiably dismissed or unjustifiably disadvantaged, and claims that its actions were justifiable in the circumstances.

## **The Authority's investigation**

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant Mr Maddock, and also from Ms Annette Maddock, Mr Maddock's wife who attended the disciplinary meeting as a support person for Mr Maddock, and from Mr Colin Perry, who also attended the disciplinary meeting as a support person for Mr Maddock.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Mr Scott Mudgway, Production Manager, Mr Alex Robertson, Production Manager, and Mr Nick Barton, Director.

[6] I also received submissions from the representatives for the Applicant and the Respondent.

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

## **Issues**

[8] The issues requiring investigation are whether or not:

- Mr Maddock was unjustifiably disadvantaged by being suspended from work by PCL?
- Mr Maddock was unjustifiably dismissed by PCL?
- PCL breached s 120 of the Act?

## **Background**

[9] PCL is a large manufacturer of wooden pallets, bins and crates. It has two branches, Napier and Auckland. Mr Barton is the Director and a joint shareholder. It has approximately 38 employees in Auckland.

[10] Mr Maddock is a truck driver. He commenced employment in July 2018 with PCL based in Auckland and was provided with an individual employment agreement which he signed on 29 June 2018 (the Employment Agreement).

[11] The Employment Agreement contained the following clauses:

20.4 Nothing in this clause shall prevent the summary termination of your employment without notice or payment in lieu for serious misconduct.

32 Harassment/Bullying

Harassment and/or Bullying will not be tolerated by the employer and disciplinary action will be taken if allegations of harassment and/or bullying are established.

32.1 Harassment and discrimination at work policy is in effect and this agreement references that policy.

[12] The Pallet Company Group – House Rules (the House Rules) set out categories of what was held to constitute Serious Misconduct and what was held to constitute Misconduct. Set out under Serious Misconduct was : “Physical or verbal abuse, assault or intimidation of any other person ....”

[13] Mr Maddock confirmed that he received a copy of the Employment Agreement, but not a copy of the House Rules. Mr Barton said that in addition to a copy of the Employment Agreement, Mr Maddock would also have received a copy of the House Rules.

[14] A copy of the House Rules was provided in evidence and had been signed by Mr Maddock, and initialled on each page by him. I am satisfied that Mr Maddock had been provided with the House Rules.

[15] Mr Maddock suffered a work related injury in 2020 and was off work until April 2021. Prior to his return to the workplace there was a meeting between him and his ACC Assessor, Mr Mudgway, and Mr Robinson about his return. Changes to his work hours following his return had been agreed.

*Events prior to 2 June 2021*

[16] Mr Maddock said that on his return to work, he felt he was not made welcome by Mr Mudgway and Mr Robertson when he went into the Production Office where they worked.

[17] On the first day Mr Maddock said Mr Robertson accompanied him on a drive to another company to show him where to tip off sawdust. Mr Robertson said Mr Maddock had been talkative on the drive, and Mr Maddock confirmed that everything between them was fine on the drive.

[18] Mr Maddock said that the second day of his return, he again felt unwelcomed by Mr Mudgway and Mr Robertson. He considered he could no longer trust them or Mr Barton, who had not welcomed him back on his return.

[19] On his return home that evening, he discussed his concerns with his wife and family who suggested he start recording work related issues in a notebook, and he immediately implemented that.

[20] Mr Mudgway said that it was well known within the Auckland branch that Mr Maddock was writing comments down in a notebook.

[21] Mr Maddock said he began to think he was being singled out for health and safety breaches.

*April 2021: sawdust incident*

[22] On 27 April 2021 when Mr Maddock had been delivering sawdust to the tip, there had been complaints from members of the public about unsecured loads of sawdust which was coming out of the top of the PCL container he was driving along the motorway.

[23] An office administrator had tried to contact Mr Maddock on his mobile phone but it had gone straight to his voicemail. Mr Mudgway then tried to call Mr Maddock, but was also unable to make contact.

