



# Employment Court of New Zealand

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## Mercer v Maori Television Service [2010] NZEmpC 133 (8 October 2010)

Last Updated: 26 October 2010

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2010\] NZEMPC 133](#)

ARC 62/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN DAVID MERCER Plaintiff

AND MAORI TELEVISION SERVICE Defendant

Hearing: 12-14 and 23 April 2010 (Heard at Auckland)

Appearances: Shelley Eden, counsel for the plaintiff

Blair Edwards, counsel for the defendant

Judgment: 8 October 2010

### JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff, Mr Mercer, has challenged a determination of the Employment Relations Authority which found that his dismissal on notice was a decision that a fair and reasonable employer would have reached in all the circumstances at the time.

#### **Factual findings**

[2] Mr Mercer was employed as a camera operator by the defendant, Maori Television Service (MTS), in February 2004. From as early as October 2005 he had received a number of notices from MTS about his lateness. In April 2006 he received a formal written warning for lateness which was to remain on his personnel file for a period of six months. He received further notices of lateness in August and September 2006, May 2007 and in June of that year was required to attend a meeting concerning another allegation of lateness. He was advised that MTS expected there

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would be no examples of unreasonable timekeeping for the next six months and he was required to advise management in advance if he knew that he was going to be late.

[3] There were two further incidents in July 2007, which resulted in a first written warning for poor timekeeping, issued on 2 August 2007, which was to remain on his personnel file for the next six months.

[4] On 19 September 2007, a final written warning was issued relating to allegations concerning his driving on the North Western Motorway on 29 August and his lateness for work on 31 August 2007. The warning was expressed to be effective for a period of nine months from 14 September.

[5] On 14 November 2007 it was alleged Mr Mercer was absent from work without notification. Mr Mercer claimed he had notified his team leader in advance and his team leader later accepted responsibility for the incident. However, it was still made the subject of a disciplinary investigation. The parties went to mediation and on 12 December 2007 resolved the

disciplinary matter by written terms of settlement which was said to be in full and final settlement of all matters between the parties arising out of the employment relationship between them, up to and including the date of the agreement.

[6] The terms of settlement record, amongst other things, that there was to be a final written warning, no further incidents of misconduct and that all communications regarding absences or lateness were to be made to either the facilities manager or the operations manager, one hour before his start time. The terms of settlement stated: "Failure to meet with these obligations will result in dismissal". It is to be noted that the terms of settlement do not expressly state how long the final written warning was to remain in force.

[7] The terms of settlement also provided for performance review hui (meetings) to be held at six week intervals with the operations manager and the human resource department, for a period of eight months. These would include completed feedback forms from clients regarding Mr Mercer's attitude and performance for that period.

[8] Mr Mercer was represented throughout the investigation and subsequent mediation by John Minto, a union organiser with the Unite Union, to which Mr Mercer belonged.

[9] A hohou rongo (peacemaking) meeting was held at MTS on 17 January 2008 during which various managers at MTS aired their concerns about Mr Mercer's work and attitude.

[10] A first performance hui was held on 15 February 2008 which demonstrated that Mr Mercer had either "achieved" or "successfully achieved" all of the agreed "expectations" and performance indicators and that there had been positive client feedback. In relation to timekeeping it had been agreed as an expectation that the plaintiff would arrive 15 minutes before his shift to prepare for the day and would check in with management before leaving. If there was to be lateness he was to advise them in advance. It was noted that he had arrived early on most days and had notified management on the odd occasion that he had been stuck in traffic.

[11] The second performance hui took place about 4 April 2008. This records that he had not "achieved expectations" in relation to communications with internal partners or in client feedback. For timekeeping, however, it was recorded that he had achieved, there had been no noted examples of lateness and he was usually early.

[12] On 15 April Mr Mercer received a certificate for successfully completing a training course.

[13] The operations manager, Jason Shazell, spoke to Mr Mercer immediately following an incident on 26 May 2008 when Mr Mercer was late for work by 30 minutes. Mr Mercer explained that this was due to an accident on the motorway. Mr Shazell took the matter no further at that time. On 27 May 2008 Mr Mercer arrived some 1 hour and 45 minutes late for his shift and when the matter was discussed with Mr Shazell shortly after the incident, Mr Mercer advised that he had misread the roster. Mr Shazell took this matter no further at that time. Mr Shazell advised Mr Mercer that the next performance review would be coming up soon. Mr Shazell claimed that on 9 June he verbally advised Mr Mercer that the third performance

review would be held on 16 June 2008. Mr Mercer denied receiving that advice. Little turns on the point. However, the third performance hui was not held within the six weeks required by the terms of settlement.

[14] On 13 June 2008 Mr Mercer called the facilities manager, Maawhi Torrance and left a voice message at 7.56am for an 8.15am start, stating that he was sick and would not be coming in. Mr Shazell did not discuss this incident with Mr Mercer at that time.

[15] On the morning of 16 June, Mr Shazell was advised by Gwendolyn Arago- Kemp, a senior human resource advisor at MTS, that she had seen Mr Mercer arrive that morning at 9.15am for a 9am start. This was initially done by way of email. After receiving that advice, Mr Shazell approached Mr Mercer and asked him if he was happy for the third performance review to proceed that day or if he needed more time to prepare first. Mr Shazell did not mention any of the incidents of lateness at that time.

