

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 112
5340342

BETWEEN WHAREPAIA JOHN ROBB
Applicant

AND TRANSFIELD SERVICES
(NEW ZEALAND) LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Alistair Hammond and Darren Foster, Counsel for
Applicant
Gillian Service and June Hardacre, Counsel for
Respondent

Investigation Meeting: 16 and 17 February 2012 at Whangarei

Submissions Received: 21 February 2012 from Applicant
24 February 2012 from Respondent
02 March 2012 from Applicant

Determination: 29 March 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Wharepaia (“John”) Robb’s summary dismissal by Transfield Services (New Zealand) Limited (“Transfield”) was unjustified.**
- B. Transfield is ordered to pay Mr Robb \$5,000 distress compensation.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Robb was employed by Transfield as an Excavator Operator from 23 October 2007 until his summary dismissal for serious misconduct on 25 November

2010. Mr Robb claimed that his dismissal was substantively and procedurally unjustified.

[2] Transfield claimed that its actions were justified because it believed Mr Robb had breached its house rules by continually stealing diesel from its excavators over a nine month period.

Relevant facts

[3] Mr Robb is an experienced operator of heavy machinery. He has approximately 38 years' experience working for construction/earth civil engineering companies. At the time of his dismissal Mr Robb had worked for Transfield for three and a half years.

[4] Mr Robb's role as an excavator operator required him to operate either a Caterpillar 12 tonne excavator ("Cat") or a Sumitomo 12 tonne excavator ("Sumo"). Over the relevant period, Transfield only had two excavator operators onsite, Mr Robb and Mr Janos de Jong. Mr de Jong was also employed by Transfield and he had a similar level of experience and expertise as Mr Robb.

[5] Mr Robb's usual hours of work were from 7.30am until 5pm Monday to Friday. This included the time he took to travel to the work site, to attend tool box meetings (i.e. internal briefing meetings), perform job starts and travel back to the yard. Mr Robb normally operated an excavator for between six and eight hours per day.

[6] Transfield's excavator operators were responsible for filling the excavators they operated with diesel which had been purchased from a nominated service station using a Transfield fuel card. Diesel was transported back to the job site in either a tank situated on the back of the excavator operator's work ute, or in a tanker trailer which was towed behind their work ute.

[7] The fuel card that Mr Robb used was specifically linked by plant number to the particular excavator he was using at the time. Over the period March to June

2010, Mr Robb operated the Sumo¹ and from September to November 2010 he operated the Cat.²

[8] In March 2010 Transfield began monitoring the fuel consumption of the two excavators because it had noticed a difference in fuel usage between operators following Mr Robb's return from working at different Transfield sites. Transfield also considered it unusual that Mr Robb usually filled his ute tank from completely empty when other operators usually did partial tank fills only.

[9] Mr Robb was on ACC leave from 16 June until 13 September 2010. Both the Sumo and Cat excavators continued to be used by Transfield employees whilst Mr Robb was away. Whilst Mr Robb was on ACC leave between June and September 2010, the fuel consumption of the two excavators was similar and considerably less than when Mr Robb had been operating them.³

[10] When Mr Robb returned to work from ACC Transfield swapped him from the Sumo to the Cat excavator to see if the fuel consumption levels changed between the two excavators when Mr Robb was operating them.

Disciplinary process

[11] On 23 November 2010 Mr Michael Hayes, Kaipara Branch Manager for Infrastructure Roding for Transfield, raised his concern with Mr Martin Hughes, Northern Regional Manager for the Infrastructure Roads Business at Transfield, that Mr Robb had been stealing diesel.

[12] After discussing the excavator fuel records for the preceding six months during the two periods over which Mr Robb had been working, Mr Hughes and Mr Hayes agreed that a disciplinary process was appropriate.

[13] Mr Hayes drafted the disciplinary letter which invited Mr Robb to a disciplinary meeting. The letter stated:

"Dear John,

This letter is to request that you attend a meeting at the offices of Transfield Services Limited, Dargaville, on Friday, 26 November 2010 at 3.00pm. Please be advised of your right to bring a support person if you wish.