[24] When Mr Maddock returned to the office, Mr Robertson spoke to him, saying that it was Mr Maddock's responsibility to ensure all loads on the truck were secure.

[25] Mr Maddock emailed Mr Robertson on 27 April 2021 attaching a link which related to specialised requirements for heavy vehicles and loads on the New Zealand Transport Agency website. Mr Maddock requested on the email that calls be sent to the phone provided by PCL and not to his personal phone.

[26] Mr Robertson replied by email that same day, 27 April 2021 stating that as a result of the complaints, PCL had been trying to contact Mr Maddock in order to assess the situation and decide what action might be required to ensure public safety, and also stating:

as far as the phone calls go, you seemed to make very clear verbal communications that you wouldn't answer the phone .... As you explained you were speaking on the phone to your wife at the time. The communication between base and truck is extremely important as the case may have been a matter of extreme safety concerns, with the amount of phone calls I would have expected a priority return call over and above any personal matters ...

*May 2021 PPE wear incident*

[27] In early May 2021 Mr Maddock said he was making a delivery to another company's site. On arrival he had been spoken to by that company's Health and Safety Officer who told him that shorts were not appropriate PPE gear for their site, and advising that he had sent emails previously to PCL advising it of that requirement.

[28] Mr Maddock said he had spoken to Mr Mudgway and Mr Robertson on his return about what had occurred. He said they appeared to find it amusing and that Mr Mudgway had commented: "I suppose he was Indian."

[29] Mr Mudgway denied having made the comment concerning the race of the Health and Safety Officer, and said he did not know why he would have made the comment, pointing out that his wife is Indian.

[30] Mr Robertson said all the drivers usually wore shorts, and he had told Mr Maddock that another driver had kept a pair of trousers in his truck for occasions when they were required.

[31] Mr Maddock emailed Mr Robertson on 3 May 2021 stating that Mr Robertson's suggestion that he provide trousers for work was not acceptable and: "your obligation as my employer to make sure I have the required PPE for these sites". Mr Robertson said he offered to provide a pair of trousers for Mr Maddock.

*28 May 2021 email about truck loading*

[32] On 28 May 2021 Mr Robertson sent an email to Mr Maddock stating: "I would like to take this opportunity to remind all drivers on site that they are required to stay out of the danger zone while trucks are being loaded".

[33] Mr Robertson said that there had been changes to health and safety standards during the period when Mr Maddock was absent. The instruction about staying out of the danger zone when trucks were being loaded had been provided to all drivers, and a copy was printed out for Mr Maddock at his request.

[34] After receiving the email from Mr Robertson, Mr Maddock said he observed another PCL drivers not abiding by the instruction in it and he sent a note to Mr Robertson.

[35] Mr Robertson responded by email dated 31 May 2021 in which he pointed out that health and safety was an ongoing matter of great concern to him and it was everyone's duty to prevent a danger or hazard when noticed, stating: "There is no rule for one and not the other ..".

[36] Mr Maddock said that he had never seen health and safety rules applied in PCL although the House Rules stated: "first of all health and safety is a great concern and an ongoing matter, it continues to change as industries change".

[37] Mr Maddock responded later that night stating:

you can't have one rule for one person and a different one for other people I will take you to task on this issue and if I see this happening and I will inform you and I would expect you to act on it, however if you don't I will proceed to take the matter further."

*Events 2 June 2021*

[38] Mr Maddock said he sat in his truck for approximately 20 minutes on the morning of 2 June 2021 waiting for his truck to be filled, however after noticing it was not full, he got out of the driver's cab and walked into the factory. It was an urgent order and he wanted to ask the fork hoist driver if the load was complete.

[39] While he was speaking to the fork hoist driver, he interacted with another factory employee by giving him 'the covid elbow' and also interacted with others. He said Mr Mudgway appeared, put his hand on his waist and gave him a push to move him along, telling him that he should not be in the factory.

