

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 8
5341029

BETWEEN DOMINIC PEREIRA
 Applicant

AND IMPERIAL TOBACCO NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Carolyn Heaton, counsel for the Applicant
 Rachel Burt and Sarah Backhouse, counsel for the
 Respondent

Investigation Meeting: 15 September 2011 and closing submissions by
 telephone conference on 19 September 2011

Determination: 25 January 2012

DETERMINATION OF THE AUTHORITY

- A. Dominic Pereira was unjustifiably dismissed by Imperial Tobacco New Zealand Limited (ITNZL).**
- B. ITNZL is ordered to reinstate Mr Pereira to his former position and to pay him compensation of \$5000 for injury to his feelings, a sum reduced for blameworthy conduct by him.**
- C. Costs are reserved.**

Employment relationship problem

[1] Imperial Tobacco New Zealand Limited (ITNZL) dismissed Dominic Pereira on 12 April 2011 for serious misconduct. Mr Pereira has worked at its cigarette manufacturing factory in the Hutt Valley for 35 years, firstly for two predecessor companies that operated the factory and, since 1999, for ITNZL. He was the material

stores supervisor responsible for two employees, Joshua Ross and Belford Rodrigues, and sometimes supervised a third worker, Gilbert Milne. Mr Pereira reported to Graham Chote who was appointed as ITNZL's Logistics Manager in October 2009.

[2] ITNZL suspended Mr Pereira from work on 18 March 2011 after advising him of a disciplinary investigation into a complaint from Mr Ross and a report from Mr Chote. Mr Ross complained he was harassed and bullied by Mr Pereira. Mr Chote's report was about Mr Pereira's conduct during a meeting at work on 14 March with Mr Ross, Mr Rodrigues and Mr Chote.

[3] ITNZL factory manager Mike McInnarney and human resources manager Pat Wylie conducted the disciplinary investigation. They interviewed Mr Ross, Mr Chote, Mr Milne, Mr Rodrigues and two other employees. They then notified Mr Pereira of four allegations for which he was asked an explanation:

- (i) behaving in an aggressive and intimidating manner towards Mr Ross on 14 March 2011; and
- (ii) verbally and physically threatening Mr Chote on 23 September 2010; and
- (iii) behaving in an insubordinate manner toward Mr Chote and threatening him in a discussion in February 2010; and
- (iv) creating an unsafe and fearful working environment by comments made and behaviour towards Mr Milne and Mr Ross.

[4] At a disciplinary meeting on 31 March Mr Pereira requested further information, suggested some other employees be interviewed, and proposed the parties attend mediation. Mr McInnarney agreed to mediation, which was held on 8 April without resolving the matter. A further disciplinary meeting was held on 12 April during which Mr Pereira provided detailed responses to the allegations. Following an adjournment of the meeting Mr McInnarney informed Mr Pereira he was dismissed. In a six page letter to Mr Pereira dated 14 April 2011 Mr McInnarney set out an account of his investigation, his findings on the allegations and his reasons for imposing the penalty of dismissal.

[5] Mr Pereira lodged a personal grievance application in the Authority on 5 May 2011. From his statement of problem and ITNZL's statement in reply I identified the following issues requiring investigation and determination:

- (i) whether ITNZL's actions in investigating Mr Pereira's conduct and its decision to dismiss him were what a fair and reasonable employer could have done in all the circumstances at the time of those actions; and
- (ii) if not, what remedies should be awarded to Mr Pereira considering reinstatement (if practicable and reasonable to do so), reimbursement of lost wages (subject to satisfactory evidence of reasonable endeavours to mitigate the loss) and compensation for humiliation, loss of dignity and injury to his feelings; and
- (iii) if remedies were awarded, whether any remedies should be reduced due to blameworthy conduct by Mr Pereira contributing to the situation giving rise to his personal grievance; and
- (iv) costs.

[6] I record that Mr Pereira had also raised a disadvantage grievance about his suspension that, on the evidence available to me, required no detailed investigation. Because of a preliminary indication from me on that point, the alleged disadvantage was not addressed in closing submissions for Mr Pereira. For completeness however I find that the suspension of Mr Pereira from 18 March 2011, on full pay, was a justified action by ITNZL. In all the circumstances at the time the decision was made on reasonable grounds and only after fairly giving him the opportunity to comment on the proposal for suspension.¹ It did not unfairly affect his ability to participate in the disciplinary investigation of his alleged conduct or behaviour.

The investigation

[7] Mr Pereira, Mr McInnarney, Ms Wylie, and Mr Chote lodged written witness statements for the Authority's investigation. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their statements and answered questions from the Authority member and the parties' representatives. The representatives provided closing written submissions and, by telephone conference four days later, presented oral arguments on the facts and issues for determination.

[8] As permitted by s174 of the Employment Relations Act 2000 (the Act), this determination does not record all evidence and submissions received but states

¹ *Kereopa v Go Bus Transport Limited* (EC Auckland, AC 25A/09, 18 September 2009) at [29].

findings of fact and law and expresses conclusions on matters requiring determination. The Authority's findings are made on the civil standard of the balance of probabilities, assessing the evidence to determine what is more likely than not to have happened.

[9] I regret issuing this determination was delayed due to the demands of other Authority matters and acknowledge the parties' patience.