¹ Plant No 4564

² Plant No 4504

³ Approximately half or one third less.

The following matters will be discussed at the meeting:

- *Breach of the Transfield Services house rules.*

Please could you advise if the date and time are not suitable and an alternative will be arranged. [...]"

[14] This letter was dated 24 November 2010 and it was personally handed to Mr Robb that morning. There is a dispute over who actually handed Mr Robb the letter and the time he actually received it, but I find that nothing turns on that conflict.

[15] By way of background, it had been agreed that Mr Robb would leave work at 1.30pm on 24 November 2010 so that he could travel up North with his family to attend a funeral. Mr Robb said that after receiving the disciplinary letter he returned to the yard and was told by Mr Hayes that the matter should be dealt with before he left work that day (i.e. before he finished work at 1.30pm).

[16] That account was contradicted by Mr Hayes who said that Mr Robb came into his office on 24 November 2011 and asked to have the meeting that day because he was going up North to a funeral and he was not sure whether he would be back by Friday, which was the day the meeting had been scheduled.

[17] Mr Hayes said he tried to talk Mr Robb out of having the disciplinary meeting that day because it related to "*a serious matter and he would probably want a support person, such as Mr le Gros⁴ there with him*". Mr Hayes said that Mr Robb declined that suggestion and pushed to have the meeting immediately.

[18] Mr Chris Golledge, Contract Maintenance Manager, Opawa District for Roothing and Infrastructure at Transfield, had been scheduled to attend the disciplinary meeting on 26 November 2010 as a management witness. Mr Golledge told me he was very surprised when he was told by Mr Hayes that the meeting was going to proceed that day (i.e. on 24 November 2010).

[19] I have preferred the evidence of Mr Hayes and Mr Golledge as to why the meeting was held on 24 November 2010 on the basis it is more likely to be correct. I consider it unlikely Mr Hayes would have arranged a meeting for Friday, 26 November 2010 and coordinated Mr Golledge's availability for that day but then just a couple of hours later insisted Mr Robb attend a meeting that afternoon. That was inconsistent with what had been arranged in the disciplinary letter and it was

⁴ Mr Le Gros was a Transfield employee who was also a representative for the in-house union.

inconvenient to Mr Hayes because it meant he had not had an opportunity to properly prepare for it.

[20] I also consider it likely that Mr Hayes attempted to discourage Mr Robb from having the meeting that afternoon by explaining that it was “*a serious matter*”. However, I find that Mr Robb did not fully understand the seriousness of the issues which were to be discussed at the meeting because Mr Hayes had not set out any specific disciplinary allegations, or details of the alleged breach of house rules, no supporting documentation had been attached to the disciplinary letter, and he had not put Mr Robb on notice that his ongoing employment was in jeopardy, or that the company was concerned that he had engaged in serious misconduct.

[21] Mr Hayes admitted that he did not inform Mr Robb in advance of the 24 November 2011 meeting that the purpose of the meeting was for him to respond to allegations he had been stealing diesel. The first Mr Robb knew of that was when Mr Hayes raised it during the disciplinary meeting. I accept Mr Robb’s evidence that he was blindsided by the allegation.

Disciplinary meeting

[22] The disciplinary meeting was conducted by Mr Hayes. Mr Golledge did not take any notes during the meeting⁵ and was present just as an observer.

[23] Mr Hayes said he put to Mr Robb that he had been stealing diesel from the company. Mr Robb’s response was to ask what proof the company had, so Mr Hayes then produced a written record of the diesel consumption for both excavators over the period March-November 2010. Transfield admitted that the information recording the diesel purchases for each digger was not presented in a particularly clear manner and I agree that was an appropriate concession to have made.

[24] The document Mr Robb was shown recorded:

- (a) The diesel purchases made by each excavator operator;
- (b) The date of each diesel purchase;
- (c) The number of litres of diesel purchased;

⁵ He made a brief diary entry after the meeting

- (d) The plant identification number;
- (e) The number of hours the excavator had worked each month;
- (f) The average estimated amount of diesel used by each excavator operator per hour for each month over the period March to November 2010.