[40] Mr Mudgway said he had observed Mr Maddock in the nailing side of the factory where pallets were being nailed down using hammer guns. Mr Maddock had been elbowing and 'fist pumping' employees on the factory floor.

[41] Knowing Mr Robertson was endeavouring to enforce health and safety standards which had become more prominent following the Covid lockdown, he had asked Mr Maddock to leave the factory floor. He had walked back to the Production Office and asked the factory employee to put the crate on another run because he could see Mr Maddock was agitated at the delay.

[42] Mr Maddock said being on the factory floor had not been an issue in the past, and he noted it down in his notebook before returning to his truck. He finished tying the load down on his truck then went to the Managers' office because "he had had enough of it".

[43] When questioned during the Investigation Meeting about what he meant by the expression, Mr Maddock explained he had "had enough of the issues since his return to the workplace", referring to an occasion when pallets had fallen off his truck and Mr Robertson had set off after him to find and retrieve them. He considered that when there had been a debriefing about it later in the Production office, the staff were laughing at him.

[44] Mr Mudgway, Mr Robertson and an office administrator were in the office when Mr Maddock entered it on 2 June 2021. Mr Maddock said he had been feeling frustrated at the time, and this feeling had been building up since his return to work.

[45] He said he had spoken to Mr Mudgway and asked him the next time he asked him to leave the factory floor, to find out his reason for being there because he had a genuine reason for being there on that occasion.

[46] The office administrator had left the office to answer a telephone call and Mr Maddock said Mr Robertson had crossed the room from his desk, stood over him and said his manner

was threatening. He had asked Mr Robertson how he was being threatening to him and Mr Mudgway.

[47] Mr Maddock said Mr Mudgway stood up and began to speak, he appeared agitated and made threatening gestures towards him by punching his clenched fist against his open hand. As a result Mr Maddock cautioned Mr Mudgway about the gesture which he considered to be threatening, and suggested that they went to the boardroom to discuss the concerns he had logged in his notebook. Mr Mudgway agreed and they went up to the office.

[48] Mr Mudgway said Mr Maddock had come into the office in an aggressive manner. He had said that he was “only asking” the factory employee about his load. He replied that Mr Maddock should have seen him or Mr Robertson about the load, and asked him not to go around ‘fist pumping’ the factory employees, physically demonstrating what Mr Maddock had been doing.

[49] Mr Maddock had responded that he had ‘a whole book of things on you guys’. Mr Robertson had asked Mr Maddock if he had been wearing the correct PPE wear and Mr Maddock told him to stay out of it because “he was in big trouble too”.

[50] Mr Mudgway said he had asked Mr Maddock what was in the notebook, and Mr Maddock responded “watch yourself or I’ll knock your block off”.

[51] Mr Robertson said that he had tried to intervene when he heard Mr Maddock make the comment about ‘knocking his block off’ to Mr Mudgway, and Mr Maddock had told him he was next and in serious trouble.

[52] Mr Robertson said he had offered to accompany the two men upstairs, but Mr Maddock told him not to.

*The meeting in the upstairs office*

[53] Mr Mudgway said he was curious to know what Mr Maddock had been recording in the notebook he was keeping so he agreed to accompany him upstairs to another office. He said he did not feel threatened and knew there were other employees in the office areas upstairs.

[54] Mr Maddock said that during the board room meeting he had raised his concerns as noted in the notebook and commented on the fact that none of the PCL managers had thought to check with him how he had found the return to work. Next he raised his health and safety issues.

[55] Mr Mudgway confirmed that after they reached the boardroom Mr Maddock pulled out his notebook with dates and times of observations and opened with the statement that no one

had asked how he was after he returned to work. His (Mr Maddock) response had been that there had been a meeting a week before Mr Maddock's return to work when Mr Maddock said he was fit to return to work and there were no issues.