[16] Later that afternoon Mr Mercer invited his Team Leader, Bretton Richards, to come along to the performance review if he wanted to, to see what it was all about.

[17] Ms Arago-Kemp, Mr Shazell and Mr Richards were all present at the start of the meeting, although Mr Richards left part way through.

[18] The hui did not follow the format of the other performance reviews. Instead, nine instances of alleged misconduct were raised with Mr Mercer. After discussion Mr Mercer thought these were reduced to four issues:

a. his lateness on 26 May 2008 allegedly due to an accident on the motorway;

b) his lateness on 27 May 2008 when he allegedly misread the roster;

c) his failure to call in within an hour of his 8.15am start on 13 June; and d) his alleged late arrival at 9.15am that morning.

[19] Mr Shazell's evidence was that a fifth matter of concern was discussed, which was said to be a general deterioration of Mr Mercer's performance and attitude, as evidenced by poor client feedback since the last review.

[20] Ms Arago-Kemp's evidence was that the four allegations of lateness amounted to breaches of the settlement agreement and would need to be addressed in the context of a disciplinary process. I am not satisfied that this was made sufficiently clear to Mr Mercer at the meeting, although I find it was the view of both Ms Arago-Kemp and Mr Shazell before the meeting even began.

[21] There was an issue between the parties as to Mr Mercer's responses, in particular to the allegation that Ms Arago-Kemp had seen him arrive at 9.15am that morning. It was Mr Mercer's evidence that he had not been late that morning so he claimed that he had denied the allegation and said that he could not recall having seen Ms Arago-Kemp that morning. Ms Arago-Kemp recorded in her notes that Mr Mercer told them he was running late, the start time was 9am for a Native Affairs programme (which Mr Mercer was involved in filming), although the start time varies on the show depending on the format, and ideally he should have been there at

9am. There is an issue between the parties whether Mr Mercer made those admissions.

[22] Ms Arago-Kemp, in cross-examination, accepted that Mr Mercer did not know this matter was going to be raised with him and he would have been surprised. She claimed that "he kind of accepted that he had been running late". She also claimed that she wrote down exactly what he had said as he was responding because it was very important. After being closely questioned on the issue, she accepted that Mr Mercer was actually unsure whether he was late or not, rather than admitting he was late. She finally accepted that he never actually admitted on 16 June that he was running late. That corresponds with Mr Mercer's evidence and I resolve that issue in his favour.

[23] Ms Arago-Kemp drew a diagram illustrating that, according to her, Mr Mercer's performance was on a steep downward slide. Mr Shazell concluded the meeting with a discussion of the performance indicators, the first seven of which

showed unsatisfactory or unachieved performances, with the last two inconclusive. Mr Shazell advised that he would get further feedback from two of the managers, namely Ms Torrance and Mr Richards. There was an issue between the parties as to whether they all agreed that Mr Mercer's performance at that stage had not gone past the point of no return.

[24] I accept Mr Mercer's evidence that this may well have been the impression given to him because it is supported by Ms Arago-Kemp's evidence. She stated that both she and Mr Shazell indicated to Mr Mercer at the meeting that, although things were not looking good at that stage, if the input from those two remaining managers was good then perhaps Mr Mercer's performance would not fall below the line of acceptability, as at that point it was right on the line.

[25] Mr Mercer's evidence was that he left the meeting thinking there had been some unfortunate events but that matters would not be taken any further. That view is not substantiated by Mr Mercer's other evidence of the steps he took to counter the allegations of lateness that day. He claims that after the meeting he recalled there were at least two witnesses who should have been able to support his timely arrival. One was Annabelle Lee-Harris, a senior reporter and producer employed at MTS, and the other was her mother, Sandra Lee. He claimed that Ms Lee-Harris had a

9am editing call and Ms Lee was there to present a show that he was involved in filming and that they all arrived at the same time. It is common ground that he went and spoke to Ms Lee-Harris and asked her what time they had arrived at work on 16

June. Her evidence was that he seemed concerned when he made that enquiry, that she was aware at the time that he was in trouble and under scrutiny for his timekeeping, that her call time for the day was 9.30am and that her mother's call time was 10am and that she had told Mr Mercer, in response to his enquiry, that she had said 9am or shortly after 9am.

[26] On 17 June Mr Mercer told Mr Shazell that he had seen Ms Lee-Harris and Ms Lee on the front steps and they had entered together and that he did not believe he was late on 16 June. He also told Mr Shazell that his car parking ticket stated he had arrived at 8.50am but he had not kept or copied the ticket because he had had to use it to take his car out of the car park on 16 June. Mr Shazell made a

contemporary note of their discussion. However, Ms Lee-Harris was not interviewed by MTS until 30 June and Ms Lee was never interviewed.

[27] Mr Shazell obtained feedback from the other two managers and on 19 June Ms Torrance sent him an email, copied to Ms Arago-Kemp, that had many unsatisfactory comments about Mr Mercer. One example is that he was "a great rotten apple amongst the bunch. He is self-serving & has a negative impact on all clients". This feedback was not shown to Mr Mercer until the Employment Relations Authority investigation.