[25] Mr Hayes had added to that record his own handwritten notes recording what he estimated was the amount of excess fuel used by Mr Robb each month over the period March to November 2010.

[26] Mr Hayes told Mr Robb that whatever excavator he had been using, the fuel usage was two or three times what it was when the same excavator was used by another operator.

[27] Mr Hayes said that he pointed out to Mr Robb that the other excavator operator would fill the fuel tanks that they had on their utes, which would hold approximately 250 litres, sporadically with a different number of litres every couple of days, but that Mr Robb's fuel tank had usually been filled up from completely empty, which was considered unusual. He accepts he did not put any specific dates on these allegedly unusual diesel purchases.

[28] Mr Hayes said he put to Mr Robb that Transfield could not see how the excavators consistently used two or three times as much fuel when they were being operated by Mr Robb as they did when they were operated by another operator. He said the company believed the difference was due to Mr Robb stealing diesel by using some of the diesel he had purchased himself and not in the excavator he was operating. Ms Hayes said he asked Mr Robb where the fuel was going.

[29] Mr Robb said that he told Mr Hayes that "*fuel went in the machinery, as it had always done*". Mr Robb said he did not know what to say in response to Mr Hayes' questions because he was in a state of shock over the allegations against him.

[30] Mr Robb accepted that he had been shown the record of his diesel purchases compared to the diesel purchased by other excavator operators over the relevant time, but he told me that he did not understand what that information meant. Mr Robb said

that he did not believe he was in a position to be able to properly respond to the allegations because they had been sprung on him.

[31] Mr Robb said he was also distracted and concerned because he knew he had to leave work at 1.30pm that day because his family were waiting for him at home so they could travel up North together for the funeral. He believed that his distraction about the funeral had adversely impacted on his ability to address Transfield's concerns at the disciplinary meeting.

[32] Mr Hayes alleged that when the allegation of theft was put to Mr Robb, "*he was very calm and very still when I said this. Mr Robb said he didn't want to admit or deny whether he had or not [stolen diesel] as he did not want to implicate himself*".

[33] Mr Golledge's evidence was that:

"Mr Robb said that he never accepted nor denied the allegation of diesel theft and repeated this several times during the meeting. He said he would not commit himself and when Mr Hayes had pressed Mr Robb for an explanation, Mr Robb gave none."

[34] Mr Golledge provided the Authority with a copy of a diary note that he took immediately after the meeting with Mr Robb. This stated that Mr Robb "*would not admit it nor deny it*".

[35] Mr Robb disputed that he had ever said he did not want to implicate himself. He did not answer the theft allegation because of his absolute surprise about it. He said he was in complete shock and "*was not sure how to react to this situation*". Mr Robb said he had repeated a number of times that "*the diesel was going in the bloody machine*." Mr Hayes and Mr Golledge acknowledged that he did so.

[36] I consider it likely, on the balance of probabilities, that Mr Robb said he did not admit or deny the allegations but that he did not say he would not say anything because he did not want to implicate himself. I consider that if such a comment was made, it was likely that it would have been recorded in the diary note. I also note that Mr Golledge did not refer to that part of Mr Robb's alleged comment in his written statement.

Adjournment

[37] Both parties agreed that the meeting was short and only lasted for around 10 or so minutes. There was a brief break during which Mr Hayes phoned Mr Hughes and said that Mr Robb failed to give a satisfactory explanation for why his fuel purchases were so high and that his response to the theft allegation had been that he would neither admit nor deny it. Mr Hayes indicated that he intended to dismiss Mr Robb and Mr Hughes gave him the go ahead to do so.

[38] Transfield has a “*one up*” policy whereby any dismissal decisions must be authorised by a manager who is one level higher than the manager who is making the decision to dismiss. Transfield put that policy in place to ensure consistency across the organisation, and to ensure that dismissal decisions were sound by having them signed off internally by a more senior manager than the decision maker. This was an internal Transfield management practice which was not recorded in any written policy.