[56] Mr Maddock had asked him (Mr Mudgway) what his role was and when he replied Production Manager had asked again what his role was, to which he (Mr Mudgway) replied that it was to "run Nick's business and do the work, be safe and go home happy." Mr Maddock replied "bullshit", that no one in PCL was happy and not once had Mr Mudgway asked if he was happy.

[57] Mr Mudgway said he responded that Mr Maddock had been in such a negative place since his return that he had been too intimidated to approach him.

[58] Mr Maddock said that he, Mr Robertson and another PCL employee had been laughing at him when he was using a special tool he had acquired to help him load pallets on to the truck following his return to work.

[59] Mr Mudgway said he had offered to ask the employee to come into the meeting room, and did so. When the employee arrived, the employee said that he did not understand to what Mr Maddock was referring. Mr Mudgway said he told Mr Maddock that he could remove that concern from his notebook, but Mr Maddock replied that it was staying.

[60] Next Mr Maddock had referred to the incident when the pallets had come off his truck and everyone in another company had been laughing at him when he next delivered there. Mr Mudgway said he did not know how the other company would know about it, and Mr Maddock said that Mr Robertson had told them.

[61] Mr Maddock next referred to a message Mr Mudgway had left on his phone about the sawdust incident which he had found to be aggressive, and said Mr Mudgway was not a good manager.

[62] At this point Mr Mudgway said the meeting was becoming heated and the Managing Director came into the room and asked them to lower their voices. She had asked if everything was well, and when they replied that it was, she left.

[63] Mr Maddock said he raised the issue of the PPE wear being required for the site visit, and referred to Mr Mudgway having made the racist comment "I suppose he was Indian." Mr Maddock said Mr Mudgway became extremely agitated, said in an extremely angry tone: "How dare you call me a fuckin racist, I'm not a fucken racist, Im married to a fuckn Indian".

[64] At that point the Managing Director had reappeared and Mr Maddock asked her to ask Mr Mudgway to stop swearing. Her response had been to suggest to Mr Mudgway that she considered it best to end the meeting, and to stand him (Mr Maddock) down on full pay and asked if he agreed?

[65] Mr Mudgway said he did agree so Mr Maddock said he had left, with Mr Mudgway following him down the stairs from the boardroom, yelling at him (Mr Maddock) that he was not a racist.

[66] Mr Mudgway said that he had remained calm during the first part of the meeting, however when Mr Maddock accused him of making a racist remark, he had been extremely offended and became agitated also. He confirmed he had sworn, but not at Mr Maddock.

[67] When the Managing Director returned to the room and asked what he (Mr Mudgway) had wanted to do, he said he would stand Mr Maddock down on full pay so they could both calm down.

[68] The Managing Director had emailed Mr Maddock that afternoon, 2 June 2021, stating:

Following discussions this morning between Scott and yourself, we want to confirm that you are relieved from work duties today, on full pay while we are investigating the matter. You will be notified this afternoon of details of a meeting that will take place, to discuss this further.

[69] Mr Maddock replied by email that same day advising that he was so stressed by “the verbal abuse to me from Scott” that he needed medical care, had made an appointment with his doctor, and would be taking sick leave for the rest of the week.

[70] Mr Barton wrote a letter to Mr Maddock dated 2 June 2021 which stated:

You are required to attend a disciplinary meeting on Tuesday 8 June 2021 at 10am in the offices of the Pallet Company Limited .... The purpose of this meeting is to provide you with an opportunity to explain why you threatened Scott Mudgway and Alex Robertson.

As per our House Rules policy, you may not verbally abuse another person (*‘Physical or verbal abuse, assault or intimidation of any other person’*) and this is considered ‘Serious Misconduct’. It is possible that if the allegation is established against you, it may result in a disciplinary process.

You have the right to bring a representative to this meeting.

