

Attention is drawn to the order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 188
5597435

BETWEEN KEN MILLER
 Applicant

A N D METROPOLITAN GLASS &
 GLAZING LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Catherine Stewart and Stephanie Ball, Counsel for Applicant
 Rebecca Rendle and Courtney Walker, Counsel for Respondent

Investigation Meeting: 10, 11, 12, 16 May 2016 at Auckland

Submissions Received: 10 and 16 May 2016 from Applicant
 10 and 16 May 2016 from Respondent

Date of Determination: 13 June 2016

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Ken Miller’s employment was affected to his disadvantage by the unjustifiable action of the respondent, Metropolitan Glass & Glazing Limited (Metro), in suspending him without substantive justification and without following a fair procedure:**
- (a) To remedy this grievance, Metro is to pay Mr Miller compensation for humiliation, loss of dignity and injury to**

his feelings in the sum of \$7,200 being compensation of \$8,000 less a deduction of 10% for contributory conduct.

- B. Mr Miller's claim that he was the subject of bullying and harassment during the course of his employment which was reported but not investigated by Metro, was not established by him. Accordingly, he has no grievance.**
- C. There is not a discrete unjustified disadvantage claim established in relation to the procedure undertaken by Metro in respect of Mr Miller's dismissal.**
- D. Mr Miller was unjustifiably dismissed from his employment by Metro. The dismissal was both substantively unjustified and carried out in a procedurally unfair manner. To remedy the grievance of unjustified dismissal:**

 - (a) Mr Miller is reinstated to the position of Project Manager at Metro or to a position no less advantageous based in Auckland on a permanent basis:**

 - (i) Reinstatement is to restore Mr Miller to his former terms and conditions of employment at Metro;**
 - (ii) Reinstatement is suspended for 14 days from the date of this determination to enable any facilitated mediation to take place;**
 - (b) Reimbursement of remuneration lost by Mr Miller, which taking into account contributory conduct, amounts to 3 months' lost remuneration (including KiwSaver contribution of 3%) totalling \$32,187.48;**
 - (c) Compensation for humiliation, loss of dignity and injury to his feelings in the sum of \$18,000, being compensation of \$20,000 less a deduction of 10% for contributory conduct.**

E. Payments of compensation and lost remuneration are to be made by Metro to Mr Miller within 14 days of the date of this determination.

F. Costs are reserved.

Employment relationship problem

[1] The applicant, Mr Ken Miller, was employed as a Project Manager – Commercial Contracts, by the respondent, Metropolitan Glass & Glazing Limited (Metro) from 16 February 2015 until his dismissal on 23 December 2015.

[2] On 25 August 2015, Metro suspended Mr Miller from his employment so that it could investigate allegations of serious misconduct arising out of two incidents on 21 and 24 August 2015.

[3] The first incident on 21 August 2015, involved heated discussions between Mr Miller and Mr Joe Wase, Glazing Supervisor concerning a glazing project. The second incident occurred at a meeting on 24 August 2015. The meeting was held to discuss the management structure in glazing and the incident between Mr Miller and Mr Wase on 21 August 2015.

[4] Mr Miller and Mr Wase were both present at this meeting as were their respective managers, Mr Bruce Tod, Contracts Manager and Mr Brian Hyland, Glazing Manager, Commercial. At the meeting, Mr Miller became agitated and vented his frustrations about various work issues, including the management structure in glazing.

[5] Following the meeting, Mr Miller was suspended while Metro conducted a disciplinary investigation. Mr Miller was subsequently dismissed by Metro for serious misconduct in respect of the incidents on 21 and 24 August 2015.

[6] Mr Miller raised personal grievances claiming his suspension and dismissal were both substantively and procedurally unjustified. Mr Miller also raised a claim that Metro failed to investigate claims of bullying and harassment raised by him during the course of his employment.

[7] Despite attempts by the parties to settle their grievances, including mediation assistance, no resolution was reached and the matter proceeded to an investigation by the Authority.

Mr Miller's claims

[8] In respect of his suspension, Mr Miller seeks compensation for humiliation, loss of dignity and injury to his feelings under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[9] In respect of his claim that Metro failed to take any action to investigate his concerns of alleged bullying and harassment, Mr Miller seeks compensation for humiliation, loss of dignity and injury to his feelings under s.123(1)(c)(i) of the Act.

[10] Mr Miller claims his dismissal was unjustified and seeks to be reinstated by Metro to his former position or placed in to a position no less advantageous to him. In addition, Mr Miller seeks compensation under s.123(1)(c)(i) of the Act and reimbursement of lost remuneration under s.128 of the Act.

Metro's responses

[11] Metro denies Mr Miller's claims that he was unjustifiably disadvantaged and unjustifiably dismissed by it. Metro says Mr Miller's conduct towards Mr Wase on 21 August 2015 and his conduct at the meeting on 24 August 2015, was aggressive, uncooperative and derogatory of Metro. As a result of its disciplinary investigation, Metro formed the view that Mr Miller's conduct amounted to serious misconduct for which dismissal was justified.

[12] Metro denies Mr Miller's entitlement to any remedies. In the event of a finding by the Authority that Mr Miller's dismissal was unjustified, Metro strongly resists Mr Miller's claim to be reinstated. Metro says such a remedy would be entirely unreasonable and impracticable for a number of reasons including a mutual loss of trust and confidence and that Mr Miller's position no longer exists.

The Authority's investigation meeting

[13] The investigation meeting took 3½ days in the Authority. Comprehensive opening and closing submissions were filed by counsel for both parties which were of assistance to the Authority.

[14] For the Authority's investigation meeting, witness statements were filed by Mr Miller and his wife, Mrs Christina Miller and by Ms Suzanne Masefield, a mind body analyst. In addition, Mr Miller summonsed three witnesses, all of whom are currently employed by Metro.

[15] Eight witness statements were filed on behalf of Metro, including by Mr Nigel Rigby, Metro's Chief Executive Officer, Mr Bruce Tod, Contracts Manager and Ms Rebecca Phillips, Metro's Human Resources Manager. Other witness statements were provided by current employees of Metro.

[16] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[17] As permitted under s.174E of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence, which was significant. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

Non-publication orders

[18] Non-publication orders were sought by the parties at the outset of the investigation meeting in respect of one Metro employee who was not a witness at the investigation meeting and in respect of three Metro employees summonsed to give evidence.

[19] The Authority has a wide discretion to prohibit the publication of evidence¹.

[20] I accept non-publication orders are necessary in respect of the evidence that identifies or might identify the one Metro employee who was not a witness and the three witnesses summonsed to give evidence. The orders are necessary to ensure those individuals are not adversely affected. Their names will be anonymised using letters of the alphabet.

[21] I make non- publication orders accordingly.