Dismissal decision

[39] Mr Hayes and Mr Golledge met with Mr Robb again after the short break and asked if he had anything more to say about the allegations. Mr Robb confirmed that he did not. Mr Hayes then advised Mr Robb that because he had no explanation for the excessive amount of diesel used, the company considered it to be theft so he would be instantly dismissed.

[40] Mr Robb said he was “*literally dumbfounded and in a state of shock after being told I had been dismissed for theft of diesel*”. Mr Hayes then uplifted Mr Robb’s company vehicle and dropped him home.

Justification test

[41] Mr Robb was dismissed on 24 November 2010, prior to the recent changes which were made to the s.103A justification test which came into effect on 1 April 2011.

[42] The test for justification which applies is that contained in the Employment Relations Act 2000 (“the Act”) prior to 1 April 2011, namely:

“103A Test of justification

For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

[43] An employer which is seeking to justify its dismissal decision must show that its decision was fair and reasonable in the circumstances prevailing at the time it was made. Justification is therefore determined on an objective basis having regard to all relevant circumstances as they existed at the time of dismissal.

[44] The use of the word “would” in s.103A imposes on the Authority a requirement to judge the employer’s actions against the objective standard of a fair and reasonable employer. This is not the standard that would have applied if it had been the decision-maker, but is rather the standard that the Authority considers a fair and reasonable employer, in the circumstances of the actual employer, would have decided, and how that decision would have been reached.

[45] The justification test encompasses not just the employer’s disciplinary investigation and decision about whether misconduct has occurred and, if so, the seriousness of it; it also relates to the employer’s ultimate decision regarding the appropriate sanction. The Authority is therefore required to objectively review all of Transfield’s actions up to and including its decision to dismiss Mr Robb.

Good faith

[46] There are also statutory requirements for parties to employment relationships to act in good faith⁶. It is appropriate for the Authority to examine whether Transfield complied with its statutory good faith obligations to provide Mr Robb with access to information and an opportunity to comment on it as required by s4(1A) of the Act when assessing justification and examining the fairness and reasonableness of the process which led to Mr Robb’s dismissal.

[47] The aim of s.4(1A) in the Act is to ensure that employees are fairly and adequately informed about the basis for decisions which may adversely affect their ongoing employment so that they have an opportunity to comment in a meaningful

⁶ Section 4 ERA.

way before the final decision is made that may affect them. The Employment Court has acknowledged that s.4(1A) is a “*natural justice provision*” in which “*the core right is the opportunity to comment – the access to information is facilitative so as to ensure that the opportunity to comment is real*”⁷.

[48] An employer which acts in breach of its statutory good faith obligations may find it difficult to justify a subsequent dismissal because a fair and reasonable employer will not generally act towards an employee in contravention of the law⁸. The minimum requirements of procedural fairness include giving an employee notice of the specific allegations of misconduct and the likely consequences if the allegations are established⁹.

Relevant case law

[49] The onus of proof rests on Transfield to justify its decision to dismiss Mr Robb. The Court of Appeal in *Honda New Zealand Ltd v. New Zealand Boilermakers’ Union*¹⁰ held:

“It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; 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.”

[50] The Employment Court has expressly recognised that employment institutions must have regard to the quality of evidence necessary where the allegation is a grave one. Where serious allegations are being made, “*there is a high threshold to be met and the evidence in support needs to be as convincing in its nature as the charge was grave.*”¹¹

[51] The Employment Court had also previously recognised that in the case of *Hardie v. Round*¹² in which it stated:

“The more serious the allegation of misconduct against the employee, the greater will be the expectation of its proof.”

⁷ *Vice-Chancellor of Massey University v. Wrigley* [2010] NZEmpC 52

⁸ *Allen v. Transfield Industries Group Ltd t/a “Medismart Ltde”* (2009) 6 NZELR 53

⁹ *AFFCO New Zealand Ltd v. Nepia and Morunga* 28 September 2007, Shaw J, WC25/07; *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35

¹⁰ (1990) ERNZ Sel Cas 855 (CA)