[28] Mr Shazell wrote to Mr Mercer on 24 June enclosing a copy of the performance review and referring to the incidents on 26 and 27 May and 13 and 16

June. The latter was stated to be “about your apparent lateness to work by 15 minutes on the 16th June which was witnessed by Gwen [Ms Arago-Kemp], HR Advisor”. It concluded that much of Mr Mercer’s performance was not achieved to a satisfactory level, with examples of “unacceptable timekeeping and notification”. Mr Mercer was required to attend a meeting on 26 June, the purpose of which was to present him with any details that may have come out of an investigation and to allow

him a fair opportunity to present his view. It stated that MTS was considering disciplinary action up to and including dismissal and encouraged him to bring a representative with him.

[29] Ms Arago-Kemp and Mr Shazell and Mr Minto attended that 26 June meeting but after a quarter of an hour, when Mr Mercer had not arrived, he was phoned and he said that he was at least 30 minutes away. Mr Minto advised that he had other meetings that afternoon and it was agreed that the disciplinary hui would be rescheduled to the following day.

[30] The meeting on 27 June took place in the presence of Ms Arago-Kemp, Mr Shazell, Mr Mercer and Mr Minto. The four allegations of misconduct relating to lateness were raised and discussed. Mr Mercer repeated his explanations and reiterated that he had witnesses, namely Ms Lee-Harris and Ms Lee, to his entry to work on time on 16 June. He said Patrice Hutchinson had been in the television studio setting up the cameras when he arrived on that morning and he had found Mr

Richards in the loading area at around 9.10am. He claimed they would be able to substantiate seeing him prior to 9.15am. He asked Mr Shazell for the notes from the meeting of 16 June to confirm what was actually said and was told that they were not available as they might have been thrown away. The disciplinary hui ended with Ms Arago-Kemp suggesting an adjournment until 30 June so that she and Mr Shazell could look into what she described as “new information” from Mr Mercer on his apparent lateness on 16 June and, in particular, his advice that he had walked into the building with Ms Lee-Harris and her mother. That later part of Mr Mercer’s explanation was not new. As Mr Shazell’s handwritten note dated 17 June confirms, he was given that information by Mr Mercer on that day. It was therefore not “new” as at 27 June and could well have been investigated in a more timely fashion.

[31] Before he had spoken to Mr Shazell on 17 June, Mr Mercer had checked with security at MTS and had requested the closed circuit television footage of the entrance to the MTS building from 6am until 10am on 16 June. The CCTV close circuit television footage was missing and the security guard advised Mr Mercer that the computer must have crashed. Mr Mercer told Mr Shazell this on 17 June at the same time as he advised him about Ms Lee-Harris and Ms Lee. I also find that Mr Shazell said that he would pass this information on to human resources and I take this to be a reference to Ms Arago-Kemp who assisted Mr Shazell throughout the investigation process.

[32] Immediately before the meeting on 30 June Ms Arago-Kemp, for the first time, approached Ms Lee-Harris. She claimed to have had a very slim chance to interview Ms Lee-Harris before the disciplinary meeting reconvened. Her evidence was that when she spoke with Ms Lee-Harris the latter was aware of the situation because she had previously been approached by Mr Mercer. I find, from Ms Lee-Harris’s evidence that she was taken by surprise when Ms Arago-Kemp approached her in the news room. Ms Arago-Kemp told her that her answer about the arrival time was important, that what they were dealing with was of a serious nature and that Ms Lee-Harris had to be as precise as possible. She advised Ms Arago-Kemp that her arrival time with Mr Mercer was “after 9am, but well before 9.30am. Possibly after 9.10am but more in the quarter hour after 9am”. She actually thought it was somewhere between 9.08am and 9.12am.

[33] Ms Lee-Harris’s affidavit evidence of the time of arrival conforms almost exactly with that of Ms Arago-Kemp although it is common ground that Ms Arago-Kemp did not make any written note of the conversation or obtain a written statement from Ms Lee-Harris at the time. Such exactitude after nearly two years is surprising.

[34] I also find, again from Ms Lee-Harris’s evidence, that it is more likely than not that Ms Arago-Kemp told Ms Lee-Harris at the time of the interview that Ms Arago-Kemp had seen them come in at 9.15am. Ms Arago-Kemp denied this in evidence but I prefer the evidence of Ms Lee-Harris on the point. It is likely that Ms Arago-Kemp’s advice to Ms Lee-Harris may have changed the latter’s recollection from what she had told Mr Mercer on 17 June.

[35] Ms Arago-Kemp was unable to provide to the Court a satisfactory explanation as to why her interview with Ms Lee-Harris was left until the last moment before the final disciplinary meeting on 30 June when MTS had that information on 17 June. If further time to carry out proper enquiries into other witnesses had been required, the meeting of 30 June could have been postponed.

[36] When the 30 June meeting started, Ms Arago-Kemp informed Mr Mercer and Mr Minto that she was absolutely sure of the time of the arrival of Mr Mercer and that Ms Lee-Harris’s response supported her view.