¹ Schedule 2 clause 10(1) of the Act

The issues

[22] The issues for the Authority to determine are:

- (a) Was Mr Miller unjustifiably disadvantaged in his employment?
 - (i) Was Metro justified in suspending Mr Miller from his employment and did it do so fairly?
 - (ii) Was Metro's disciplinary investigation in to Mr Miller's conduct fair and reasonable?
 - (iii) Was Mr Miller subjected to bullying and harassment in his employment by Metro which was not investigated by it?
- (b) Was Mr Miller's dismissal by Metro justified?
 - (i) Could a fair and reasonable employer have concluded that Mr Miller's conduct on 21 and 24 August 2015 amounted to serious misconduct which justified his dismissal?
 - (ii) Did Metro undertake a fair investigation in to allegations that Mr Miller's conduct on 21 and 24 August 2015 amounted to serious misconduct?
- (c) In the event the Authority finds Mr Miller was unjustifiably disadvantaged, what remedy, if any, is Mr Miller entitled to?
- (d) In the event the Authority finds Mr Miller was unjustifiably dismissed what remedies, including reinstatement, is Mr Miller entitled to?
- (e) In the event the Authority finds Mr Miller has personal grievances for which he is entitled to remedies, was Mr Miller's conduct a contributing factor which requires a reduction in remedies awarded under s.124 of the Act?

The test of justification

[23] By raising personal grievances and bringing them to the Authority for investigation and determination, the Authority is required to apply the test of justification under s.103A of the Act.

[24] Under this test, the question of whether Metro's decisions in respect of Mr Miller, including suspension and dismissal were justifiable must be determined, on an objective basis, by considering whether Metro's actions, and how Metro acted, were what a fair and reasonable employer could have done in all the circumstances at the time the suspension and subsequent dismissal occurred².

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

[26] The test in s.103A is to be applied with the proviso that a dismissal or an action by an employer must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly³.

[27] The Authority has been required to consider a substantial amount of information relating to Mr Miller's employment by Metro, his interactions with staff and management and the work environment at Metro. The Authority was also provided with information concerning the working relationships and behaviours of other Metro staff.

[28] All the evidence has been carefully considered and summarised. Evidence relevant to the issues for determination will be included in this determination where necessary.

² *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [22]

³ Section 103A(5)

Metro

[29] Metro manufactures and supplies glass products for commercial and residential sectors throughout New Zealand. Metro employs over 750 people throughout New Zealand, approximately 300 of whom are based in Auckland.

Mr Miller's employment by Metro

[30] Mr Miller has considerable experience and qualifications in the construction industry, both in New Zealand and overseas. Immediately prior to his employment by Metro, Mr Miller was employed in the role of National Contracts Manager, by Metro's main competitor, Viridian Glass Limited (Viridian).

[31] Viridian has a number of directors. Mr Miller says the management structure led to difficulties in initiating change within the organisation. As a result of these challenges, Mr Miller says he decided to explore other suitable job opportunities.

[32] In December 2014, NES Global Talent (NES), a recruitment company with which Metro regularly dealt, and continues to deal, placed some advertisements seeking candidates for positions in construction. Mr Miller contacted Mr Bruce Jordan, the owner of NES, about positions within the glass industry. Mr Jordan informed Mr Miller that he was dealing with Metro and would make enquiries.

[33] As a result of his enquiries with Metro, Mr Jordan interviewed Mr Miller remotely. A meeting was then arranged with Ms Phillips, Metro's HR Manager to discuss Mr Miller's skills and experience.

Mr Miller's interviews with Metro

[34] A member of Metro's commercial glazing team who was skilled in contract and commercial law had recently left Metro. This departure had left a gap in skills and knowledge in that area. Mr Bruce Tod, the Contracts Manager did not have the necessary skills and knowledge and was being required to "*get up to speed*" quickly.

[35] Ms Phillips told the Authority at its investigation meeting, that Mr Tod although very capable did not have the level of skills required in those areas and was "young and green".

[36] Mr Miller had considerable skills in project management, programme planning, contract/commercial law and health and safety. After meeting Mr Miller, Ms Phillips says she felt his skills in these areas would be very beneficial to Metro

[37] In an email from Mr Jordan to Mr Miller on 8 January 2015 in preparation for Mr Miller's second interview with Metro, Mr Jordan suggested that areas in which he may be spoken to about included:

- *Your desire to lead key projects and delivery of frameworks.*
- *To lead the estimating team and deliver and execute projects also to coach and up-skill staff.*
- *To mentor and help Bruce [Tod] further develop his skills.*

[38] Mr Miller was interviewed by Metro's Chief Executive Officer, Mr Rigby and with the Contracts Manager, Mr Tod. Mr Miller had 4 interviews with Metro before being offered employment by it.

Mr Miller's employment by Metro

[39] Metro created a position of Project Manager – Commercial Contracts for Mr Miller and this was tailored to his particular skills and experience. Mr Jordan undertook reference checking and Ms Phillips prepared the necessary employment documentation. The role reported to the Contracts Manager, Mr Tod.

[40] On 23 January 2015, Mr Tod sent a letter to Mr Miller offering him the full time permanent position of Project Manager starting on 16 February 2015. The letter attached the position description for the role and the usual employee forms for completion. Mr Miller was asked to read, sign and return both copies of the individual employment agreement which was attached to the letter. The employment agreement included a 90 day trial provision.

[41] Mr Miller signed the employment agreement on 25 January 2015 and Mr Tod signed it on 27 January 2015. On 27 January 2015, Mr Miller was sent a letter from Mr Tod inviting him to participate in Metro's discretionary bonus scheme. Mr Miller accepted the invitation.

Mr Miller's role

[42] The position description described the role of Project Manager – Commercial Contracts. The role was to report to the Contracts Manager, Mr Tod and was based in Auckland. The purpose of the role was described as follows:

To manage all aspects of commercial glazing projects that you are responsible for, including building relationships with commercial customers and providing one point of contact. To develop and lead the Project Management Office (PMO) function for the Auckland region. To support the successful on time/in budget delivery of projects and assist the Contracts Manager to provide coaching and mentoring to the glazing managers and estimating team.

[43] Mr Miller's role at Metro was a new role. The role was a senior role and required regular interaction not only with Mr Tod, to whom Mr Miller reported, but also with glazing managers/supervisors including Mr Joe Wase, glazing supervisor, Mr Dane Robinson, glazing manager and Mr G, glazing supervisor. Mr Wase reports to Mr Brian Hyland, Glazing Manager – Commercial. Mr Robinson reports to Mr Tod.

Management structure – Glazing

[44] Mr Miller's role was senior to both Mr Wase and Mr Robinson. However, neither reported to him. Mr Wase, Mr Robinson and Mr Hyland were not aware of the scope and detail of Mr Miller's role, this had not been discussed with them before Mr Miller's employment. They became aware of the scope and detail of Mr Miller's role when they saw the job description for the first time following the issuing of the current proceedings in the Authority.

[45] Within a week or so of Mr Miller starting in the job, Mr Robinson raised issues with Mr Tod about Mr Miller's role. Mr Robinson says he understood Mr Miller's role was more of a project management role. However, after seeing the job description for the role during the Authority's investigation, he says he became aware that it was a more senior role than he had thought.

[46] Mr Tod and Mr Miller discussed how Mr Tod wanted projects to be managed. In an email on 20 May 2015, Mr Miller set out his understanding as follows:

Brian, T, Dane are in charge of all the jobs and supervisors report to them not me, I will no longer get involved with regards to the running

or management of any projects unless requested to do so, as such I will have no more involvement with UOA sites building apart from programming unless requested to by Brian. I am to carry out programme plans and amend them when requested to do so by you, Brian, T or Dane. With regards to health and safety this will be made much more clearer when the meeting takes place between you, Brian, Dane and T and I. Thank you for clearing this up.