The test of justification

[10] Whether ITNZL's decision to dismiss Mr Pereira and how it reached that decision was justified is assessed against the objective standard of what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.² In making that assessment the Authority must consider whether:

- (i) having regard to its resources, ITNZL sufficiently investigated the allegations made against Mr Pereira before dismissing him;
- (ii) ITNZL raised the concerns it had with Mr Pereira before dismissing him; and
- (iii) ITNZL gave Mr Pereira a reasonable opportunity to respond to its concerns; and
- (iv) ITNZL genuinely considered Mr Pereira's explanation in relation to the allegations made against him; and
- (v) any other appropriate factors should be taken into account; and
- (vi) any defects identified in the process followed by ITNZL were only minor and did not result in the employee being treated unfairly?

[11] Throughout the employment relationship, including during the disciplinary investigation, both parties were also subject to the good faith obligation to be active, constructive, responsive and communicative in maintaining a productive relationship and not to do anything likely, directly or indirectly, to mislead or deceive one another.³ For ITNZL this included a requirement to provide Mr Pereira with access to information relevant to the continuation of his employment and an opportunity to comment on that information before it made any decision likely to have an adverse

² Section 103A of the Employment Relations Act 2000.

³ Sections 4(1) and 4(1A)(b) of the Employment Relations Act 2000.

effect on the continuation of his employment.⁴

[12] In assessing ITNZL's actions the Authority does not substitute its own view of what should have been done but considers whether ITNZL's actions were what the notional fair and reasonable employer could have done in the circumstances.⁵

The employer's findings

[13] Mr McInnarney's 14 April letter summarised his extensive findings that Mr Pereira committed serious misconduct on three specified occasions – in February 2010, September 2010 and March 2011 – and some other unspecified occasions.

[14] He found that, during the 14 March meeting, Mr Pereira "behaved in an angry and forceful manner towards Mr Ross" in a way that amounted to harassment. The meeting took place in the portacabin-style office used by Mr Pereira in the material stores area of the factory. When Mr Chote was discussing arrangements for managing materials when Mr Ross was away, an argument began between Mr Ross and Mr Pereira. ITNZL alleged that "without provocation" Mr Pereira had leaned over his desk towards Mr Ross and accused him of shaking his head at Mr Pereira. He was said to have stared at Mr Ross, wagged his finger at him and verbally assaulted him by saying "I can see what's going on here now" and saying to Mr Chote "this little shit has been in your ear".

[15] In respect of the 23 September 2010 incident Mr McInnarney found Mr Pereira "verbally and physically threatened Mr Chote". Mr Pereira had become annoyed when Mr Chote questioned why he stopped an employee from another department going into part of the material stores to remove some wall units. At the time Mr Pereira considered access to that area was restricted due to an imminent MAF inspection while Mr Chote wanted the employee to be allowed to collect the units without delay. Mr Pereira denied he raised his fist to Mr Chote and told him he was "this close to getting a smack" but Mr McInnarney found Mr Chote's account more credible. He said he did so because Mr Chote was a manager and because, while Mr Chote was seeking to make changes to operations that Mr Pereira disagreed with,

⁴ s 4(1A)(c) of the Act.

⁵ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [58].

there was no evidence to support Mr Pereira's allegation that Mr Chote was trying to push him out of his job.

[16] Mr McInnarney found Mr Pereira had "behaved in an insubordinate manner toward Mr Chote" in February 2010 during a discussion about quarantine procedures. The actual date of this event was never specified in any of the evidence. Mr Pereira was alleged to have ignored a reasonable and lawful instruction by walking away from Mr Chote in the middle of a conversation and not returning to talk to him when asked to do so. He was also said to have threatened Mr Chote by saying he was scared what he would do to him and that "if it was anybody else asking me, I would smash them". On the latter allegation Mr McInnarney's letter of 14 April did not record a specific finding but noted Mr Pereira accepted he was angry and heated in the meeting and found Mr Pereira was aggressive and insubordinate towards Mr Chote.

[17] On the fourth allegation Mr McInnarney made "a credibility finding" that Mr Pereira "created a workplace environment that was unsafe and fearful". Mr McInnarney recorded that during the 12 April disciplinary meeting Mr Pereira accepted others might perceive his behaviour as threatening but said he was "willing to change if need be". The allegations about the workplace environment were that Mr Pereira

- a. threatened to put Mr Milne "down the bloody road"; and
- b. sometimes thumped the table; and
- c. grunted or 'blew up' when Mr Ross suggested things could be done differently; and
- d. behaved in a way that made Mr Ross sometimes afraid to go into the office; and
- e. behaved in way that caused Mr Milne to hide in the stores area when Mr Pereira was "in a mood".

[18] Mr McInnarney said his overall finding of serious misconduct by Mr Pereira – in relation to behaviour towards Mr Ross and Mr Chote – was "particularly influenced by the large number of statements from other employees that describe a fearful and intimidating workplace environment as created by [Mr Pereira's] behaviour".

[19] Having found Mr Pereira's behaviour was serious misconduct, Mr

McInnarney decided the appropriate penalty was summary dismissal. Before doing so Mr McInnarney said he took account of Mr Pereira's 35 years service, his performance with ITNZL, his apology for how his behaviour was perceived by others, his claim that he was unaware of the impact of his actions on others, his statement of willingness to change and his co-operation with the disciplinary inquiry. However Mr McInnarney found the following factors more influential:

- (i) he was not convinced Mr Pereira would be "proactive" in changing his behaviour because Mr Pereira had expressed his preparedness to change in a conditional way by using the phrase "if need be"; and
- (ii) he was not confident Mr Pereira would be able to read others' reactions in the future and adequately modify his behaviour; and
- (iii) there was a health and safety risk to Mr Ross as there were no positions to which either Mr Pereira or Mr Ross could be redeployed in the business and Mr McInnarney was not confident that a similar incident would not occur in the future; and
- (iv) ITNZL had a "zero tolerance" policy on harassment; and
- (v) he doubted Mr Pereira would respect and comply with Mr Chote's instructions in the future because Mr Pereira believed Mr Chote had engaged in a conspiracy to push him out of his job.