¹¹ *Rooney Earthmoving Ltd v. McTague* [2009] ERNZ 240

¹² (2008) 8 NZELC 99,317

[52] Therefore, in order to justify its dismissal of Mr Robb, at the time it decided to dismiss him Transfield must have either had clear evidence upon which a reasonable employer would safely have relied or it must have carried out reasonable inquiries which left it, on the balance of probabilities, with reasonable grounds for believing that Mr Robb had stolen diesel and it must have had a genuine belief that he had actually done so; see *Airline Stewards and Hostesses of NZ IUOW v. Air New Zealand*¹³ and *Allen v Transpacific Industries Group Limited t/a "Medismart Limited"*.¹⁴

[53] The Employment Court in *X v. Auckland District Health Board*¹⁵ held that an employee accused of serious misconduct which may potentially result in dismissal is entitled to know not only of the allegations but the evidence in support of them that the employer will consider.

[54] In *Madden v. New Zealand Railways Corporation*¹⁶, the Employment Court held:

"As the Court has pointed out often enough, an employer who has failed to give its employee an adequate opportunity of being heard prior to dismissal for misconduct cannot be said to have had any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it. It thus becomes unhelpful to distinguish in such situations between substantive and procedural justification. The Court is left in the situation where the substantive ground relied on may have been refuted by the employee if he had been given the opportunity to do so. Therefore the ground is treated as not having been established by the employer. It seems less important that the reason for that may appear to some to be procedural in character."

[55] In *Nelson Air Ltd v. New Zealand Airline Pilots' Association*¹⁷ the Court of Appeal recognised that when considering the issue of justification it was often convenient to distinguish between procedural and substantive unfairness but then went on to state:

"But there is no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all of the circumstances."

¹³ [1990] 3 NZILR 584 (CA)

¹⁴ Ibid 8

¹⁵ [2007] ERNZ 66

¹⁶ [1991] 2 ERNZ 690

¹⁷ [1994] 2 ERNZ 665

[56] The Employment Court in *Air New Zealand Ltd v. Hudson*¹⁸ approached the question of whether the employer's finding of serious misconduct was justified by stating:

“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.”

[57] The Labour Court in *NZ (With exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd*¹⁹ stated:

“It is well established by many judgments of this Court and, before it, of the Arbitration Court, that a dismissal which is substantively justified will be vitiated if, in the process, the minimum standards of fair and reasonable dealing are ignored or neglected. [...]

Where there is no agreed procedure the law implies into the employment relationship a requirement to follow a procedure which is, in the circumstances, fair and reasonable. Again, a good and conscientious employer will follow such a procedure. What that procedure should be in any particular case is a question of fact and degree depending on the circumstances of the case, the kind and length of employment, its history and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.

The minimum requirements can be said to be:

- (1) Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
- (2) An opportunity (which must be a real as opposed to a nominal one) for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
- (3) An unbiased consideration of the worker's explanation in the sense that the consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

¹⁸ [2006] ERNZ 415

¹⁹ [1990] 1 NZILR 35

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over indulgent person."

Outcome

[58] I find that Transfield's dismissal of Mr Robb was unjustified.

[59] A fair and reasonable employer would have set out the specific disciplinary allegations in the disciplinary letter dated 24 November 2010 so that Mr Robb was on notice of the purpose of the meeting. Although Transfield referred to its house rules, it did not identify which rule it was relying on. This meant that Mr Robb pressed for a meeting to be held on 24 November 2011 without knowing that he was going to be required to answer theft allegations or that one possible outcome of the meeting could be his summary dismissal.

[60] I find that a fair and reasonable employer would have provided Mr Robb, at the same time it gave him the disciplinary letter, with a copy of the information on which it relied in support of its disciplinary concerns. It would not have presented that information for the first time during a brief disciplinary meeting because doing that effectively deprived Mr Robb of a real or genuine opportunity to consider and respond to it.

[61] That was evident from the many possible explanations Mr Robb put forward after his dismissal to explain the fuel differential. These were matters that he could have raised in response to the disciplinary allegations had he been given a reasonable opportunity to prepare for the disciplinary meeting. Giving Mr Robb time to prepare would have also enabled Transfield to have considered and if necessary investigated his possible explanations. Because Transfield unexpectedly sprung its allegations on Mr Robb proper consideration of various possible reasons for the fuel differential did not occur until after he had been dismissed.