[37] Ms Arago-Kemp accepted that she had not interviewed Ms Hutchinson nor Mr Richards until the Authority investigation and had never interviewed Ms Lee. Her claim was that Mr Richard’s name had not been brought up by Mr Mercer as a possible witness to Mr Mercer’s time of arrival. That is inconsistent with the evidence of Mr Mercer that he informed Ms Arago-Kemp and Mr Shazell at the 16

June meeting that after looking into the studio and seeing that Ms Hutchinson had set up the cameras, he went outside of the building and found Mr Richards in the loading area at about 9.10am. I find that Mr Mercer's explanation was offered at the 16 June meeting, but, again, it was not investigated prior to the 30 June meeting.

[38] As to the failure to interview Ms Lee, Ms Arago-Kemp said in answer to questions in cross-examination that she assumed Ms Lee would simply have confirmed her daughter's evidence. I did not find Ms Arago-Kemp's explanation for why she had not interviewed Ms Hutchinson, Ms Lee or Mr Richards satisfactory. It is possible that the investigations were not carried out because Ms Arago-Kemp was already absolutely sure of Mr Mercer's arrival time on 16 June.

[39] Mr Shazell's evidence was that the 30 June meeting, after some initial discussions about Mr Mercer's new information on his lateness on 16 June (which I have already found was not new) and about Ms Arago-Kemp's account of her meeting with Ms Lee-Harris, was adjourned to consider these further matters. During the adjournment, at which I find Ms Arago-Kemp was present with Mr Shazell, Mr Shazell says that he gave further consideration to their discussion about the 16 June lateness. He found that Ms Arago-Kemp had been a reliable witness and there were no other witnesses that could support Mr Mercer's assertion that he had actually arrived at work on time that morning. After considering Mr Mercer's responses, Mr Shazell said that he accepted that the 26 May incident on the motorway was outside Mr Mercer's control, but he took into account each of the other disciplinary allegations and Mr Mercer's poor performance and made the preliminary decision to dismiss Mr Mercer.

[40] When the meeting resumed Mr Shazell informed Mr Mercer that he had accepted the 26 May incident had been outside his control, but that Mr Shazell's intention was to terminate the employment relationship with four week's notice to be paid in lieu. Mr Shazell advised Mr Mercer that he had found that Mr Mercer had breached the terms of settlement and that his performance had dropped below the standard of acceptability that was outlined at the beginning of the performance review process. He also referred to the historical issues which had been the basis of the terms of settlement and the further final written warning issued in that document.

[41] When those matters were explored in cross-examination it appeared that Mr Shazell was of the view that the November disciplinary matter had been proven and that the terms of settlement required the final warning to remain in force for eight months from 12 December 2007. It is clear from the evidence that MTS was unable

to establish the basis of the November disciplinary complaint because Mr Mercer's team leader at the time had confirmed in writing that he had received a call advising him that Mr Mercer was unwell, and the team leader apologised for any inconvenience and took full responsibility for any injustice to Mr Mercer or his family.

[42] Further it is clear that the terms of settlement did not expressly include a statement that the final written warning was to stay in place for eight months. My interpretation of the terms of settlement, against the evidence I heard, is that the final written warning related back to the September final written warning which was for nine months and which was still in force at the time. This final written warning had expired, on or about 14 or 15 June, one or two days before the 16 June incident, which appears to have been regarded as the final straw by Mr Shazell.

[43] At the conclusion of the 30 June meeting Mr Mercer asked for a "sink or swim opportunity", Mr Shazell responded that this had been given in December in the terms of settlement. Ms Arago-Kemp confirmed that the decision to dismiss was effective from that day with a period of four weeks notice paid out in lieu.

[44] Mr Shazell said that a letter confirming that decision was prepared to be sent to Mr Mercer's home but he had left his current address. This letter, dated 30 June, confirmed the decision on that day that the dismissal was warranted and stated:

This action was taken after considering the current performance management plan that you were on as part of a formal settlement, which had fallen to below the satisfactory level required. As explained at the meeting on 30th June, it was decided that you had been given ample opportunity to improve on your performance over the last few months and years; however the trust and confidence in the working relationship with you had been seriously undermined.

[45] In evidence before the Court Ms Arago-Kemp contended that she was not the decision maker but that the decision had been made by Mr Shazell. She conceded in cross-examination that MTS was intending to dismiss Mr Mercer in relation to the November 2007 investigation, in spite of the letter from Mr Mercer's team leader. Ms Arago-Kemp's response was that it was very difficult in the ensuing disciplinary meetings relating to that incident to actually get the truth from the staff members,

including the team leader who was a friend of Mr Mercer. It was also put to her that security camera footage verified in November that there had been a conversation between Mr Mercer and the team leader and she reluctantly accepted that. She also accepted that the final warning he was on at the time could have been seen to have been continued by the terms of settlement, but she claimed that there was a new final written warning, effective from that day, even though its length was not expressed.

[46] In cross-examination Ms Arago-Kemp also accepted, reluctantly, that she might have been compromised when it came to

objectively assessing the evidence because “at the time what I knew was what I had seen”. She accepted that at some time she had considered that she should have withdrawn from the investigation, but did not do so. There was no adequate explanation as to why she had not withdrawn.