Determination

[20] For the reasons set out in the remainder of this determination I find ITNZL's decisions that Mr Pereira's behaviour amounted to serious misconduct and that he should be dismissed for that behaviour were not conclusions a fair and reasonable employer, having conducted a full and fair inquiry, could have reached in all the circumstances at the time. There were aspects of ITNZL's inquiry into the allegations which were not sufficiently investigated and consequently ITNZL did not or could not genuinely consider Mr Pereira's explanations. Those defects were not minor and resulted in him being treated unfairly. Accordingly Mr Pereira's dismissal was unjustified.

[21] In summary the reasons are:

- a. ITNZL's inquiry included incidents which could fairly only have been dealt with earlier, and it was unfair to consider later; and

- b. its findings about the 14 March meeting were based on a less than full account of what actually occurred in it; and
- c. the allegation regarding a fearful work environment lacked sufficient detail for Mr Pereira to be able to fairly respond; and
- d. Mr McInnarney's conclusion about serious misconduct was based on an unreasonable weight given to negative comments from other employees; and
- e. Inadequate consideration was given to alternatives to dismissal.

The scope of the disciplinary inquiry

[22] ITNZL's disciplinary inquiry began as a result of an oral complaint made by Mr Ross on 14 March, which he then set out more fully in writing on 16 March. Mr Ross alleged Mr Pereira had deliberately tried to intimidate him on 14 March by leaning towards him over his desk and saying "I see what's going on here – this little shit has been in your ear". Mr Ross wrote that he was certain Mr Pereira would have punched him if Mr Chote was not there and Mr Pereira "has scared the shit out of me". He wrote of previous conversations in which he said Mr Pereira had verbally abused him. He also wrote that he had seen "quite a few arguments between Dom [Pereira] and Graham [Chote]" over the last year to 18 months.

[23] Mr Ross also accused Mr Pereira of physically threatening him in 2006 during a discussion over pay. Mr Ross said he complained to Bill Steel, the logistics manager at the time, but Mr Steel had convinced him not to take the matter any further.

[24] Mr Pereira was suspended on 18 March on the basis that ITNZL needed to investigate allegations Mr Ross had made about the 14 March meeting and earlier instances of how he was treated by Mr Pereira.

[25] The allegations about Mr Pereira's conduct towards Mr Chote in February and September 2010 were added to ITNZL's disciplinary inquiry after Mr McInnarney interviewed Mr Chote on 21 March 2011.

[26] ITNZL submitted that the February and September 2010 incidents were fairly

included in its inquiry because they were recent and particularly serious events which showed a potentially concerning pattern of behaviour by Mr Pereira.

[27] I do not agree ITNZL acted fairly by including those incidents – respectively more than 11 and five months old – in its March 2011 inquiry. Rather I accept Mr Pereira’s submission that it was incredible those two incidents, if they occurred as alleged, were not dealt with at the time. Not to do so was, as he submitted, a significant failure of management. That is correct because they were circumstances in which ITNZL was obliged to be active and constructive in maintaining a productive employment relationship. If some action was necessary regarding Mr Pereira’s behaviour, it was necessary at the time, not some indeterminate future date when another instance of what appeared to be unsatisfactory behaviour occurred.

[28] Mr Chote had four earlier opportunities to address the 2010 incidents – twice by instigating a disciplinary procedure at the time and twice through performance review meetings held in the months after each event was said to have occurred. Mr Chote’s evidence was that he gave Mr Pereira the benefit of the doubt over the February incident and chose not to report his behaviour as he thought he could handle the situation himself. He could also have addressed that incident during an August 2010 performance appraisal of Mr Pereira but said he did not do so because he had not seen any repeat of “that sort of aggressive behaviour” and “hoped it might be a one-off incident”.

[29] Mr Chote said he was “very shaken up” by the 23 September incident and went to see Mr Pereira about it the next day. He reported saying to Mr Pereira: “I don’t know what you were trying to pull yesterday but if that happens again I am going to have to report that sort of behaviour because it’s unacceptable”. He said that Mr Pereira then apologised and had said he did not know what came over him.

[30] At a further performance appraisal session, held with Mr Pereira on 6 December, Mr Chote did not address the 23 September incident directly with him. The form completed and signed off by Mr Chote identified Mr Pereira as meeting overall competency but needing to work on “personal development both for himself and the support/guidance his role requires”. Nothing specifically addressed his communication or behaviour.

[31] Mr Chote did not initiate any disciplinary procedure in respect of Mr Pereira's performance or conduct in respect of either incident. The company's discipline policy states the warning procedure "will" be implemented where an employee's behaviour breaches Company standards or performance. It identifies managers as "responsible and accountable" for confronting and resolving poor performance, appropriately managing instances of misconduct, and ensuring their reporting manager and human resources advisor were made aware of situations potentially requiring disciplinary action.

[32] Mr Chote had received no specific training on managing disciplinary matters but the company's disciplinary policy was available to him on the central drive of its computer system. He did not initiate any steps under that policy about either incident or discuss what had happened with Mr McInnarney or Ms Wylie.

[33] ITNZL had a policy against harassment. Its definition of harassment included "insulting and aggressive behaviour" and "bullying and intimidation". The policy included a responsibility on employees to present any complaint "promptly". That policy was available to Mr Chote but he took no action under it at the time of the 2010 incidents.