[62] I also find that a fair and reasonable employer would have advised Mr Robb in the disciplinary letter that, if the allegations against him were proven or if his

explanation to the disciplinary concern was found to be unsatisfactory, then his ongoing employment could be at risk. If Mr Robb had known his ongoing employment was at risk he may have decided to take the legal advice he had sought after his dismissal prior to the disciplinary meeting being held.

[63] I consider that a fair and reasonable employer would not have held a disciplinary meeting with Mr Robb on 24 November 2010 in the circumstances which Transfield knew existed at the time, namely:

- (a) No specific allegations had been put to Mr Robb;
- (b) He was not aware that the purpose of the meeting was to obtain his response to theft allegations;
- (c) He was not on notice that his ongoing employment could be in jeopardy;
- (d) He was not given a real or genuine opportunity to consider the information which Transfield believed supported its theft allegation;
- (e) Mr Robb was not given an opportunity to take advice or to prepare his response;
- (f) Mr Robb was about to depart for a funeral and his family were waiting for him to leave work at 1.30pm.

[64] A fair and reasonable employer would have ensured, prior to expecting Mr Robb to respond to its concerns, he:

- (a) Was aware of the specific allegations against him;
- (b) Had adequate time to consider the information Transfield believed supported its disciplinary concerns;
- (c) Knew his ongoing employment was in jeopardy;
- (d) Had been given a reasonable opportunity to take advice and prepare his response.

[65] I find that the disciplinary process Transfield followed was so fundamentally flawed that it was not justified at the time it dismissed him in concluding that Mr Robb had stolen its diesel.

[66] Transfield did not recognise that Mr Robb was likely to have been under some pressure as a result of the bereavement and impending funeral. It should have been sensitive to that and whilst it could have set out its concerns and put specific allegations and shared its information with Mr Robb at the meeting on 24 November 2010, it was unreasonable, unfair, and highly prejudicial to Mr Robb to expect him to have responded to the theft allegation during that meeting.

[67] I also find that the manner in which the information Transfield relied on to support its claims of theft was presented to Mr Robb was unfair. It was not immediately clear what the information conveyed and it is understandable that Mr Robb was still processing, with considerable shock, the allegation that he had stolen fuel from the company and was therefore not in a position to take in the various numbers on the page which Mr Hayes believed he had explained. I find that explanation was inadequate.

[68] It was unreasonable for Transfield to have expected Mr Robb to have taken in all of the information Mr Hayes conveyed to him during the meeting on 24 November 2010 because that same information required considerable explanation during the Authority's investigation. Transfield's view of this information was not immediately clear, even after it had filed its witness statements which explained how it had relied on the information.

[69] There were a number of entries in the fuel consumption document which, on the face of it, raised ambiguities²⁰ which required explanation during the Authority's investigation. I find that those same matters were not addressed by Transfield during the 24 November 2011 disciplinary meeting.

[70] I consider Transfield did not undertake a fair or proper investigation because it did not put its specific concerns to Mr Robb in a sufficiently clear manner which would have enabled him to have responded to them in a meaningful way.

²⁰ Some examples include the references to depot card Daniel H; depot card Jack; operated 4508 (which was not a digger) 18 hours used depot card; operated 4509 (again not a digger) 12 hours used depot card.

[71] I also find that Transfield breached its statutory s.4(1A) good faith obligations because it did not provide Mr Robb with an adequate or reasonable opportunity to comment on the information it had which was relevant to its decision to dismiss him. That was unfair to Mr Robb and undermined the justification of Transfield's decision to dismiss him.

Remedies

Contribution

[72] Having determined that Mr Robb's dismissal was unjustified, s.124 of the Act requires the Authority, in deciding both the nature and extent of remedies, to consider the extent to which Mr Robb's actions contributed towards the situation that gave rise to his dismissal grievance and if those actions so require, reduce remedies accordingly.

[73] Whilst justification must be determined based on the information and evidence available to Transfield at the time it made the decision to dismiss, contribution can be assessed in light of additional information presented to the Authority, including information which was obtained by the parties subsequent to Mr Robb's dismissal.