[47] Ms Arago-Kemp accepted that she knew the four lateness issues were going to be discussed with Mr Mercer at the performance review on 16 June. She also accepted that these were serious matters because Mr Mercer was on a final warning for lateness and, if there was no reasonable explanation for his lateness, this could result in his dismissal. She accepted that she was aware of the prospect of transforming the performance review into a disciplinary process for poor performance and lateness. She also appeared to accept that, as a matter of fairness, Mr Mercer should have been warned in advance of the 16 June meeting that he was facing the possibility of disciplinary action if he could not provide reasonable explanations for a series of lateness incidents. This was especially so as Mr Shazell said he had already discussed two of those with Mr Mercer shortly after they had occurred in May and was considering disciplinary action in relation to them, although he had not warned Mr Mercer of this, prior to the 16 June meeting.

[48] In answer to the question of what Ms Arago-Kemp understood Mr Mercer’s dismissal was for, she replied:

His dismissal was for, after we had a performance management process going on with him which is part of the settlement agreement. When we looked at that so each was entwined with the other. The performance actually was a portion of a settlement agreement which we had to honour. Clearly the performance management it wasn’t it was recording really bad at that stage. So that to me when all taken together and after the

disciplinary process, he had breached sections of that settlement agreement.

[49] When the terms of settlement were put before her, Ms Arago-Kemp said that Mr Shazell was drawing his conclusions on a number of things on the balance of probabilities that Mr Mercer had breached the second requirement that there be no further incidents of misconduct. The breaches were in relation to the lateness and not calling in about his sickness within time, and that his performance reviews showed that there was a steady decline.

[50] Mr Mercer was not given the two additional comments from the managers, obtained by Mr Shazell from Mr Richards, orally on 17 June and Ms Torrance in writing on 19 June. Further, it is difficult to show a steady decline in the performance reviews although there were two items in the second review that did not reach “expectations”. However, the performance indicators or expectations relating to lateness in that review had received very positive comments.

[51] Mr Shazell was working under the mistaken impression that the terms of settlement included the implication that the final written warning was to last eight months. Mr Shazell also confirmed that if the disciplinary notice of the previous November had been proven, Mr Mercer most likely would have been dismissed at that time. He accepted that some of the four items he intended to discuss with Mr Mercer on 16 June, could produce exactly that same result.

[52] Mr Shazell accepted that the four incidents were potentially disciplinary matters which could have resulted in Mr Mercer’s dismissal. He tried to explain that there were two separate processes going on at the same time, one, the performance management process, the other, the opportunity for Mr Mercer to give preliminary feedback on possible disciplinary incidents. It is difficult to square that explanation with Mr Shazell’s earlier evidence that he had discussed with Mr Mercer the two May lateness incidents shortly after they had occurred and that this had constituted his preliminary investigation into those two incidents. The delay in taking those matters further, and Mr Shazell’s failure to indicate any concerns at the relevant time, may well have led Mr Mercer to assume that no further action was being taken in respect of the two May incidents. Mr Shazell’s explanation as to why the

performance review was some ten weeks, instead of six weeks, after the April review, was also unsatisfactory.

[53] Mr Shazell accepted that in his letter of 24 June the main issues he considered for disciplinary investigation were about lateness and failure to notify absences. He accepted, in answer to questions from the Court, that the negative feedback he had been getting did not lead to his decision in the disciplinary enquiry and that even though Mr Mercer’s performance was falling, and that this had been clearly communicated, that was not the reason for the disciplinary action. That is also difficult to reconcile with the reasons for the dismissal given in his 30 June letter.

[54] Mr Shazell also accepted that, at the subsequent meetings on 27 and 30 June, the client feedback was discussed but he claimed that even if he had received satisfactory feedback from the clients that may not have saved Mr Mercer from the effects of his lateness. Mr Shazell also confirmed that although his dismissal letter of 30 June referred to Mr Mercer having fallen below the satisfactory level required, his dismissal was in relation to the issues of lateness and failure to report, even though they are not specifically mentioned. He also agreed that he had accepted Mr Mercer’s explanation about the 26 May incident and it was the incidents of 27 May and 13 and 16 June upon which his decision to dismiss was based. He accepted that the decline in Mr Mercer’s performance was a background factor but not the primary driver for the disciplinary action but accepted that his letter confirming the grounds for dismissal reflected aspects of poor performance, other than lateness. He contended that any one of the three incidents on its own would have been sufficient to have resulted in a dismissal.

## Submissions and discussion

[55] Counsel were agreed that the Court's role is to consider whether MTS was able to justify its decision to dismiss, in terms of [s 103A](#) of the [Employment Relations Act 2000](#). The Court's focus on this de novo challenge must be to determine, on an objective basis, whether MTS's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the

time the dismissal occurred. Ms Eden submitted the Court must apply the standards of a notional employer to the conduct of the actual employer citing *White v Auckland District Health Board*.[\[1\]](#)

[56] Mr Edwards for MTS submitted that the dismissal was justifiable as a result of Mr Mercer's failure to adhere to the terms of settlement, that the disciplinary process was procedurally fair in all respects and that MTS had reasonable grounds to dismiss the plaintiff.

[57] In support of his submission that the dismissal was procedurally fair Mr Edwards cited the *Chief Executive of Unitec Institute of Technology v Henderson*[\[2\]](#) where the Chief Judge stated that "procedural infelicities" ought not to be determinative and that fairness and reasonableness must be assessed broadly and:[\[3\]](#)

...not by the application of inflexible principles by minute and pedantic scrutiny ... even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer.