[34] In his written evidence Mr Chote, very fairly, said he regretted not reporting the 23 September 2010 incident earlier as it may have meant the situation that occurred between Mr Ross and Mr Pereira on 14 March 2011 could have been avoided. He said he felt it was a weakness on his part.

[35] Mr McInnarney, in his evidence, defended Mr Chote's decision not to do anything more about the February and September incidents at the time they occurred as due to Mr Chote feeling intimidated by Mr Pereira. This was a state of mind which Mr McInnarney ascribed to Mr Chote rather than one Mr Chote reported when he was interviewed during the disciplinary inquiry. By the time he prepared his witness statement for the Authority investigation Mr Chote had adopted that as part of his explanation for not having done more to address what he saw as unacceptable behaviour by Mr Pereira in 2010. However that account was not consistent, I find, with Mr Chote's own evidence about what he did at the time of the two earlier events.

[36] In February – after Mr Pereira made a comment while walking away from Mr Chote about ‘smashing’ anyone else but him – Mr Chote went to Mr Pereira’s desk, got him to fill in a form about quarantine procedures and said to Mr Pereira that he was “not frightened of him”.

[37] Mr Chote’s evidence was that he felt “shaken” and tears came to his eyes during Mr Pereira’s angry outburst in September. However on the next day Mr Chote confronted Mr Pereira about the limits of acceptable behaviour, cautioned him that he would be “reported” if there was any repetition, and received an apology. Mr Chote’s firm line, I find, was entirely appropriate as a manager but was not the action of an intimidated man.

[38] Mr Pereira’s evidence was that during 2010 he had twice sought the assistance of ITNZL’s technical services manager Tony Lewin because he was concerned about how things were between him and Mr Chote. Prior to his appointment as a manager Mr Chote was a supervisor reporting to Mr Lewin and Mr Lewin had frequent contact in his role with Mr Pereira in the material stores. Mr Pereira said he told Mr Lewin he wanted to speak with Ms Wylie about his problems with Mr Chote but Mr Lewin said not to do so and that he would talk to Mr Chote. Mr Chote confirmed in his oral evidence that Mr Lewin had spoken with him. Mr Chote recalled Mr Lewin coming to him after “one of the incidents” in 2010 and asking his “side”. Mr Chote said Mr Lewin explained Mr Pereira’s “side of it and the impression of how I’d come across to Dominic and it might pay me to work on that side of my skills”.

[39] Mr Lewin was interviewed by Mr McInnarney during the disciplinary inquiry. According to notes of that interview he said Mr Pereira and Mr Chote “had not hit it off since day one” but he believed “both parties are equally responsible, there was some misinterpretations (*sic*) between them”. However there is nothing in those notes to suggest Mr Lewin mentioned or had previously mentioned the concerns raised with him by Mr Pereira in 2010 or his conversations about those concerns with Mr Chote and Mr Pereira. Mr McInnarney said in his evidence, in answer to questions, that he was “mildly surprised” Mr Lewin had not mentioned those conversations to him.

[40] I do not accept ITNZL's submission that it was significant that Ms Wylie and Mr McInnarney were not previously aware of the 2010 incidents until told by Mr Chote and Mr Ross after 14 March 2011. Mr Chote and Mr Lewin were both managers and were responsible under ITNZL's discipline policy (clause 3.1) for ensuring fair process was followed in potential discipline situations. Their knowledge of events in 2010 was ITNZL's knowledge and their decisions or oversights in not discussing those incidents with Mr McInnarney and Ms Wylie at the time did not excuse the delay in dealing with them.

[41] I do not accept ITNZL's submission that the principles regarding delay in carrying out a disciplinary inquiry expressed by the Employment Court in *Petersen v Board of Trustees of Buller High School* apply in the present matter.⁶ That case involved a delay of 22 years where the complainant was a child at the time of the employee's misconduct towards her. An initial complaint made by the child in 1976 was withdrawn within a day. When she made the complaint a second time, in 1998, the subsequent disciplinary inquiry and dismissal occurred over an 18-month period. There was however no delay in school officials beginning to investigate the matter on the occasion of either complaint. In respect of the second complaint Mr Petersen was notified of a formal investigation within a fortnight.

[42] In the light of the action or inaction of Mr Chote, and what Mr Lewin knew (at least in part), I find a fair and reasonable employer could not have included the allegations about the February and September 2010 incidents in the disciplinary inquiry conducted in March 2011. It was a situation analogous to that in *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* where the Court reached the following conclusion about an employer not taking earlier steps to address allegedly unsatisfactory behaviour or conduct:⁷

I reject the submission that Mr Donaldson was behaving like a reasonable employer. If he had a list extending to two pages of matters causing dissatisfaction those concerns could not all have arisen at the same time. He must obviously have had many opportunities to raise these matters singularly or in pairs, as and when they cropped up. To store them up and then to smite the employee with them, hip and thigh, in one giant installment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

⁶ *Petersen v Board of Trustees of Buller High School* [2002] 1 ERNZ 139 (EC).

⁷ *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920, 928 (EC).

[43] If Mr Pereira's conduct or behaviour in 2010 required correction more severe or extensive than Mr Chote's words to him on 24 September 2010, that should have occurred much closer to the time.

[44] Accordingly ITNZL's 2011 disciplinary inquiry unfairly included allegations about Mr Pereira's conduct in 2010 and those allegations, inevitably, unfairly coloured its decisions about the allegations regarding his conduct in the 14 March 2011 meeting.