Cheers

Ken Miller

[47] In late June 2015, Mr Miller recorded in a note some challenges with regard to the reporting and programme planning within the department. Mr Miller recorded:

A PM [Project Manager] would deal with a PM regarding a project and hand it down to supervisor/site manager etc. As Joe continues not to listen to Ken and says he is not his boss it proves difficult when it comes to programmes and health and safety issues. ... as Ken has no authority over the supervisors or the managers Brian, Dale or T then, it is rather difficult to make sure projects are kept in line with project plans and contractually procedures. This is where the frustration comes in, knowing we are not giving the best service to our clients.

[48] Mr Miller says he left this document on Mr Tod's desk. Mr Tod says he never received it.

[49] Mr Tod says issues arose with some of the employees with whom Mr Miller engaged because Mr Miller's role was a new one and "*the guys were not used to it*". Mr Hyland says Mr Miller's role was something new for everyone.

Working Relationships

[50] Mr Wase says he found working with Mr Miller difficult. He says he felt Mr Miller ignored his eight years' experience at Metro and tried to impose changes on him. Other employees say Mr Miller had a direct, "black and white" communication style and was intent on pushing through changes rapidly.

[51] Mr Tod spoke with Mr Miller about his communication style as did Mr Jordan after being contacted by Ms Phillips. Ms Phillips had become concerned that Mr Miller was not integrating well into the work environment.

[52] It is clear that Mr Miller was employed into a new role at Metro. The role required the development and implementation of new processes including in project management and health and safety. Key employees with whom Mr Miller interacted

and worked and who had been at Metro for quite some time, did not have a proper understanding of his role as it had not been discussed fully with them. Even though Mr Miller's role was a senior role, these key employees did not report to him.

[53] Mr Miller attempted to obtain some clarity from Mr Tod about the working and reporting relationships. In particular, Mr Wase's apparent refusal to listen to Mr Miller. At the Authority's investigation meeting, Mr Tod acknowledged that Mr Miller's frustration by this situation was building in the period leading up to 21 August 2015.

[54] It is my view that these were the factors which led to tensions in the team and which ultimately created the situation which led to the incidents in August 2015 and to Mr Miller's suspension and dismissal. The August incidents cannot be viewed in isolation.

[55] Metro had no reason to, and did not invoke the 90 day trial period contained in Mr Miller's employment agreement. On 29 May 2015, Metro paid Mr Miller a bonus. The bonus was entirely discretionary.

Performance review- August 2015

[56] In mid to late August 2015, Mr Tod gave Mr Miller a very good performance appraisal. The rating system for the appraisal form used by Metro rated performance at 3 levels, "needs improvement", "doing well" and "excellent performance".

[57] The performance appraisal form completed by Mr Tod was divided into two parts, "The Big Three" and "The Core Four + 2". The Big Three were to "Deliver The Results", "Improve The Organisation" and "Focus on People". In each of "The Big Three", Mr Tod rated Mr Miller as "*doing well*".

[58] "The Core Four + 2" included "Customer Intimacy", "Performance without Compromise", "One Metro/Teamwork", "Technical Leadership", "Clarity of Direction" and "Managing People". Mr Miller scored "doing well" in respect of four out of the six deliverables and "excellent performance" in respect of two.

[59] Comments noted by Mr Tod on Mr Miller's performance appraisal form included that Mr Miller had brought on board "exceptional skill and knowledge around planning the plan, and working the plan ...". In respect of education of staff

around contract law, Mr Tod's comments were "results already show that the skills learned from these sessions will have long term benefit to the business".

[60] In relation to technical leadership, the comments included that Mr Miller's understanding of contract law and process "is vital at Metro, his ability to share this across the greater group has been *brilliant*". In respect of managing people, Mr Tod commented:

Ken's leadership style is very direct. Success here will be learning some flexibility in order to influence and lead a larger audience inside the organisation.

[61] The performance appraisal confirms Mr Tod was aware of Mr Miller's personality, that he had been employed by Metro at a time of great change and as a result there had been conflict. Because of his direct leadership style, Mr Miller would need to learn some flexibility.

[62] The performance appraisal was a good one. Although Mr Tod says he was new to performance appraisals and wanted to be "upbeat" in respect of Mr Miller's performance, he stood by his appraisal of Mr Miller's performance.

[63] From the evidence, there were various conflicts with Mr Miller in the period leading up to the performance review. There had been a number of conversations between Mr Tod and Mr Miller about the resistance he was receiving to changes, notably from Mr Wase who Mr Miller found to be aggressive. Mr Miller had expressed his frustrations to Mr Tod about Mr Wase.

[64] Notably, at the time of the performance appraisal, a matter of days before the first incident on 21 August 2015, there had been no formal meetings with or warnings issued to Mr Miller or anyone else arising out of the work situation. Mr Tod rated Mr Miller as "doing well" with team work in his performance appraisal.

[65] It is my view that the comments made by Mr Tod about team work in the performance appraisal accurately describe the situation in the glazing team at Metro a matter of days before the first incident which ultimately led to Mr Miller's suspension and subsequent dismissal. The comments were:

Ken has come in [sic] Metro at a time of great change, his "black and white" personality has meant he has come across conflict with people in the business, his drive to be successful at all levels has seen him

adopt change of his own natural tendencies to allow him to coexist successfully. I admire Ken's commitment to Metro and long term this will value added.

Incident of 21 August 2015

[66] On Friday, 21 August 2015, Mr Miller and Mr Wase had discussions in Metro's office which were then followed by further discussions in the factory. During the course of the disciplinary investigation, Closed Circuit Television (CCTV) footage of the discussions in the office and in the factory were produced.

[67] The discussion in the office concerned the sequence in which glass needed to be glazed into their frames for delivery to a worksite. Installation was required to be in a particular sequence. Mr Miller says that the project plan that he had developed with Mr Wase's manager, Mr Hyland, included the sequence and delivery dates of installation.

[68] Mr Miller says Mr Wase was providing him with information which contradicted the project plan developed with Mr Hyland. Mr Miller says Mr Wase became aggressive and he tried to stop the conversation. Mr Miller says he asked Mr Wase to wait until Mr Hyland returned from his holiday on Monday, 24 August 2015 so that the matter could be resolved.

[69] Mr Wase says when he spoke to Mr Miller in the office, Mr Miller became flustered and could not seem to recall the project details. Mr Wase says Mr Miller seemed surprised that Mr Wase was involved in the project, spoke to him in a sarcastic tone, became agitated and raised his voice.

[70] After the conversation, Mr Wase telephoned Mr Hyland who was on holiday. Mr Hyland told Mr Wase to go to the factory and confirm the correct sequencing order for the glazing, with the leading hand of the structural glazing team.

[71] This is what Mr Wase did. Mr Wase says while he was discussing the information with the leading hand, Mr Miller called him over. Mr Wase says Mr Miller was abrupt with him.

CCTV footage- 21 August 2015

[72] I have viewed the 6 clips of CCTV footage of the incidents in the office and factory on 21 August 2015. The footage did not have sound so I was only able to view the interactions of Mr Miller and Mr Wase.

[73] I have also considered the evidence of Ms Masefield, Body/Mind Analyst and owner of the Body Language Company at Think Success Limited. Ms Masefield's professional opinion is that in both interactions in the office and in the factory, Mr Wase took on a "power position" and Mr Miller a "passive stance".