#### *Disciplinary Process*

[71] Mr Barton said he had been away from the office on 2 June 2021 and learned of the incident involving Mr Maddock when the Managing Director and Mr Mudgway telephoned him. They explained what had occurred.

[72] The Managing Director told him she had heard the yelling from her office which was adjacent to the boardroom, and that Mr Maddock had been sent home on full pay. Mr Barton said he agreed with that decision because he had not wanted Mr Maddock to be driving a truck when he was upset.

[73] When he (Mr Barton) returned to the Auckland office he commenced an investigation by:

- a) speaking to all the employees who had been involved in events on 2 June 2021;
- b) taking statements from the witnesses;
- c) preparing and viewing video footage of the incident; and
- d) inviting Mr Maddock to attend a disciplinary meeting.

[74] Mr Maddock had been unwell on 8 June 2021, and the meeting had been rescheduled to 17 June 2021. Mr Maddock had wanted to return to the workplace prior to the meeting, however this request was declined because Mr Barton said he wanted to avoid any further disruption to the workplace and his suspension on full pay continued until the meeting.

[75] Prior to the meeting Mr Maddock via his representative requested copies of Mr Maddock's Employment Agreement and the House Rules.

[76] Mr Barton said PCL had provided copies of the Employment Agreement and the House Rules just before the disciplinary meeting started. He confirmed these had not been provided prior to the meeting, however observed that Mr Maddock had been provided with these at the start of his employment.

[77] The witness statements from the office administrator who had been in the production office on 2 June 2021, Mr Mudgway, and Mr Robertson, had also been provided to Mr Maddock in advance of the meeting.

[78] Mr Wood wrote to Mr Barton on 14 June 2021 raising a formal complaint about the way Mr Maddock had been treated by Mr Mudgway, alleging that there had been a physical assault. The letter also referred to Mr Maddock's suspension on 2 June 2021. Mediation was requested.

[79] Mr Barton responded on 14 June 2021 asking if Mr Maddock wanted to proceed with the disciplinary meeting or attend a mediation. Mr Barton also advised that Mr Maddock had not sent a formal statement with regard to the allegation about Mr Mudgway pushing him and stating: “with what I have received from the 4 people this does not add up.”. Mr Wood responded that Mr Maddock had raised a formal complaint.

*Disciplinary meeting 17 June 2021*

[80] Mr Maddock attended the disciplinary meeting held on 17 June 2021 with Mr Barton and the Managing Director accompanied by Mrs Maddock, Mr Perry and Mr Wood.

[81] During the meeting Mr Maddock said the issues were discussed, and Mr Barton asked for his explanation so he had explained his view of what had occurred on 2 June 2021. Mrs Maddock and Mr Perry confirmed that Mr Maddock had been able to provide his version of what had taken place.

[82] Mr Barton said that the video footage was viewed in the disciplinary meeting and in his view did not support Mr Maddock’s version of what had occurred in which he denied all the concerns, including threatening to ‘knock peoples’ blocks off’.

[83] The meeting commenced at 3.05 p.m. and was adjourned at 16.20 p.m. for Mr Barton and the Managing Director to discuss the issue. Mr Barton said they considered that Mr Maddock alleged Mr Mudgway had pushed him and punched his fist into his hand. He had weighed this against the witness statements, and the video evidence. On the balance of probabilities they had considered that Mr Maddock’s claims against Mr Mudgway were not correct.

[84] When the meeting resumed, Mr Barton confirmed the decision to summarily dismiss Mr Maddock on the basis of serious misconduct.

[85] On 18 June 2021 Mr Maddock via his representative requested the reason for the termination of his employment in writing, but this was not provided to him.

**Was Mr Maddock unjustifiably disadvantaged by being suspended from work by the PCL?**

[86] Mr Maddock was suspended on 2 June 2021 by the Managing Director following an altercation.

[87] There was no contractual provision in Mr Maddock’s Employment Agreement providing for suspension.