Faulty finding about Mr Pereira's conduct on 14 March

[45] ITNZL submitted Mr Pereira's conduct in the work meeting on 14 March fell within the examples of serious misconduct given in its employment agreement with him and breached the company's harassment policy. The agreement refers to "physical or verbal violence against any person on company premises" as serious misconduct. The harassment policy gives "insulting or aggressive behaviour" and "bullying and intimidation" as examples.

[46] I find ITNZL did not fairly take account of all the evidence available to it in reaching its conclusion that Mr Pereira had harassed Mr Ross by his conduct in that meeting. It was, I find, correct that Mr Pereira did act in an angry and forceful manner towards Mr Ross – as Mr Pereira accepted he had. However ITNZL's conclusion that this amounted to serious misconduct was reached without fairly taking into account the conduct of Mr Ross which contributed to the situation.

[47] Mr Chote said he called the meeting with Mr Pereira, Mr Ross and Mr Rodrigues to talk about how the material stores area ran and how the team coped when someone was away. According to an account written by Mr Chote later that day Mr Pereira was "defensive" about being asked questions and asked why Mr Ross and Mr Rodrigues had to be there. He reported Mr Pereira as saying: "I don't see why they have to be here, are you just trying to make me look this small (and held up his forefinger above his thumb in a gesture to suggest small)" and then saying "are you just trying to make me look stupid in front of these two?". An argument then developed after Mr Ross said materials were not put away correctly when he was

away from work and he had to spend time putting materials in their proper position when he returned. Mr Pereira insisted that materials were put away correctly by other workers (whom Mr Chote referred to as 'stand ins').

[48] Mr Ross reported to Mr McInnarney and Ms Wyle that Mr Pereira had behaved aggressively towards him (including referring to him as a "little shit") after Mr Ross had shaken his head at Mr Pereira's comment that materials were put away correctly.

[49] The written account of Mr Ross refers to Mr Pereira as "leaning further and further towards me over his desk". Mr Ross wrote that "[Mr Pereira] would have punched/hit me if Graham [Chote] hadn't been there, yelling at him to calm down and stop".

[50] Mr Chote's account written on 14 March refers to Mr Pereira wagging his finger at Mr Ross and "display[ing] quite an aggressive stance". By the time he took part in a formal interview on 21 March Mr Chote's description on this point had developed so he described Mr Pereira as having "stood over Josh [Ross] and pointed his finger at him while he was speaking".

[51] Mr Pereira admitted that he had stood up behind his desk and pointed his finger at Mr Ross while speaking. However I find neither the evidence available to Mr McInnarney, nor later to the Authority, supported any credible conclusion that Mr Ross was in any real physical danger at the time. Mr Pereira did not move from behind his desk and he would have had to get past Mr Chote and Mr Rodrigues to reach Mr Ross (unless he had leapt over his desk).

[52] However there was an important piece of information about the 14 March conversation not reported to Mr McInnarney by Mr Chote or Mr Ross, either in their written reports (Chote, 14 March; Ross, 16 March) or subsequent interviews (Chote, 21 March; Ross, 23 March, according to notes made by Ms Wylie).

[53] Neither man mentioned that shortly before Mr Pereira's outburst Mr Ross called him a liar. Mr Ross' written complaint said at the time he shook his head he "knew [Mr Pereira] was practically lying through his teeth" but made no reference to

having voiced that thought. However Mr Chote's oral evidence to the Authority, in response to questions, was that he heard Mr Ross say to Mr Pereira: "That's a lie, Dom, you know. I talked to you about this yesterday". Mr Chote said it was at that point Mr Pereira stood up.

[54] It is an important point because Mr McInnarney specifically asked Mr Ross, in an interview on 23 March, whether he had deliberately provoked Mr Pereira. Mr Ross' reply – as recorded by Ms Wylie – was "no" and that while he had maintained eye contact with Mr Pereira, that was not a deliberate act to annoy him.

[55] The allegation ITNZL put to Mr Pereira was that he had acted in the way that he had towards Mr Ross on 14 March "without provocation". Considering Mr Ross' actual comments to him, and not just what Mr Ross told Mr McInnarney was said, that allegation was not correct.

[56] In front of his manager Mr Pereira was accused by an employee reporting to him of being a liar. It was an important part of the context to his reaction, especially given that he had already challenged Mr Chote about being belittled in front of the other two employees.

[57] I find both Mr Chote and Mr Ross misled Mr McInnarney by not accurately reporting such an important part of the conversation. Being accused of lying in such a way did not necessarily excuse Mr Pereira's behaviour towards Mr Ross that day, but knowledge of that comment was something Mr McInnarney should have been able to consider as a mitigating factor.

[58] Mr Pereira referred in the disciplinary meeting of 12 April to "Josh calling him a liar" but confirmation of that information from Mr Chote and Mr Ross was not available to Mr McInnarney as it should have been and I consider it more likely than not that he consequently did not give due weight to that evidence from Mr Pereira.

[59] As a result, I find, Mr McInnarney was not able to fairly assess the conduct of Mr Pereira. Mr McInnarney's conclusions in the absence of that information are not excused as being founded on a reasonable and honestly held belief, because it is not just his actions that are within the scope of the s103A test but also those of Mr Chote

who, I find, failed to carry out his responsibility to fully and accurately inform the company's decision maker of what had happened.

Insufficiently specific allegation regarding work environment

[60] I find the allegation that Mr Pereira created an unsafe and fearful working environment was not fairly put to him by ITNZL.

[61] The five examples cited in support of the allegation lacked sufficient details for Mr Pereira to fairly respond to them. Two required him to respond to the reasons that Mr Milne sometimes hid in another store and why Mr Ross said he was sometimes afraid to go into the office at times – states of mind which could have a variety of causes and about which Mr Pereira could not fairly respond in any definitive way.