[74] Ms Miller concluded that in her opinion Mr Miller was not shown in the footage as being aggressive towards Mr Wase. However, Ms Masefield says "*...it was evident from both parties' body language that they were not in good rapport with each other during their interactions*". I agree with Ms Masefield's conclusions.

Subsequent reporting of the incidents

[75] Mr Miller told Mr Tod about these interactions with Mr Wase late on 21 August 2015. At the investigation meeting, Mr Tod said Mr Miller told him he had had a "*run in earlier with Joe*". Mr Miller also told Mr Tod that Mr Wase had been aggressive. Mr Tod said Mr Miller was not complaining about it. However, Mr Tod decided he would take the matter up with Mr Hyland on Monday, 24 August 2015.

[76] Mr Tod was also told by another staff member, Ms Pam Hegg, that Mr Miller and Mr Wase had had "*words*". Mr Tod ran into Mr Wase who told him that he and Mr Miller had had "*words*". Mr Wase told Mr Tod that he had spoken to Mr Hyland and that the matter would be sorted out on the following Monday.

Mr Tod's contemporaneous record of discussions with Mr Miller and Mr Wase

[77] Mr Tod did not elevate the matter to his supervisor, Mr Dean Brown, as he did not think it was warranted. Mr Tod wrote up an employee discussion report on 21 August 2015. The report stated:

*Bruce Tod – Ken Miller
Discussion in regard to a heated conversation between Ken and Joe Wase. Joe Wase had some information in regards to the works that Ken is overseeing in the structural glazing area. This information*

was in conflict with information that Ken had – via Brian Hyland who had prepared the programme plan for the works. Ken feels that Joe was aggressive in his manner approaching him with this information, and suggested that they not discuss it further as Ken would clarify with Brian Monday. Ken finds Joe generally aggressive and uncooperative and prefers to stick to the line of command, dealing directly with Brian, as Joe reports to Brian.

PTO

This is not the first conversation Ken and I have had around his relationship with Joe. Ken's very structured/by the book nature heavily conflicts with Joe's relaxed nature and Ken concedes he would rather not have to deal with him as he believes Joe has no respect for him. Note that when Ken talks with passion about something, (and I have given him feedback directly about this before) that it presents itself as aggression, I believe this to be a contributing factor to the situation. I have spoken with Joe separately regarding the same incident.

***Any agreed actions.** Ken to follow up with Brian on Monday to review the programme plan. Ken seems frustrated with the process in planning these works, Ken is used to operating in a more structured environment.*

Bruce Tod

21 August 2015

Meeting on 24 August 2015

[78] On Monday 24 August 2015 Mr Miller tried to talk to Mr Hyland about the “chain of command” and his conversation with Mr Wase regarding the DNZ project on 21 August 2015.

[79] However, Mr Hyland was unable to discuss the matter with him. Mr Miller then sent an email at 7.23am, to Mr Hyland and copied Mr Tod. The email stated:

Subject: DNZ

Hey Brian, following on from our conversation of this morning, as you know it was agreed a couple of months ago the chain of command with regards to your guys, any communication would be through you so as to alleviate any possible of misinterpretations. On Friday Joe came to see me with different instructions with regards to delivery date for the windows for DNZ than the ones you gave me, I told him to wait until you were back on Monday and talk to you about it.

I find Joe's whole persona as aggressive, can you let me know if what Joe was telling me is true and the delivery date for the windows are not as we put down on the programme plan, if so we need to get together to address these issues asp.

Cheers, Ken

[80] After sending the email, Mr Miller was requested by Mr Tod to attend a meeting with him, Mr Wase and Mr Hyland.

[81] Mr Miller says he was shocked by the meeting and felt attacked by Mr Tod who appeared to be blaming him for the incident on 21 August 2015. Mr Miller acknowledges that because of this he became frustrated and agitated at the meeting. Mr Tod says Mr Miller was irate and worked-up at the meeting.

Contemporaneous notes following meeting of 24 August 2015

[82] Mr Tod subsequently recorded his version of events in a file note. The file note records Mr Miller coming across as frustrated at the meeting, stating that he felt threatened by Mr Wase, who he found to be aggressive. Mr Tod described Mr Miller's frustration at the meeting as presenting itself as aggressive. The file note also recorded Mr Wase's version of events of 21 August 2015. Mr Tod recorded Mr Wase stating that he had tried giving accurate information to Mr Miller about the contract but that Mr Miller "did not want to hear it" and was dismissive.

[83] The note also recorded discussions at the meeting about the management structure and Mr Miller's frustration with it.

[84] Mr Tod's note recorded:

At this point I dismissed Brian and Joe as the meeting was largely going nowhere, my key observations were:

- *the incident with Joe was a catalyst that has set off Ken's frustration that he believes Metro/GZU should be managed in a different way.*
- *Ken when frustrated and fired up comes across aggressively. Whether this is his intention or not.*
- *Ken a number of times to various people continues to comment that, he is going to leave Metro that he does not fit in, and that he is wasting his time.*
- *Joe also contributes to this situation as he does not communicate well with Ken, and does not take instructions from Ken when he should.*

Ken and I continued the conversation once Brian and Joe had left as Ken is still heated. Further talk around his disillusion in what he sees as disorganisation and lack of structure, Ken gives me feedback that my management style is often not firm as it needs to be, I take this on board and try to explain so that he can understand and that working as a team often means we get resolution without the need to give instructions. ...

Mr Tod concluded:

These outbursts I consider to be inappropriate and I am frustrated to have to sit in a room with employees to try and resolve if they are not necessary and I do not expect them at this level.

[85] At the investigation meeting, Mr Tod described his frustration at having to deal with “grown men” in this way and his frustration with Mr Miller’s “tantrum” at the meeting on 24 August 2015.

[86] Mr Tod’s employee discussion report of 21 August 2015 and file note of 24 August 2015, were contemporaneous notes. In my view, these notes accurately record what was reported to him shortly after the incident on 21 August 2015 and what occurred at the meeting on 24 August 2015.

[87] Also, Mr Hyland’s email of 27 August 2015, provided in response to a request by Human Resources, was a reasonably contemporaneous note of what occurred at the meeting on 24 August 2015. Mr Hyland’s email stated:

*Hi Rebecca,
My account of Monday.*

Ken came to me first thing when he got into work and told me about his and Joe’s confrontation on the previous Friday and said that Joe was very aggressive towards him and he wasn’t happy about it and didn’t want to deal with Joe anymore. I then went to Bruce and we called a meeting with Ken and Joe to get the issue resolved.

Bruce opened the meeting saying that we all have to work together and we need to get this problem resolved. During the meeting Ken ignored Joe until near the end when Joe spoke directly to him.

Bruce explained to Ken that the structure that we have in glazing is quite open in that Managers can talk to supervisors of other areas and vice versa quite openly. Ken came back to Bruce saying that this is a poor management practice and it should be more structured. Bruce then told him that he realises that Ken is used to the more structured management style but this is how it works here and he will have to work with it.

The meeting went backwards and forwards on this point.

Ken told us that on Friday when Joe went to him to discuss the structural glazing sequence he came across as very aggressive. Joe then said it was actually Ken that was getting aggressive and there were other people in the office that could back this up. At this point Ken became agitated and Bruce had to step in and ask Ken to take a breath. After this Bruce then asked Joe and myself to leave the room, he wanted to talk with Ken alone.