[88] In *Kereopa v Go Bus Transport Ltd* the Employment Court commented:

[28] ... Mr Menzies addressed it and relied on *Singh v Sherildee Holdings Ltd*, where Judge Couch stated:

[91] In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.

[29] As Mr Menzies submitted, here there were safety concerns about a driver allegedly driving a bus after smoking cannabis which would have justified a suspension without delay. Mr Menzies cited *Graham v Airways Corporation of New Zealand Ltd*,<sup>3</sup> which found there was no immutable rule requiring that an employee must be told of the employer's proposal to suspend, with a view to giving the employee an opportunity to persuade the employer not to do so.<sup>1</sup>

[89] What is important is that PCL acted as a fair and reasonable employer when addressing this issue.

[90] It is clear from the evidence that Mr Maddock was in an agitated state during the meeting on 2 June 2021. It is not disputed that the level of discussion between Mr Maddock and Mr Mudgway had twice reached the point at which the Managing Director had considered it appropriate to intervene, the second time making the decision after consultation with Mr Mudgway to send Mr Maddock home.

[91] Mr Maddock drove trucks. In that situation I consider that a fair and reasonable employer could act immediately by apprehending a health and safety situation if Mr Maddock drove in that agitated state.

[92] Mr Maddock's response that same day to the email from the Managing Director confirming his suspension was to advise he was needing medical care as a result of the stress from the meeting with Mr Mudgway, and had been signed off on sick leave for a week as a result.

[93] On 11 June 2021 Mr Maddock contacted PCL via his representative and advised that he would be back at his normal duties on 14 June 2021. Mr Wood also mentioned mediation and Mr Barton had responded to that request, following which the meeting on 17 June 2021 proceeded.

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<sup>1</sup> *Kereopa v Go Bus Transport* (2009) 7 NZELR 4

[94] I find that the initial period of suspension was justified on health and safety grounds as supported by the evidence that Mr Maddock had been so stressed from the meeting that he needed medical care and was unfit to attend work for a week.

[95] However there was no reason after 11 June 2021 when it was indicated Mr Maddock was fit enough to return to work that he should not have been provided with reasons for PCL wanting to continue the suspension, and asking for his feedback on that issue prior to confirming it would continue.

[96] I find that the latter part of Mr Maddock's suspension was not justified resulting in him being unjustifiably disadvantaged.

### **Was Mr Maddock was unjustifiably dismissed by PCL?**

[97] Mr Maddock was dismissed for serious misconduct on 17 June 2021 at the conclusion of the disciplinary meeting.

[98] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

- (3) (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 thinks 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.

[99] The Test of justification requires that the employer acted in a manner that was 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.

[100] Procedural fairness required that Mr Maddock was:

- a) informed of the allegations against him;
- b) given the right to have a support person or representative at the meeting;
- c) been advised of the possible outcomes should the allegations be upheld including the possible termination of his employment;
- d) provided with the relevant information; and
- e) provided with the opportunity to provide an explanation which would be considered before a decision was made.

[101] PCL is a relatively small employer with no inhouse Human Resources department or advice. Mr Maddock had however been provided with an Employment Agreement which set out at clause 20 that serious misconduct could result in summary termination of employment, and that harassment and/or bullying would not be tolerated and would result in disciplinary action at clause 32.

[102] Mr Maddock had also been supplied with a copy of the House Rules which set out that physical or verbal abuse was considered to be serious misconduct.

[103] Although it is disputed that Mr Maddock was provided with a copy of both of these at the commencement of the meeting on 17 June 2021, I find that he had received them at the onset of his employment and was aware of their contents. The fact that a copy was not available at the meeting I therefore find this did not result in any unfairness to Mr Maddock.

*Informed of the allegations and of right to a support person*

[104] In the letter from Mr Barton dated 2 June 2021 Mr Maddock was informed of the allegations against him, namely that he threatened Mr Mudgway and Mr Robertson, and that the allegations if established would be considered serious misconduct and result in disciplinary action. He was also advised of his right to have a support person present at the meeting.