[58] Mr Edwards submitted that in the case of the third review Mr Shazell had decided that two further assessors needed to provide him with feedback before the review could be further discussed with Mr Mercer. He submitted that on the basis of the additional feedback, which was obtained orally from Mr Richards on 17 June and in writing from Ms Torrance on 19 June, Mr Shazell had decided to continue the review process in the disciplinary process.

[59] One difficulty with this submission is that, as I have found, the feedback material was never put to Mr Mercer for comment before the decision to dismiss was made. Mr Edwards contended that there was no obligation for Mr Shazell to disclose that material because it had been given in confidence and it was ultimately Mr Shazell's opinion of all the feedback that mattered. The difficulty with that submission is that it is questionable whether such material can be relied on for disciplinary purposes if Mr Mercer had never been given an adequate opportunity to respond to the criticisms made.

[60] Mr Edwards submitted that Mr Shazell was entitled to rely on an eight month period from 12 December 2007 to conclude that the final written warning was still in effect on 16 June 2008. I reject that submission. It was only Mr Shazell who appeared to assume that there was an eight month period implicit in the terms of settlement. That period is not expressed, nor, in my view, implicit in the terms of settlement. In view of the conclusions I have already reached about whether the November 2007 disciplinary matter could have even resulted in a dismissal, the most reasonable interpretation of the terms of settlement is that it was referring back to the September final warning, which had expired one or two days before 16 June. I

found in *Butcher v OCS Ltd*[\[4\]](#) that an expired warning can be taken into account by an

employer when deciding to dismiss an employee because the expired warning is part of all the circumstances that the Court or the Authority is required to consider under [s 103A](#). However, in the present case the decision maker Mr Shazell was working on a wrong assumption that the final written warning was still current to justify the decision to dismiss.

[61] I also accept Ms Eden's submission that the 27 May incident, when Mr Mercer said he misread the roster, had already been the subject of a preliminary investigation by Mr Shazell who had not taken the matter further until the 16 June meeting. The lack of prompt disciplinary action may well have led Mr Mercer to believe that his explanation had been accepted and that no disciplinary action was being taken over that incident.

[62] Ms Eden sought to make the same submission in relation to the 13 June incident when Mr Mercer called in sick some 19 minutes before the start of his shift. She submitted that nothing was done immediately in spite of Mr Mercer's explanation having been received by Mr Shazell. However, on 16 June, only three days later, the matter was addressed in a meeting which was a disciplinary enquiry rather than simply a performance review.

[63] In this regard I accept Ms Eden's submission that Mr Shazell and Ms Arago-Kemp went into the 16 June meeting with the clear understanding that at least four of the incidents they were investigating could have led to a dismissal, and two of those incidents had already been the subject of a preliminary investigation by Mr Shazell. Although the meeting had been announced as a performance review hui to Mr Mercer, the true nature of the meeting required Mr Mercer to be warned in advance that at least four of the matters that his employer intended to discuss with him could result in his dismissal if his explanations were not accepted. This warning should have been given prior to the commencement of the meeting of 16 June and Mr Mercer should have been advised that he should consider having a representative present.

[64] In spite of these failures, both Ms Arago-Kemp and Mr Shazell regarded Mr Mercer's responses at the meeting amounted

to admissions of lateness on 16 June. That conclusion was unjustified, as Ms Arago-Kemp was forced to concede during her cross-examination. Mr Shazell however, appeared to continue to assume that there had been an admission. Had Mr Mercer been warned of the possible consequences flowing from the investigation of the four incidents prior to the commencement of the 16 June meeting, that would have been much closer to the events of that morning and he could have arranged to have Ms Hutchinson present to support his account. He had Mr Richards present for part of that meeting, but apparently not at the critical part which addressed the 16 June lateness. Mr Richards could have given contemporary evidence of what he considered had taken place that morning, instead of being asked months later for the Authority's investigation.

[65] Mr Mercer gave evidence that Mr Minto was not his chosen representative. I found that evidence a little hard to follow in view of the fact that Mr Minto had represented him in relation to the November incident and the subsequent mediation which culminated in the terms of settlement. However any confusion about representation could have been resolved at the earliest opportunity if Mr Mercer had been warned prior to the commencement of the 16 June meeting of the possible disciplinary consequences, which Mr Shazell and Ms Arago-Kemp had in mind and warned of the value of obtaining proper representation.

[66] Further, Mr Mercer's evidence, which was unable to be contradicted on the point, was that he had a parking ticket which showed that he had arrived at 8.50am that morning. If he had been warned of the disciplinary aspects of the meeting he was facing on 16 June, he would have been able to produce that parking ticket to support his own account of his arrival time, before he had to use the ticket to exit on the evening of 16 June.