[88] Mr Wase subsequently gave a statement to Ms Phillips in HR about the meeting on Monday, 24 August 2015 which he described as:

Mr Miller coming in with the wrong attitude and that he was unconstructive, disrespectful and said Bruce was a bad manager. Bruce had to tell him to calm down.

[89] It is evident from the contemporaneous notes that there was a heated discussion on 24 August 2015 triggered by Mr Miller's ongoing frustration with Mr Wase and unclear reporting arrangements.

[90] I do not believe it is disputed that there were issues concerning communication and reporting within glazing and that this caused Mr Miller a level of frustration, particularly when dealing with Mr Wase.

[91] Indeed, Mr Tod noted as an agreed action following the incident on 21 August 2015, that he was to follow up with Mr Hyland on Monday, 24 August 2015, to review the programme plan as this and the reporting structure were sources of frustration for Mr Miller.

[92] No agreed actions were noted by Mr Tod in relation to Mr Miller and Mr Wase's interaction on 21 August 2015.

First Issue

Was Mr Miller unjustifiably disadvantaged in his employment as a result of his suspension by Metro?

[93] The first alleged personal grievance relates to the substantive and procedural justification for the steps that were taken by Metro following the meeting on 24 August 2015.

[94] Clause 14 of Mr Miller's employment agreement states:

Suspension

14.1 If the Company considers it necessary, it may require you to undertake reduced or alternative duties consistent with your abilities, or remain away from work on pay. If any suspension extends beyond two weeks due to matters beyond the Company's control (such as Police investigation into your conduct) the suspension may continue without pay.

[95] Following the meeting on 24 August 2015, Mr Tod spoke with Ms Phillips in HR. At the Authority's investigation meeting, Mr Tod said he was "*shocked, physically shaking*" and "*taken aback*" by the way in which Mr Miller had behaved at the meeting on 24 August 2015.

[96] After meeting Ms Phillips, Mr Tod suggested to Mr Miller that Mr Miller should go home for the rest of the day and that he would be in contact with him the following day.

Letter of suspension

[97] On 25 August 2015, Mr Tod telephoned Mr Miller and told him that he was "*stood down*" from work and that there would be a meeting later in the week. The conversation was followed by a letter from Mr Tod on the same day. The letter informed Mr Miller that he was suspended on pay while an investigation was carried out by Metro.

[98] Mr Tod stated in the letter that an allegation of serious misconduct had been made against Mr Miller and that Metro wished to investigate the allegation. The allegation related to Mr Miller's actions in the meeting on 24 August 2015 and events which led to the meeting. Mr Tod made a number of assertions concerning Mr Miller's behaviour, in particular in relation to Mr Wase.

[99] I do not consider, in reaching a conclusion that Mr Miller should be suspended, that Metro acted in a way that a fair and reasonable employer could have done in all the circumstances. Neither Mr Tod nor Ms Phillips gave Mr Miller any opportunity to meet with them and hear the allegations made against him before he was suspended.

Section 103A(3) of the Act

[100] Section 103A of the Act sets out specific factors that the Authority is to consider when assessing whether an employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances. Mr Tod and Ms Phillips accepted that Mr Miller was not given the opportunity to be heard in relation to his suspension prior to it being implemented.

[101] Ms Phillips accepted that Mr Miller had been suspended by Mr Tod during the course of a telephone conversation on 25 August 2015 and that this was because it was best for him not to be in the workplace. Ms Phillips accepted there was no formal meeting and that Mr Miller was not aware that he could retain legal advice. Ms Phillips described such measures, in cases of suspension, to be “overkill”.

[102] It is my view that Metro’s suspension of Mr Miller in the circumstances was in breach of s.103A(3) of the Act and in breach of his right to natural justice. Mr Miller was suspended for a number of months prior to his dismissal. The length of the suspension was incredibly stressful for Mr Miller and for his wife.

[103] In *B&D Doors Ltd v Hamilton*⁴, Judge Couch stated in relation to suspensions that it would:

It will... only be in very few cases that a decision to suspend would be justifiable without the employee having had an informed opportunity to be heard before the decision is made. ...

[104] In the legal text book Employment Law: A Practical Guide⁵, the authors consider the legal issue of suspension and at para.18.101 state:

... in Sefo v Sealord Shellfish Ltd (2008) 5 NZELR 407 ...the Court at para [37] held that the principles had been strengthened as a result of the obligations of good faith. This required an employer contemplating possible suspension to be active and constructive, responsive and communicative and to provide relevant information and an opportunity to comment where a decision is likely to have an adverse effect on the continuation of employment.

[105] Metro failed to comply with these obligations, with the requirements of s.103A(3) and breached Mr Miller’s right to natural justice.

[106] Metro also failed to comply with its own disciplinary procedure policy. That policy requires the observation by Metro of “fair and due process” and that employees are clearly informed of issues with their performance and are treated “consistently”, “fairly” and “reasonably”.

[107] As a result of Metro’s failures, Mr Miller’s suspension was procedurally unjustified.

⁴ [2007] 5 NZELR 69 at [80]

⁵ Lexis Nexis Ltd

Justification of suspension

[108] According to Metro's disciplinary procedure policy, suspension of employees may be considered where the actions of an employee are considered by management to warrant "serious misconduct" and could result in dismissal, there has been a significant health and safety incident or Metro needs time to investigate the matter fully. No definition of serious misconduct is included in the policy.

[109] Serious misconduct is referred to in the policy under the heading "Summary Dismissal". It includes:

... a serious breach of policy/procedure...or unacceptable behaviour...identified and confirmed. Generally the behaviour of the employee is so serious that it indicates he/she no longer wishes to be bound by the contract of employment and has created significant damage to trust and confidence.

[110] The letter of suspension dated 25 August 2015 sets out four reasons for Mr Miller's suspension, specifically:

- (a) *"Apparent lack of professionalism and discourteous communication style ...";*
- (b) *"Apparent aggressive and threatening behaviour ...";*
- (c) *"Apparent lack of emotional stability and control resulting in numerous unacceptable and aggressive outbursts ...";*
- (d) *"This conduct apparently to be in direct conflict with the standards and expectations that Metro has with its employees ..."*

[111] The letter further stated that due to Mr Miller's inability to remain calm and professional in the office following the meeting on 24 August 2015, it was appropriate that he not be in the work place. And as a result of the serious nature of the allegations to be investigated, Mr Miller was to be suspended.

[112] When questioned at the Authority's investigation meeting, Ms Phillips said that having Mr Miller away from the office would eliminate an occurrence of the incident with Mr Wase, Mr Wase was busy with large contracts and it was "prudent" therefore that Mr Wase remain at work, not Mr Miller.

[113] These reasons were insufficient to justify a decision to suspend Mr Miller from his employment.

[114] Mr Tod's handwritten record of his conversations with Mr Miller and Mr Tod following the incident on 21 August 2015 recorded that Mr Miller found Mr Wase "*generally aggressive and uncooperative*".

[115] Mr Tod described Mr Miller's conduct at the meeting on 24 August 2015, as coming across as aggressive and at the Authority's investigation meeting Mr Tod described Mr Miller as "*having a tantrum*" at the meeting. Mr Tod also described Mr Miller's conduct at the meeting on 24 August 2015, as "*inappropriate*".