*Advised of the possible outcomes*

[105] Although the letter did not refer specifically to dismissal being a possible outcome, I consider that this was a minor flaw which did not result in any unfairness to Mr Maddock. This is because the letter referred to 'serious misconduct' and a 'disciplinary process' and Mr Maddock was aware from the Employment Agreement that, in accordance with clause 20.4, serious misconduct could result in summary termination for serious misconduct.

*Provided with the relevant information*

[106] Mr Maddock was provided with witness statements which Mr Barton had obtained as part of his investigation. Mr Barton's evidence was that he had also viewed the video footage prior to the disciplinary meeting, although this was not supplied to Mr Maddock in advance of the disciplinary meeting, however I note it was viewed during it.

[107] I find that Mr Maddock was provided with relevant information prior to, or during, the disciplinary meeting.

*Provided with an opportunity to explain which was considered*

[108] Mr Maddock was provided with an opportunity to provide an explanation during the disciplinary meeting, this was confirmed by Mr Maddock himself, Mrs Maddock and Mr Perry. Although the meeting was described as of a short duration by the Applicant witnesses, in fact it lasted over an hour according to notes taken during it and this was accepted by the Applicant witnesses as being accurate.

[109] I note that Mr Maddock had, through his representative, raised a formal complaint that Mr Mudgway had 'pushed' him during the incident on the factory floor on 2 June 2021. Mr Barton said he had viewed the video footage and did not see any evidence substantiating the complaint.

[110] Although it would have been preferable for Mr Barton to have responded formally to the complaint, I find there had been an opportunity for this matter to be addressed by Mr Maddock and/or Mr Wood during the disciplinary meeting. Moreover Mr Barton's evidence was that he had considered it during the adjournment, but did not find it to be substantiated.

[111] Mr Maddock also alleged that Mr Mudgway had sworn during their exchange. This was confirmed by Mr Mudgway in his evidence, and was in response to Mr Maddock having called him a racist.

[112] It is clear that Mr Mudgway felt very offended by this comment and did swear during the incident on 2 June 2021. The House Rules set out that verbal abuse was serious misconduct. However I note that the word used by Mr Mudgway was as an adjective and was not directed at Mr Maddock. As such, whilst it may have been offensive to Mr Maddock, I find it was not 'abuse'.

[113] It is incumbent on the fair and reasonable employer that he or she gives genuine consideration to the explanation provided by the employee. There was a 20 minute adjournment during the meeting on 17 June 2021 as set out in the meeting notes, from 4.20 p.m. to 4.40 p.m..

[114] During this adjournment Mr Barton said he considered that there was no discrepancy in the witness statements which had been written minutes after the incident and which included those by the office administrator and the Managing Director as well as Mr Mudgway and Mr Robertson. These described Mr Maddock as having been ‘very aggravated’, ‘very angry’ and ‘aggressive’ when he entered the Production Office.

[115] I observe that Mr Maddock’s evidence at the Investigation Meeting was that he had been ‘wound up’ at the time. Indeed Mr Maddock’s evidence was that he had not trusted Mr Mudgway and Mr Robertson after he had not been welcomed back to work as he had expected after his period of injury absence. In that atmosphere of distrust he had begun recording incidents and matters of concern to him in his notebook. He had been aggrieved by the incident on the factory floor immediately prior to his going to the Production Office.

[116] As a result I find the evidence concurs with his having been in an agitated state when he entered the Production Office. I consider that this is supported by the fact that he did so despite the urgent order he had to deliver and the delayed loading of which had been the reason for his entry into the factory.

[117] Mr Barton said he had weighed the evidence, being the witness statements, the video footage and Mr Maddock’s explanation. He said he saw no evidence of the alleged push of Mr Maddock by Mr Mudgway and decided that the balance of probability weighed against Mr Maddock’s version of events.