[62] Mr Milne's allegations – about Mr Pereira sometimes thumping the table and saying he would "put him down the bloody road" – needed to be read in the context of Mr Milne's other complaints, that Mr Pereira would make him repeat counting work if he made a mistake and expected the store floor to be swept daily. Mr Milne also reported that Mr Pereira was annoyed when Mr Ross was late to work. Applying a dose of common sense, it is not surprising that a supervisor will sometimes give unpopular directions to employees, and their other complaints needed to be assessed in that light.

[63] Mr Ross' specific complaint – that Mr Pereira got angry and either "blows up" or grunts at suggestions about how to do things differently – lacked sufficient detail for Mr Pereira to be able to explain his response at a particular time and for ITNZL consequently to be able to assess whether or not it was unsatisfactory in the particular circumstances.

Over-emphasis on negative comments of other staff

[64] Mr McInnarney's conclusion on serious misconduct was, I find, unfairly reached because, as he put it, he was "particularly influenced by the large number of statements from other employees that describe a fearful and intimidating workplace

environment as created by [Mr Pereira's] behaviour".

[65] Having read the notes of interviews Mr McInnarney conducted with ten employees (Mr Chote, Sue Browning, Joyce Lowrie, Mr Milne, Mr Ross, Mr Rodrigues, Marion Hewitt, Charles Tanielu, Mr Lewin, and Shane Fookes) and having heard him give evidence about those interviews and what he understood from them, I was not persuaded such a stark conclusion was one a reasonable employer could fairly reach.

[66] Of the ten employees interviewed, as many had positive or mixed comments as negative ones, despite several of the interviews being in response to an unfairly 'closed' question about whether the employee knew of "bullying by Mr Pereira". Mr McInnarney's conclusions from that material were, I find, overly selective and focussed on the negative.

[67] For example Mr Lewin's comments noted earlier said Mr Pereira and Mr Chote were "equally responsible". He also described Mr Pereira as having "a temper but in the same breath it takes a lot to push his buttons". Mr Rodrigues, the other employee who worked with Mr Ross and under Mr Pereira, reported that he had "no problems" with Mr Pereira. Ms Browning, the warehouse manager, who in her interview related three second-hand stories from other employees critical of Mr Pereira, described him as "courteous" to her. Ms Hewitt, the site's occupational health nurse, said Mr Ross had told her Mr Pereira gave him "the silent treatment", but said her dealings with Mr Pereira were "pleasant and very good". Mr Tanielu said Mr Pereira had once sworn at him – over an incident where Mr Tanielu cut off Mr Pereira while turning into work in his car (for which Mr Tanielu had apologised) – but he would be "comfortable" working with Mr Pereira.

[68] Mr Fookes, an operations analyst who dealt with Mr Pereira in relation to obsolete stock, said he was "great to deal with". He said Mr Milne and Mr Ross appeared to "have a pretty solid relationship" with Mr Pereira. Mr Fookes did say "there seems to be a bit of tension" between Mr Pereira and Mr Chote as there appeared to be "miscommunication" over information about obsolete stock. Ms Lawrie, a security supervisor, made critical comments about Mr Pereira over a driving incident and "verbal abuse" from him once when she had stopped his children coming

on site. She said Mr Pereira had previously insulted her while she was searching him (as part of site security measures) but Mr Chote had addressed the issue when he took over as Mr Pereira's manager and there had been no further problems.

Inadequate consideration of alternatives to dismissal

[69] A fair and reasonable employer could not decide to dismiss an employee for serious misconduct without considering whether that was the appropriate and necessary penalty, and if it was not, what alternatives there might be to terminating the employment relationship.

[70] ITNZL did not do so, I find, because it failed to take fair account of the prospects for Mr Pereira changing the way that he conducted himself at work and improving his working relationship with Mr Chote, Mr Ross and Mr Milne.

[71] Mr McInnarney reached the view that Mr Pereira was not likely or able to change his ways. He took that view because he understood Mr Pereira was "prepared to change if need be". He took that to be a conditional response which did not give him confidence Mr Pereira would be "proactive" in modifying his behaviour or truly recognised the effects on others of how he conducted himself and spoke.

[72] Relying on Ms Wylie's record of the 12 April disciplinary meeting I do not accept that is a fair representation of what Mr Pereira said he was willing to do. She recorded him as saying that he was "more than willing to work with [Mr Ross] and [Mr Milne] to make a strong and better team and if he needs to change and improve he will". Mr McInnarney, I find, placed an overly technical or semantic emphasis on the use of the word 'if' in that sentence and did not fairly weigh, in the way that a fair and reasonable employer could have done, many other comments by Mr Pereira which indicated more specific analysis of how he could and would change.

[73] Ms Wyle made this note of what Mr Pereira suggested:

For [Mr Ross] he realised he needs to work on his manner, voice and behaviour as [Mr Ross] perceives he is threatening him, he is happy to address these. With [Mr Chote] there is a need for better communication because of the tension between them and a shared understanding of the roles to be able to work as a team. He stated

that if [Mr Ross] and [Mr Milne] feel that there is a need for a mediator to work between them to improve things then he is happy for this. If the company feels there is a need to work on anything else with other staff members, he is happy to do this.

[74] If Mr Chote had acted on his concerns about the 2010 incidents, the relevant performance provisions of ITNZL's disciplinary policy could likely have been invoked, including identified remedial measures and (if necessary) verbal or written warnings. A fair and reasonable employer could not, I find in the particular circumstances of this case, decide on dismissal in 2011 having failed to undertake those steps in 2010. The performance management steps were what were properly open to it in dealing with all the circumstances related to the behaviour of Mr Pereira and the other participants in the 14 March 2011 meeting.