[116] There was no reasonable justification in my view for Mr Miller's suspension. I do not consider there was any risk of a "significant issue" arising in the workplace which justified Mr Miller being required to remain away from the workplace⁶.

[117] The unjustified disadvantage grievance is established.

Second Issue

Was Mr Miller subjected to bullying and harassment in his employment by Metro which was not investigated by it?

[118] I do not accept that on the balance of probabilities, the evidence before the Authority establishes that Mr Miller was the subject of bullying and harassment in his employment.

[119] Mr Miller mentioned to Mr Tod that Mr Wase did not listen to him and was aggressive. Mr Miller did not complain or raise the matter as an issue which he required Mr Tod to take any further. The matter was raised in the context of Mr Miller's interaction with Mr Wase on 21 August 2015.

⁶ *Singh v Sherildee Holdings Ltd* EmpC Auckland AC 53/05, 22 September 2005

Third Issue

Was Mr Miller's dismissal justified?

- (i) **Could a fair and reasonable employer have concluded that Mr Miller's conduct on 21 and 24 August 2015 amounted to serious misconduct which justified his dismissal?**

[120] Following its lengthy investigation, Metro concluded that in relation to four matters of conduct alleged against him for which he had been suspended, Mr Miller had committed serious misconduct. Summary dismissal was determined to be the appropriate penalty.

[121] The test of justification set down in s.103A of the Act applies. Under the test, the question of whether Mr Miller's dismissal by Metro was justifiable must be determined, on an objective basis, by considering whether Metro's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying s.103A the Authority must also consider the factors set out in s.103A(3) as well as any others it thinks appropriate.

[122] Metro upheld the allegations against Mr Miller contained in the suspension letter of 25 August 2015 and referred to in para [109] of this determination.

Serious misconduct

[123] The serious misconduct related to the incidents between Mr Miller and Mr Wase on 21 August 2015 and to Mr Miller's behaviour subsequently at the meeting on 24 August 2015.

First incident - 21 August 2015

[124] I do not accept that, on a reasonable interpretation of the six clips of CCTV footage, Metro could have formed the view that Mr Miller was acting in an aggressive manner towards Mr Wase on 21 August 2015.

[125] I concur with the observations of Ms Masefield that during the interactions on 21 August 2015, Mr Wase exhibited dominant body language and Mr Miller took more of a passive stance. Further, the discussions between Mr Wase and Mr Miller on each of the occasions on 21 August 2015, related to a difference of opinion in

respect of information about a project. Mr Miller requested that Mr Wase wait until Monday when the difference of opinion could be resolved with Mr Hyland with whom he had agreed the project plan. This was a reasonable suggestion by a senior member of staff.

[126] Further, as described by Mr Tod, the incident on 21 August 2015, was one in which “*words*” were exchanged between Mr Wase and Mr Miller. This was how the incident was described by Mr Miller and Mr Wase themselves. At most there was a heated discussion.

[127] In the employee discussion sheet form, Mr Tod did not describe the incident between Mr Wase and Mr Miller on 21 August 2015 as a serious matter nor one which required him to take action. This was after discussing matters with both Mr Wase and Mr Miller.

[128] It is my view that Metro could not have reached a conclusion that Mr Miller’s conduct on 21 August 2015 amounted to serious misconduct.

Second incident – 24 August 2015

[129] On Monday, 24 August 2015, it was Mr Miller who sought to resolve issues with Mr Wase’s Manager, Mr Hyland concerning the “*chain of command*”. This was an issue Mr Miller had attempted to resolve on more than one occasion during the course of his employment.

[130] As he records in his email to Mr Hyland on the morning of 24 August 2015, Mr Wase came to him on 21 August 2015 with:

... different instructions with regard to delivery dates for the windows for DNZ than the ones you gave me, I told him to wait until you were back on Monday and to talk to you about it. I find Joe’s whole persona as aggressive. Can you please let me know if what Joe was telling me is true and the delivery date for the windows are not as we put down on the programme plan, if so we need to get together to address these issues ASP.

[131] It was Mr Miller who was taking the initiative following the heated disagreement on 21 August 2015, to have issues concerning instructions and the chain of command resolved.

[132] At the meeting on 24 August 2015, Mr Miller became agitated and vented his frustrations about a number of work issues, including the incident with Mr Wase on 21 August 2015. Mr Miller was angry and upset.

[133] Again, the contemporaneous notes following the meeting on 24 August 2015 and shortly thereafter, confirm that at most, Mr Miller had a “*tantrum*” and became “*irate*”. This was because of ongoing frustrations with Mr Wase and the “*chain of command*”. It was no more than that and certainly, in my view, did not reach the threshold required for dismissing an employee on the grounds of serious misconduct.

[134] Judge Corkill in *Campbell v The Commissioner of Salford School*⁷ states:

Another factor which is relevant to dismissals for serious misconduct is the well-established requirement that the more serious the allegation against an employee which it is said could justify dismissal, the higher the expected standard of proof.

[135] Judge Corkill then refers to the Labour Court decision in *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd*⁸

... However, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave. This does not involve proof beyond reasonable doubt, nor does it involve some kind of halfway house between proof on a balance of probabilities and proof beyond reasonable doubt. It involves only an awareness on the part of the grievance committee of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the act of serious misconduct, that the proof of that act must be convincing in the way we have described. This is because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.

[136] I concur with the submission made by counsel for Mr Miller that a fair and reasonable employer could not have characterised Mr Miller’s conduct in either or both incidents as “*deeply impairing, or destructive of the basic confidence or trust essential to the employment relationship in order to justify dismissal*”⁹. Types of conduct which characterise serious misconduct are assault, threatening behaviour, intimidation and fighting.

⁷ [2015] NZEmpC 122 at para.[122]

⁸ [1989] 3 NZILR 82 (LC) at 4

⁹ Paragraph 47, closing submissions

- (ii) **Did Metro undertake a fair investigation in to allegations that Mr Miller's conduct on 21 and 24 August 2015 amounted to serious misconduct?**

Disciplinary investigation

[137] Metro conducted a lengthy disciplinary investigation over a number of months to ascertain whether or not Mr Miller's conduct on each of the occasions of 21 and 24 August 2015 constituted serious misconduct for which he could be dismissed.

[138] A significant amount of evidence regarding the process undertaken by Metro was provided to the Authority. I do not intend canvassing all the evidence in relation to the investigation process. However, it is my view that the disciplinary investigation and the process undertaken by Metro was flawed.

[139] Metro's disciplinary procedure policy sets out its purpose and scope as follows:

To provide employees and management with a recognised process to remedy and resolve continuing problems or unacceptable employee performance or conduct. This policy pertains to all Metro Performance Glass (Metro) sites and business units.

The disciplinary process is designed to ensure that when deviation from acceptable standards has occurred, employees are aware of and comply with the standards of performance that are expected of a Metro employee. It is a process of consultation, counselling and, if necessary, warning where employees are clearly informed about their performance with the aim of rectifying any problem. This policy is designed not only to comply with employment legislation, but also to provide a framework which ensures fair and due process is observed.

...