[118] Mr Barton said he had considered, but rejected, any lesser outcome than dismissal on the basis of the threat of serious violence by Mr Maddock. He said Mr Maddock had shown no remorse, and he would not tolerate such behaviour in the workplace.

[119] I find that the decision by PCL to dismiss Mr Maddock was what a fair and reasonable employer could have done in the circumstances at the relevant time.

[120] I find that although there were flaws in the process, I consider these were minor consistent with the resources of the employer and did not result in any unfairness to Mr Maddock.

[121] I determine that Mr Maddock was not unjustifiably dismissed by PCL.

### **Did PCL breach s 120 of the Act?**

[122] Mr Maddock was not provided with written reasons for the termination of his employment.

[123] Mr Barton said he had explained the reason for the dismissal as having been based on the balance of probability, that he considered the allegations of threatening Mr Mudgway and Mr Robertson were substantiated.

[124] Mr Maddock's evidence was that he had been dismissed for 'threatening to knock Scott's block off' and that he had been dismissed on the balance of probability.

[125] I find Mr Maddock was aware of the reason for his dismissal from the disciplinary meeting on 17 June 2021 and therefore this is not a defect in the process adopted by PCL.

[126] However I do not find that Mr Maddock having requested written reasons for his dismissal, PCL was in breach of s 120 of the Act when it failed to supply them

[127] I determine that PCL breached s 120 of the Act.

### **Remedies**

[128] Mr Maddock has been unjustifiably disadvantaged. Mr Maddock's evidence was that it had not been clear to him if he would continue to be paid after his period of sick leave finished. This had been a matter of concern to him.

[129] It also increased his level of anxiety prior to the disciplinary meeting.

[130] **PCL is ordered to pay Mr Maddock the sum of \$2000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

### *Contribution*

[131] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[132] I find no contributing conduct by Mr Maddock and there will be no reduction in the remedy ordered.

### **Penalty**

[133] The Applicant is seeking penalties in respect of the failure to provide Mr Maddock with written reasons for his dismissal as requested by him pursuant to s 120 of the Act.

[134] Penalties for breaches of various sections of the Act render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[135] In deciding whether to impose a penalty and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.<sup>2</sup>

[136] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[137] One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to provide written reasons for dismissal in writing if this is requested.

[138] Failure to provide these was a matter of concern for Mr Maddock, although I note that he was aware that the reason for his dismissal was the threat to 'knock Scott's block off' and that he was dismissed 'on the balance of probability'.

*Identify the nature and number of statutory breaches*

[139] There is one statutory breach identified, meriting a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$20,000.00.

*Step Two- assess the severity of the breaches*

[140] The aggravating factors include the fact that Mr Maddock was distressed by his dismissal.

[141] Ameliorating factors on the part of PCL are that it is a small employer lacking the HR assistance of a larger organisation.

[142] I consider that the penalty amount should be reduced to 10%.

*The Respondent's financial circumstances*

[143] I have no information that would support the view that the Respondent's financial position is precarious.

[144] In the circumstances, no reduction is made to the penalty on this basis.

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<sup>2</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC

*Proportionality*

[145] In considering the level of penalties awarded in similar cases decided since *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*<sup>3</sup> and considering the impact on the Applicant in this case, I consider the appropriate level of the penalties in this matter to be \$1,000.

*Should any part of the penalty be paid to Mr Maddock?*

[146] The purpose of penalties is to deter, not to compensate. However I accept that the failure to provide written reasons for his dismissal was a matter of concern to Mr Maddock.

[147] In the circumstances \$1,000 is an appropriate penalty for the single breach of s 120 of the Act.

**[148] I order PCL to pay Mr Maddock \$500.00, with the balance of \$500.00 to be paid to the Authority for payment into a Crown Bank Account pursuant to s 136 of the Act.**

**Costs**

[149] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[150] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[151] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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<sup>3</sup> See n.2 above

[152] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].