[67] The other aspect which is deeply troubling was Ms Arago-Kemp's dual role as the key witness and complainant about the misconduct on 16 June and her participation in all aspects of the disciplinary process as the HR advisor, including assisting Mr Shazell in the conclusion he reached. She was adamant that Mr Mercer had arrived at 9.15am and that may have led her not to investigate Ms Lee-Harris as a potential witness until 30 June even though her name and that of her mother had been given to Mr Shazell on 17 June by Mr Mercer. A written statement ought to have been taken from Ms Lee-Harris especially as she had confirmed to Mr Mercer on or about 17 June that they had arrived together at 9am the previous day. Ms Arago-Kemp never spoke to Ms Lee and did not make any independent attempt to check Mr Mercer's account of the lack of security footage covering the relevant time. This was possibly because she had closed her mind to any explanation that was contrary to her own view of the arrival time. MTS is a large organisation and there was a human resource manager to whom Ms Arago-Kemp reported. That person should have assisted in the enquiry, not Ms Arago-Kemp.

[68] These unsatisfactory matters, and those to which I have previously referred, cumulatively satisfy me that a fair and reasonable employer would not have conducted a disciplinary process at the same time as a performance review in the way that MTS did. This was not fair and reasonable enquiry, which is an express requirement of MTS's own policies.

[69] Turning to the substantive reasons for the dismissal as given by Mr Shazell, I find Mr Shazell had effectively waived any concerns about the 27 May incident after he had carried out his preliminary investigation with Mr Mercer at the time. As to the incident on 13 June, Mr Mercer gave an explanation which was supported by his partner, that he had been unwell in the morning from about 7am but was not sure

whether or not he was going to make it to work until approximately 20 minutes before he was due, at which point contact was made with MTS. I accept the view of MTS that this was not satisfactory, but that of itself it would not have been sufficient for a fair and reasonable employer to have warranted a dismissal. MTS appeared to have formed an unfounded view that Mr Mercer was unwell because of alcoholic indulgence the previous night, but a full enquiry would have shown this view was mistaken.

[70] As to the events of 16 June, there was room for the view that Ms Arago-Kemp was mistaken, especially in light of Ms Lee-Harris's initial response to Mr Mercer's enquiry that he had arrived about 9am. A fair and reasonable employer would have investigated the incident more thoroughly at the time and have reached an incontrovertible view as to whether or not Ms Arago-Kemp was correct. Mr Shazell did little more than accept that Ms Arago-Kemp was a credible witness and that was the end of the matter.

[71] Finally there is some confusion as to the true reasons for the dismissal. Those expressed in the 30 June letter do not refer to the three incidents of lateness. They refer to performance issues which may reflect the feedback Mr Shazell had received. This was not provided to Mr Mercer for his comment or explanation. Ms Arago-Kemp's explanation for what she considered to be the reasons for the dismissal shows similar confusion.

[72] In terms of [s 103A](#), for all these reasons, I conclude that MTS has been unable to discharge the burden of showing that Mr Mercer's dismissal was justified. His challenge succeeds.

## **Remedies**

[73] At the commencement of the hearing Ms Eden advised that reinstatement was no longer sought and that Mr Mercer was seeking compensation for lost wages, loss of dignity and injury to feelings as well as costs.

[74] Mr Mercer gave very brief evidence in support of his claim for reimbursement. He claimed that he was earning approximately \$53,000 per annum when he was working at MTS and since that time he had only managed to earn between July 2008 and March 2010, a total of \$55,000. He claimed reimbursement for wages lost as a result of his unjustified dismissal. He gave no evidence in chief as to his efforts to obtain other work and I am not aware of any other documentation supporting his evidence of how much he earned following his dismissal.

[75] Ms Eden submitted that Mr Mercer's actual net losses to March 2010 were

\$51,000 and no future losses were sought. She submitted that given the nature of the industry in which Mr Mercer operated and the difficulty of finding alternative work due to having been dismissed by the primary provider of Maori Television, it was not out of order to award an amount at least equal to 12 months losses. She cited *Trotter v Telecom Corp of NZ Ltd*<sup>[5]</sup> to the effect that it is safe to infer that a loss is due to the grievance unless the evidence points the other way.

[76] Mr Edwards relied on his cross-examination of Mr Mercer where he asked him whether or not he had applied for full time work with any other employers since his dismissal. Mr Mercer confirmed that he had worked as a camera operator on a contractual basis since he left MTS. Mr Edwards submitted that because the plaintiff had not provided any evidence to the Court that he had actively been looking for full time employment, the Court should conclude that he had failed to mitigate his losses and the chain of causation between the grievance and his losses had therefore been broken.

[77] I accept Mr Edward's submission. The evidence led on behalf of Mr Mercer is inadequate, as to the actual losses, the amounts subsequently earned and his efforts to obtain other employment. I am prepared, however, to infer that in the circumstances he did sustain at least three months' loss of ordinary time remuneration and would have awarded that amount under [s 128\(2\)](#) of the Act, subject to my findings of contribution.

[78] Mr Mercer gave fuller evidence in support of his claim for \$10,000 as compensation for humiliation, loss of dignity and injury to feelings. Mr Mercer gave evidence that the dismissal had enormous personal impact on his relationship with the mother of his son, which led them to separate and this had been enormously distressing and stressful for him. Natalie Rose Te Hei gave confirmatory evidence that the dismissal had put a strain on their relationship, they had had fights and arguments and it led them to split up. She gave evidence that Mr Mercer had spent years studying to get into his role with MTS and that it was a huge disappointment for him to be dismissed and he had found it very difficult to deal with. She said that in losing his job Mr Mercer had "lost a bit of his soul". Mr Mercer also gave evidence that it was humiliating not to be believed and for MTS to seem disinterested in pursuing the lines of enquiry he provided.