[74] This was a situation in which, subsequent to his dismissal, Mr Robb engaged counsel who raised a number of concerns about Transfield's decision to dismiss him. These concerns were fully and properly investigated by Transfield and duly responded to. I had sufficient evidence before me by both parties to enable me to assess the credibility of Mr Robb's subsequent explanations for the fuel differential. All of this new material is relevant to the Authority's assessment of contribution.

[75] I now briefly summarise each of Mr Robb's possible explanations and provide my view as to whether or not they satisfactorily explained the differential, on the balance of probabilities.

(a) *Differences between the two excavators.*

[76] I accept that the two excavators were of different makes, but I find they both have an average fuel consumption of 7 litres per hour and are both 12 tonne excavators with the same capacity engines and power output.²¹ Even if the particular

²¹ I was provided with the specifications for each excavator.

make of the excavator meant that they had different average fuel consumption, that did not explain to my satisfaction why Mr Robb's average fuel consumption per hour was more than double that of his colleague, Mr de Jong when using the same excavator.

(b) *Inaccurate hour meter.*

[77] Mr Robb suggested that the hour meters on the excavators were inaccurate which had affected the average fuel consumption calculations. The evidence satisfied me that the hour meters on the excavators were more likely than not to have been accurate.

[78] The excavators were both serviced regularly and until Mr Robb raised this concern there had been no other information suggesting that there was any recording or accuracy problems with the hour meters. Transfield has a system for operators to report faults with the excavators, but no reports were ever received for either excavator.

[79] Transfield bills the excavators out based on their hour meters, so it would have been a serious matter if the hour meters had been inaccurate. It would have directly affected Transfield's profits, so if there was a problem I would have expected Transfield to have addressed it with some urgency.

[80] I have accepted Transfield's evidence that the hour meters/clocks on the excavators were accurate. Even if they were inaccurate, then I would have expected any inaccuracy would have applied to any operator over the nine month period, not just to Mr Robb.

(c) *Use of fuel card to fill up other Transfield plant (i.e. not the excavator assigned to the fuel card that was used to purchase the diesel)*

[81] Whilst I accept that on the odd occasion Mr Robb may have topped up other plant, when that occurred he should have recorded that on his timesheet and/or on the fuel card records so that Transfield could see where the diesel he was purchasing had been used.

[82] I accept Transfield's evidence that there were no records which supported Mr Robb's suggestion that he had regularly filled up other plant. I consider it would

have been unusual for him to have done so, particularly over a nine month period. I do not consider it can reasonably account for Mr Robb purchasing almost twice the amount of diesel the other excavator operators purchased over a nine month period.

- (d) *Mr Robb said that he would empty his fuel tank on the back of his ute every evening which was why he mostly filled it up to capacity when obtaining fuel, unlike his colleagues who would fill their fuel tanks up with an odd and varying number of litres of diesel.*

[83] The evidence did not satisfy me, on the balance of probabilities, that Mr Robb normally completely emptied his fuel tank before purchasing diesel. However, even if he had done so, then his actions were contrary to Transfield's express instruction that the excavator fuel tanks should be left empty or as empty as possible to deter diesel thefts by third parties whilst the plant was left unattended overnight.

- (e) *Mr Robb initially suggested that the way he drove the digger could account for the difference in fuel use.*

[84] However, when questioned by me about that in more detail, Mr Robb accepted that would not account for him using double the fuel of his colleagues who were undertaking similar activities and whom had a similar level of experience and expertise as him.

- (f) *Mr Robb suggested that the tasks he undertook when driving the digger may have explained the fuel differential.*

[85] I was not satisfied with that explanation because after reviewing the timesheets and work undertaken I find that over the nine month period, the other drivers of the two excavators were generally undertaking the same or similar type of work.

- (g) *Mr Robb suggested that the Cat had a faulty fuel lock which made it easy for third parties to steal fuel.*

[86] I was not satisfied with that explanation because Mr Robb had only recorded third party fuel theft on one occasion over the nine month period in issue. It therefore cannot satisfactorily explain Mr Robb's double fuel use for the entire nine month period in issue.