[75] Mr McInnarney's evidence revealed considerable tolerance for Mr Chote adjusting to his new responsibilities as a manager but not an equivalent tolerance for Mr Pereira as a supervisor adjusting to the style and expectations of a new manager. Mr Pereira had no prior disciplinary matters in 35 years of service. His performance reviews by his previous manager in 2006, 2007 and 2008 included this description under the heading of interpersonal qualities:

*Dominic is well respected by subordinates, peers and superiors alike.
He works well with others, both within and outside the department.*

[76] If the standard of conduct or performance to which Mr Pereira was held prior to Mr Chote's appointment as his manager was deficient, the responsibility for that (and adjusting to new or different expectations) cannot have rested with him alone. In Mr Pereira's performance review for December 2010 Mr Chote identified a need for Mr Pereira to develop more on "the support/guidance his role requires" but there was nothing to indicate any specific measures or steps to achieve such change had been identified or put in place.

Remedies

[77] In settlement of Mr Pereira's personal grievance for unjustified dismissal I have considered the remedies of reinstatement, reimbursement of lost wages and

benefits, and compensation for humiliation, loss of dignity and injury to his feelings.⁸ Remedies awarded are subject to reduction for actions by Mr Pereira which contributed to the situation giving rise to his grievance.⁹

Reinstatement

[78] ITNZL opposed reinstatement on the grounds that it was not practicable and reasonable. Its submission that reinstatement would not be feasible or ultimately successful was, in large part, based on the conclusion of its disciplinary inquiry that Mr Pereira had created an unsafe and fearful environment for the employees he supervised and for Mr Chote. I could not accept that submission because it was based on conclusions I had found were not justifiably reached. Rather I had to consider what the available evidence established about the practicability and reasonableness of an order for reinstatement.

[79] Practicability concerns the prospects for successful reimposition of the employment relationship.¹⁰ It involves the question of whether Mr Pereira would be a harmonious and effective member of ITNZL's team if he were reinstated to his former position.¹¹ Assessing the reasonableness of reinstatement requires "a broad inquiry into the equities of the parties' cases" and into the prospective effects of an order for reinstatement not only on Mr Pereira and ITNZL but also other employees, including in this case Mr Chote, Mr Ross and Mr Milne.¹²

[80] Reinstatement may be ordered even where there is "considerable animosity" between a manager and the unjustifiably dismissed employee, as shown in *NZ Food Processing IUOW v Napier Tanning*, a case where the dismissal followed pushing and shoving on the factory floor between the manager and the employee.¹³

[81] The remedy of reinstatement is particularly important to Mr Pereira's prospects for continuing a working life. He is 54 years old and has spent the last 35 years working in the one factory. While his skills and experience are of value to

⁸ Section 123 of the Act.

⁹ Section 124 of the Act.

¹⁰ *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 286 (EC)

¹¹ *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).

¹² *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

¹³ [1986] ACJ 149.

ITNZL, his prospects of re-employment in a similar position or level of seniority elsewhere are, realistically, limited.¹⁴ He had, since his dismissal, looked into investing in a courier franchise, provided he could raise an initial payment of \$20,000 and buy a van for which he hoped his son-in-law could be the driver.

[82] I am satisfied there are reasonable prospects Mr Pereira can return to being a harmonious and effective member of ITNZL's team. Ms Wyle confirmed the position had not been filled, with the tasks Mr Pereira performed being shared out between others while his personal grievance application was being considered.

[83] His return would not be without some difficulties and an effort required from all parties. That is, reasonably, able to be addressed by ITNZL's human resources department and, if necessary, the assistance of an outside mediator both before Mr Pereira returns and during at least the initial period of his re-integration.

[84] The role of the human resources department, led by Ms Wylie, is particularly important because, on the evidence I heard, she and her team had not been consulted or approached in 2010 or 2011 by Mr Chote, Mr Pereira, Mr Ross or Mr Milne for help with the problems between them. ITNZL has the resource of a professional human resources manager to oversee the necessary steps in reinstatement. Those steps will include meetings to set clear expectations of behaviour for everyone and measures to monitor progress and to resolve any concerns that arise.

[85] I reached the conclusion such an approach was practicable and reasonable after considering the likely effects on Mr Chote, Mr Ross and Mr Milne.

[86] Mr Chote's evidence expressed not so much animosity as frustration about his experience of 18 months as Mr Pereira's manager. It was an understandable feeling when he hoped his career was advancing with a promotion from supervisor to manager and wanted to demonstrate his ability to improve operations in the department of which he was now in charge. However, from my assessment of him while he gave evidence during a day-long investigation meeting, Mr Chote appeared to be a robust and practical man still capable of applying himself to resolving the problems in his working relationship with Mr Pereira (which Mr Lewin and Mr

¹⁴ A factor considered in *Lewis v Howick College Board of Trustees* [2010] ERNZ 1 at [119] (EC).

Fookes had observed to be about “misinterpretations” and “miscommunication”). This was not a situation like the *NZEI* case where long-standing problems in the working relationship between a school principal and deputy principal were not resolved by earlier professional intervention and advice.¹⁵ Rather what happened here was that Mr Chote, for reasons of his own, did not seek advice and support from the human resources manager or the factory manager that might have resolved problems earlier or in a different way (such as by a performance management regime for Mr Pereira). Instead Mr Chote had, on his own evidence, ignored repeated expression of concerns by Mr Pereira about feeling belittled. That is part of why it is now reasonable for Mr Pereira to be reinstated. If there was any real substance to Mr Chote’s claim of feeling intimidated by Mr Pereira, I consider that is adequately addressed by the support Mr Chote can now expect from Ms Wylie and Mr McInnarney and, as referred to earlier, from the expectations and measures to be set in place.