[79] Ms Eden cited *Telecom New Zealand Ltd v Nutter*<sup>[6]</sup> to the effect that compensation for humiliation, loss of dignity and injury to feelings must address the actual consequences for the employee as a result of the dismissal. She submitted that this had been Mr Mercer's dream job and that the manner of the investigation and dismissal necessarily affected the level of the award.

[80] I accept Ms Eden's submission that the dismissal has caused Mr Mercer considerable distress and has damaged his personal relationship. In spite of efforts, the relationship could not be held together. I also accept that this was Mr Mercer's dream job and that the loss of the ability to work for MTS in New Zealand was a considerable blow to his pride.

[81] For these reasons, subject to the findings of contribution, an award of

\$10,000 as claimed would be justified under this head.

### **Contribution**

[82] [Section 124](#) of the Act requires that where the Court has determined that the employee has a personal grievance it must, in deciding both the nature and extent of the remedies to be provided, consider the extent to which the actions of the employee

contributed towards the situation that gave rise to the personal grievance. If those actions so require, it must reduce the remedies that would otherwise have been awarded accordingly. The authorities under this section and its forebears held that the actions must amount to blameworthy conduct. Mr Edwards submitted that the plaintiff was the author of his own misfortune and his contribution to his personal grievance should be assessed at 100 percent, even if there had been a procedural

flaw, which was denied, citing *Kernohan v Asure New Zealand Ltd*<sup>[7]</sup> and *Waitakere*

*City Council v Ioane*.<sup>[8]</sup>

[83] Ms Eden submitted that because the situation giving rise to the grievance was the manner in which MTS conducted itself by failing to fairly and thoroughly conduct the investigation and confusing misconduct with performance issues, these were not matters which Mr Mercer could have caused in any way. That, in my view, is too limited an interpretation of [s 124](#), as it is the grievant's contribution to the situation that gave rise to the personal grievance that is relevant, not whether or not

the grievant contributed to the process failures, see *Air New Zealand v Hudson*.<sup>[9]</sup>

[84] Ms Arago-Kemp was adamant that she saw Mr Mercer arrive at 9.15am on the morning of 16 June. She checked the time of his arrival and immediately ascertained when he was due to start work that morning and then sent her email to Mr Shazell. I find it more likely than not that Mr Mercer did arrive at approximately

9.15am because Ms Arago-Kemp was the only witness who actually checked the time. At the hearing that Mr Mercer appeared to resile from any suggestion that he may have first entered the MTS building at the correct time, checked the studio and then gone to the loading dock, where he met Mr Richards at about 9.10am, and that he was coming back into the building, having gone around the outside of it, when seen by Ms Arago-Kemp. I therefore find that had there been a proper investigation with contemporary interviews of the witnesses whose names were given by Mr Mercer at the time, this issue could have been easily settled.

[85] Mr Mercer was admittedly one hour and forty five minutes late on 27 May when he misread the roster. That was blameworthy conduct. Although, on one view it may have been waived by Mr Shazell in not taking the matter further after his preliminary investigation, it still constituted blameworthy conduct which could have justified Mr Mercer's dismissal as a time when he was still under the final written warning issued on 19 September 2007.

[86] There is also the issue of Mr Mercer's declining performance as evidenced by the poor feedback received by Mr Shazell. Again that is a matter, which, if properly dealt with, could well have led to a dismissal.

[87] I have already indicated my reasons for putting aside the events of 13 June. I was satisfied by the evidence led by Mr Mercer and Ms Te Hei that Mr Mercer was sick, but had been hoping to recover in sufficient time to come into work and this meant that his notification was later than that originally intended.

[88] The two incidents of lateness on 27 May and 16 June and the decline in performance when taken in the round, justify a reduction in the awards that would otherwise have been made for contributory conduct.

[89] In all the circumstances, I consider that the awards that I would otherwise have made should be reduced by 25 percent.

#### **Summary of awards**

[90] The summary of awards is as follows:

- a) I award three months ordinary time remuneration less 25 percent. If there are any difficulties in calculating this sum, leave is reserved to refer the matter back to the Court;
- b) As compensation for humiliation, loss of dignity and injury to feelings, I award \$7,500 being \$10,000 less 25 percent.
- c) Costs are reserved and may be the subject of an exchange of memoranda, if they cannot be agreed, the first memorandum being filed and served within 30 days of the date of this judgment, the memorandum in response with a further 21 days.

B S Travis

Judge

Judgment signed at 4pm on 8 October 2010

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[1] [2007] ERNZ 66 at 92.

[2] AC 12/07, 19 March 2007.

[3] At [56].

[4] [2008] ERNZ 367 at [55].

[5] [1993] NZEmpC 152; [1993] 2 ERNZ 659.

[6] [2004] 1 ERNZ 315 (CA).

[7] [2004] NZEmpC 116; [2004] 2 ERNZ 472.

[8] [2005] NZCA 376; [2005] ERNZ 1043.

[9] [2006] NZEmpC 46; [2006] ERNZ 415 at [178].