POLICY

The Metro policy on Disciplinary Procedures is:

- *Metro has a process for remedying and resolving problems and/or unacceptable employee performance or conduct.*
- *The process includes consultation with the employee, and may involve counselling and/or formal warnings where necessary.*
- *Metro will endeavour to ensure that all employees are treated consistently, fairly and reasonably when an unacceptable behaviour or performance issue has been identified, and that all ethical and legal considerations are properly satisfied.*
- *The disciplinary process will be accurately and thoroughly documented – where possible this will be on standardised form templates.*

...

PROCESS

Due process

Metro believes that employees have the right to know the likely outcomes of them failing to meet expectations.

- *Employees have the right to a consistent and predictable set of rules and regulations.*
- *Employees have the right to be fairly disciplined based on factual evidence and/or the balance of probabilities.*
- *Employees have the right to challenge facts and present a defence.*
- *Employees have the right to be considered individuals.*
- *Employees have the right to a progressive process when disciplinary action occurs due to performance issues.*

[140] The policy describes examples of conduct which may result in disciplinary action and to factors which influence the severity of a disciplinary action.

[141] Examples of misconduct include theft..., possession of, or working under the influence of alcohol or drugs, sexual or unlawful harassment, bullying, intimidation, physical and verbal threats, fighting or threatening violence in the workplace....

[142] Factors influencing the severity of a disciplinary action in respect of such misconduct include, the degree of severity of the situation, length of service, number and nature of previous offences, previous warnings...

Unacceptable performance or conduct

[143] Metro failed to consider that Mr Miller's conduct may fall into the category of unacceptable employee performance or conduct. If Metro had considered Mr Miller's conduct on 21 and 24 August 2015 may have fallen within such a category, under its policy it was required to consult with Mr Miller, counsel him and if necessary issue warnings to Mr Miller.

[144] However, from the outset Metro's investigation focused on Mr Miller's conduct on 21 and 24 August 2015 as falling in to the category of serious misconduct. This affected the process undertaken by Metro.

Use of CCTV footage

[145] Metro relied on CCTV footage in support of the allegation against Mr Miller that he had been aggressive towards Mr Wase in the office and in the factory on 21 August 2015. The footage did not have sound. Metro relied on body language.

[146] The Authority was provided with handwritten notes made by Ms Phillips in respect of the CCTV footage. Ms Phillips comments include:

... also enclosed are some still shots which PTO appear to show Ken actively seeking to pursue the confrontation with Joe. It is also after a significant amount of (what appears could be) provocation before Joe finally gets frustrated and it is visible in his posture/body language. ...

[147] Other handwritten notes include:

Joe walking away after initial discussion in factory. Just prior to Ken calling him back. ...

Joe turns as he is called back by Ken ...

Ken then initiating further discussion with Joe. Joe's posture is not apparently aggressive, Ken's hands are gesturing and he is talking.

...

Ken continues confronting Joe, still no apparent reaction ...

Joe steps back away from Ken who is still talking at him and hand gestures appear to be as if Ken is belabouring a point or berating Joe.

[148] Ms Masefield, the Body/mind analyst who provided evidence to the Authority, did not accept the interpretation placed by Ms Phillips on the CCTV footage, that Mr Miller was acting "aggressively". I agree with Ms Masefield. Ms Phillips' interpretation was not reasonable. It is my view that Ms Phillips' handwritten notes indicated bias by her against Mr Miller.

[149] The way in which Ms Phillips conducted the disciplinary investigation is, I consider, of concern. Her notes regarding the CCTV footage is one example.

[150] Following the discussion between Mr Tod and Ms Phillips about the meeting on 24 August 2015, Ms Phillips arranged for statements from Mr Robinson and Mr Wase in relation to the incident on 21 August 2015 and from Mr Hyland and Mr Wase in relation to the meeting of 24 August 2015.

[151] Mr Hyland provided his account of what occurred at the meeting on 24 August 2015 in a short email dated 27 August 2015. Mr Robinson provided a short handwritten note on 27 August 2015 giving his account of the incident on 21 August 2015.

[152] Mr Wase's statement was not in his handwriting. Ms Phillips wrote Mr Wase's statement. None of Ms Phillips questions to Mr Wase were provided to Mr Miller during the disciplinary investigation nor to the Authority.

[153] Several weeks after obtaining these statements and during the course of the investigation, Mr Hyland and Mr Wase were each requested by Ms Phillips to provide clarification statements. This request was made after Mr Miller challenged inconsistencies in their statements. The further statements were provided well after the incidents occurred.

Finding of serious misconduct – 5 November 2015

[154] In a letter from Metro to Mr Miller on 5 November 2015, Mr Miller was informed that Metro had concluded that his actions amounted to serious misconduct and its preliminary view was that the appropriate sanction was summary dismissal.

[155] Mr Miller was informed that Metro had considered various options including a final written warning but *“given the contentious relationships that clearly exist between you and key members of the team, my preliminary view is that it is unfeasible for you to return to the workplace.”*

[156] Mr Miller provided his response to Metro in a letter dated 13 November 2015.

Summary dismissal – 23 December 2015

[157] By letter dated 23 December 2015, Metro confirmed its decision to summarily dismiss Mr Miller for serious misconduct.

[158] In reaching its decision, Metro failed to properly take into account Mr Miller's positive performance appraisal undertaken a matter of days before the incident on 21 August 2015, and his excellent work record. These were factors Metro's own disciplinary procedure required it to take in to account.

[159] Metro also failed, in my view, to properly take into account the fact that Mr Miller was suffering from a great deal of stress at the time of the incidents on 21 and 24 August 2015.

[160] Mr Miller's wife is suffering from terminal cancer and Mr Miller gave evidence of the impact that his wife's health situation had on him as well as his own as a diabetic.

Unjustified dismissal

[161] Applying the test of s103A of the Act, I find that Metro's decision to summarily dismiss Mr Miller, in the overall circumstances known to it at the time it made its decision, was not that of a fair and reasonable employer.

[162] Mr Miller's dismissal was unjustified.

Remedies

Unjustified disadvantage arising out of his suspension by Metro.

[163] In order to remedy his unjustified disadvantage grievance arising from his unjustified suspension, subject to any order as to contribution, I consider compensation of \$8000 for humiliation, loss of dignity and injury to Mr Miller's feelings appropriate.

Unjustified dismissal

Reinstatement

[164] Mr Miller seeks reinstatement. Reinstatement is no longer the primary remedy under the Act, but it is an important remedy for an employee¹⁰. Section 125 of the Act provides for reinstatement "*if it is practicable and reasonable*".

[165] In *Lewis v Howick College Board of Trustees*¹¹, the Court of Appeal affirmed the view that:

... practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

¹⁰ *H v A Ltd* [2014] NZEmpC 189 at para.[108]

¹¹ [2010] NZCA 320

[166] The Employment Court in *Angus v Ports of Auckland Ltd*¹² stated in respect of “*reasonableness*” that the requirement for reasonableness invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned. This approach has been adopted by the Employment Court in the decision of Judge Ford in *H v A Ltd*¹³.

[167] Mr Miller has made out a compelling case for his reinstatement. Mr Miller has suggested repeatedly to Metro that he would attend a facilitated mediation with Mr Wase, is willing to work constructively with colleagues at Metro and to attend coaching if Metro considers that would be helpful.