[87] The fearfulness said to have been expressed by Mr Milne and Mr Ross should be adequately assuaged by the arrangements to set those expectations and measures and by the undertakings already given by Mr Pereira. Mr Pereira had spoken of his willingness to change his behaviour and his understanding of how his manner of speaking might affect Mr Milne and Mr Ross. There will be apprehension but there will also be assistance and scrutiny so they can both expect to be able to work safely (although that may sometimes include direction and correction from Mr Pereira as part of his supervisory duties).

[88] The practicability and reasonableness of Mr Pereira’s reinstatement was also supported by the evidence of opinions of other employees, expressed in their interviews with Mr McInnarney. Mr Lewin had said it would be a shame to lose Mr Pereria. Mr Rodrigues said he had no problems working with him. Mr Tanielu said he would be comfortable working with him. Mr Fookes said he was great to deal with. Others had described him as pleasant and courteous.

[89] The order for reinstatement of Mr Pereira under s126 of the Act is made on the following terms:

- a. Mr Pereira is to be reinstated to his former position; and

¹⁵ *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 286 (EC).

- b. He is to be reinstated to ITNZL's payroll from the date of this determination; and
- c. ITNZL may, at its discretion, direct Mr Pereira not to return to work for a period of up to 28 days; and
- d. During that period of up to 28 days, ITNZL is to arrange, and Mr Pereira and the relevant ITNZL managers and employees are to attend, meetings and/or mediation sessions to set expectations and measures to monitor progress and to deal with any problems that arise in re-establishing working relationships.

Lost Wages

[90] No order is made for the payment of lost wages to Mr Pereira. His evidence did not disclose reasonable endeavours to mitigate his loss. At the Authority investigation meeting held five months after his dismissal, Mr Pereira said he was waiting for a WINZ appointment. He had no evidence of having made any job applications. He had no earnings in that period. He had gone on a pre-planned two week visit to Samoa for a bi-ennial church conference. He also spent time doing volunteer work for youth and Pacific groups. While I accept he may not have been able to get work at the same level of pay as at ITNZL, the mitigation obligation required more effort than Mr Pereira made. The business prospect he had been exploring – involving a courier franchise – was not sufficient to meet that obligation.

Distress compensation

[91] I accept Mr Pereira experienced considerable humiliation, loss of dignity and injury to feelings as a result of his dismissal from his workplace of 35 years. It was also where his wife worked and central to his sense of family and community. Part of that injury is addressed by the order for his reinstatement and consequently I consider a modest award of \$7500 is a sufficient award of compensation under s123(1)(c)(i) of the Act.

Reduction of remedies for contribution

[92] The compensation awarded to Mr Pereira is to be reduced by one third, that is

to \$5000, due to blameworthy conduct by him which contributed to the situation giving rise to his personal grievance. There is no award of lost wages to which a reduction for contribution can be applied. Reinstatement is, in this context, an all-or-nothing remedy and for the reasons already given I have determined it should be awarded in full.

[93] In his evidence Mr Pereira acknowledged blameworthy elements of his own conduct towards Mr Chote, Mr Ross and Mr Milne. He accepted he had acted angrily in the 14 March meeting and acknowledged his manner of speaking was perceived as threatening.

[94] In relation to earlier events he had considered seeking assistance from Ms Wylie over his sense of frustration in his working relationship with Mr Chote but was, he said, dissuaded from doing so by Mr Lewin. He should have done more. The good faith obligation to be active and constructive in the employment relationship applied to him as well as Mr Chote and ITNZL.

Superannuation

[95] There is one matter of remedies on which I reserve leave for further application to the Authority, by either party, if necessary. It concerns what arrangements might be made, in light of Mr Pereira's reinstatement, for his continued participation in ITNZL's employee superannuation scheme. He was paid out around \$220,000 under that scheme following his dismissal. He applied around \$160,000 to paying off his mortgage and had spent some of the \$60,000 remaining.

[96] The advice ITNZL had from an actuary at the time of the Authority investigation was that if Mr Pereira was reinstated and wished to continue to participate in the scheme on the same terms he had previously enjoyed, he would have to pay that money back. Mr Pereira said he could raise the sum of \$220,000 against his house to pay back into the scheme. I expect practical arrangements can be made by ITNZL and the trustees of its superannuation scheme for that to be done and for Mr Pereira to continue to participate in the scheme on the same basis that he had done before with the same level of eventual benefits. However that expectation is not based on any detailed evidence or thorough consideration of the terms of the

superannuation scheme's trust deed. If it is not possible for him to be put back in the same position as if he had not left the scheme in April 2011, and Mr Pereira has consequently lost some of the benefit of the scheme as a result of his dismissal, the matter may need to be dealt with as a loss of benefit and compensation for it considered under s123(1)(c)(ii) of the Act. Further evidence would be required if it were necessary to consider that point and leave is reserved for this purpose.

Costs

[97] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Mr Pereira may lodge and serve a memorandum as to costs within 28 days of the date of this determination. ITNZL would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[98] If the parties cannot resolve costs themselves, the Authority is likely to set costs on its usual tariff basis. That amount would be subject to what the parties' memoranda on costs may say about whether the application of relevant principles requires an upward or downward adjustment of that tariff in the circumstances of this particular case.¹⁶

Robin Arthur
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.