[168] During his employment by Metro, Mr Miller received a discretionary bonus payment, Metro did not invoke the 90 day trial period and he received a very good performance appraisal a matter of days before the incidents which gave rise to his dismissal. Mr Miller received no warnings and was regarded by his colleagues as being extremely capable and having very good technical skills.

[169] Metro has raised issues concerning Mr Miller’s ability to work constructively with his colleagues. On 20 November 2015, prior to Mr Miller’s dismissal Mr Wase had a letter prepared and signed by colleagues expressing concern if Mr Miller was to be reinstated. Mr Wase was of course a party to the heated conversations on 21 and 24 August 2015.

[170] The letter refers to Mr Miller having “...*multiple run ins/arguments with multiple staff members on a very regular basis...*” Six staff members signed the letter. Metro employs more than 750 staff.

[171] These “*multiple run ins*”, if they occurred, could have been dealt with at the performance appraisal. That was the perfect opportunity for this issue to be discussed and resolved. It was not. It appears that this evidence is most likely a response by Metro to Mr Miller’s personal grievance claims and his strong desire for reinstatement.

[172] Mr Miller has applied for a total of 47 jobs and has been rejected outright or simply not received a reply. This, he says is because he has been dismissed

¹² [2011] NZEmpC 160

¹³ Supra para.[112]

summarily by Metro for serious misconduct. When prospective employers become aware of this, his applications for employment proceed no further. Mr Miller is highly qualified and extremely experienced and works in a specialised market.

[173] Mr Rigby, the CEO of Metro, gave evidence that Metro would be employing project managers in the future.

[174] Mr Tod gave evidence that up until 24 August 2015, he had a good relationship with Mr Miller.

[175] Reinstatement is reasonable and practicable and is an appropriate remedy in the circumstances, even having regard to Mr Miller's contributory conduct, to which I will return when considering the other remedies sought by him.

[176] I consider that Metro should instigate a facilitated mediation between Mr Wase, Mr Robinson, Mr Tod and Mr Miller to ensure that future working relationships are preserved.

Reinstatement

[177] Pursuant to s. 123 (1)(a) of the Act, I order the reinstatement of Mr Miller to the position of Project Manager or to a position no less advantageous based in Auckland on a permanent basis.

[178] Reinstatement is to restore Mr Miller to his former terms and conditions of employment at Metro.

[179] Reinstatement is suspended for 14 days from the date of this determination to enable any facilitated mediation to take place.

Loss of income- s128 of the Act

[180] Section 128 of the Act provides that where an employee has a personal grievance, and the employee has lost remuneration as a result, the Authority must order the employer to pay the employee the lesser of a sum equal to that loss of remuneration or to three months' ordinary time remuneration. Under s128(3), the Authority may, at its discretion, order an employer to pay an employee a greater sum.

[181] The Court of Appeal found in *Sam's Fukuyama Food Services Limited v Zhang*¹⁴, moderation is required in fixing awards for lost remuneration and any such award “*must have regard to the individual circumstances of the particular case*”. This decision was referred to and applied by the Employment Court in *Campbell v The Commissioner of Salford School*¹⁵.

[182] Mr Miller seeks lost remuneration for the entire period since his dismissal on 23 December 2015. Mr Miller's lost earnings per week, including KiwiSaver contribution of 3%) is \$2,475.96 gross. Up until the date of the Authority's investigation meeting Mr Miller's lost remuneration, totalled \$49,519.23 gross.

[183] I accept Mr Miller's evidence that he made multiple unsuccessful applications for work.

[184] Mr Miller did contribute to the situation which lead to his suspension and dismissal. The contribution was not significant. Given Mr Miller's contributory conduct, the award of lost remuneration for the entire period since his dismissal, is to be reduced to three months remuneration. This reduction is made exercising my discretion under s.128 of the Act.

[185] Based on the above figures, I order Metro to pay Mr Miller 3 months lost remuneration (including Kiwisaver contribution of 3%) totalling \$32,187.48.

Compensation under s.123

[186] Mr Miller seeks a significant award for compensation for the hurt and humiliation he has suffered as a result of his unjustified dismissal. Mr Miller spoke of the loss of respect, loss of pride and devastating effects his summary dismissal for serious misconduct has had on him.

[187] Subject to any contributory factors, I am satisfied that a significant award is justified in the circumstances, which I fix at \$20,000.

Contribution under s.124

[188] I consider that Mr Miller contributed to the situation that gave rise to his unjustified dismissal. However, the contribution was not significant. Mr Miller had

¹⁴ [2011] ERNZ 482 at [36]

¹⁵ [2015] NZEmpC122 at para 331

attempted to clarify the lines of communication and management structure with Mr Tod on several occasions prior to the incidents on 21 and 24 August 2015. Those issues had not been resolved by Mr Tod.

[189] A heated discussion occurred between Mr Miller and Mr Wase on 21 August 2015 about a project. Mr Miller played a part in these heated discussions which occurred in the office and then in the factory.

[190] At the meeting on 24 August 2015 to discuss the incident on 21 August 2015, issues around lines of communication and management structure, Mr Miller forcefully vented his frustrations in an inappropriate manner. This was an unfortunate way in which to deal with the issues and led to Mr Miller's suspension and dismissal.

[191] Standing back, I consider a just reduction for contributory purposes to be 10 percent. The reduction is to apply to the awards of compensation under s123 of the Act made in respect of the unjustified suspension and unjustified dismissal.

Special damages- legal costs

[192] Mr Miller seeks special damages in respect of the legal costs incurred by him prior to raising his personal grievances and filing his claims in the Authority. These legal costs total almost \$20,000 including GST.

[193] I agree with the submission made by Counsel for Metro that seeking special damages for legal costs circumvents the Authority's costs regime.

[194] The Authority is a specialist employment institution and has a costs regime which can accommodate claims for legal costs over and above its notional daily tariff. The Authority's daily tariff is often the subject of an "*uplift*" or "*reduction*" depending upon the circumstances.

[195] In *Hall v Dionex Pty Ltd*¹⁶, Judge Inglis stated:

... *In declining a similar claim for breach of contract seeking damages for loss of reputation and special damages for the legal costs incurred by the plaintiff in the context of an allegedly flawed employment investigation, it was said in George v Auckland Council*¹⁷*that:*

¹⁶ [2015] NZEmpC 29 at 110

¹⁷ [2013] NZEmpC 179

[128] ... *Simply crafting a separate claim for damages cannot suffice. While Ms George has sought damages against the Council, what she essentially seeks is resolution of her personal grievance claim. Further, there is authority for the proposition that in the context of an employment relationship problem it is not appropriate to classify costs incurred prior to the filing of a statement of problem as special damages to enable full recovery as opposed to the application of the Authority's costs regime: Harwood v Next Homes Ltd*¹⁸.

[196] This claim is more appropriately dealt with by counsel in submissions as to costs.

[197] The claim for special damages is declined.

Costs

[198] Costs are reserved. Mr Miller has 14 days from the date of this determination to file a memorandum as to costs. Metro has 14 days from receipt of Mr Miller's memorandum to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹⁸ [2003]2 ERNZ 433 at [37] (*See however Hayward v Tairāwhiti Polytechnic EMC Auckland AC43A/05 22 December 2005 at [50] where the Court appeared to accept that such costs could be recovered as special damages*).