(h) *Mr Robb said that it was known that third parties stole fuel in the area.*

[87] I accept that was the case, but note that fuel theft should have been recorded by Mr Robb. He did in fact do so on one occasion which indicated that his practice was to report any third party thefts on his timesheets. I was not satisfied third party theft reasonably explained the differential for the entire nine month period.

(i) *Mr Robb suggested that one of the excavators had a faulty fuel line.*

[88] This excavator was used by Mr Robb and his colleague so even if a faulty fuel line had affected fuel use, it would have had resulted in Mr Robb and his colleague both using the same amount of fuel. However, Mr Robb's fuel consumption was at least double that of his colleague's.

(j) *Mr Robb said that he left the excavator running during his smoko and lunch breaks.*

[89] This was contrary to Transfield's express instructions to him to turn the excavator off over these periods. However, even if Mr Robb left his excavator running the additional fuel use, if any, would have been negligible. Mr Robb accepted that it would not explain why he had used twice the amount of fuel than his colleague on the same excavator.

Unexplained fuel differential

[90] The evidence satisfied me that when using the Cat Mr Robb's average fuel usage in litres per hour was 15.15 compared with his colleague's average fuel use of 6.87 litres per hour. I was also satisfied that when using the Sumo digger, Mr Robb's average fuel use per hour was 12.9 litres compared with his colleague's average fuel use per hour of 6.92 litres. I find that these discrepancies were not satisfactorily explained by Mr Robb.

[91] I also find that Mr Robb was unable to provide any explanation for why he filled up the Cat on 4 November 2010 with 250 litres and then the very next day used another 250 litres of diesel. Based on his average Cat per hour litre consumption of diesel of 15.15 this meant that he must have worked 16.5 hours on 4 November 2010. Mr Robb's timesheets for that day say that he worked seven hours.

[92] I therefore consider that Mr Robb did significantly contribute to the situation which gave rise to his grievance because there was a substantial discrepancy in his fuel use which he was unable to satisfactorily explain. I find that this contribution should be recognised by my decision not to award Mr Robb any lost remuneration. I do not consider it should prevent Mr Robb from receiving a modest award of distress compensation.

Distress compensation

[93] Mr Robb sought distress compensation of \$20,000. The evidence did not support an award at that level.

[94] I accept that Mr Robb was distressed by the manner and timing of his dismissal. I accept his evidence that it was a huge shock and that it caused him considerable distress. Mr Robb was the sole income earner for his family and he was supporting his wife, who is terminally ill with cancer. His dismissal placed him under serious financial pressure and he found it difficult to find alternative work.

[95] I find that Transfield acted in haste without any sensitivity to Mr Robb's personal situation. It knew that he was about to attend a funeral with his family and it knew that his wife was terminally ill with cancer. As an employee with four years' service, Mr Robb was understandably hurt, humiliated and suffered injury to his feelings as a result of Transfield's actions towards him.

[96] Mr Robb said he was completely gutted by his dismissal. He was without work for six months and during that time it was a struggle for him to meet basic household outgoings. Mr Robb had to go on to a benefit for a period of time.

[97] Dargaville is a small rural town whose local industry is primarily focused upon servicing the rural sector. Given the current economic conditions and its geographical location, there are not a large number of employers which need an employee with Mr Robb's particular skills.

[98] I find that Mr Robb's ability to find new employment was hampered by the information that his former manager, Mr Butler, passed to other potential employers in the community. I accept that Mr Robb was genuinely and understandably very distressed by that.

[99] Mr Butler accepted that he had confirmed to Mr Robb's new employer (after he had finally obtained work after a long period of unemployment) that Mr Robb had been "*sacked from Transfield for stealing diesel*". Mr Butler also admitted to having a conversation with another potential employer advising that Mr Robb had been dismissed from Transfield. Mr Robb alleged that Mr Butler made other such comments widely known in the small community.

[100] When giving his evidence Mr Butler demonstrated a contemptuous and high handed attitude towards Mr Robb. I therefore consider it highly likely that Mr Robb's allegation that Mr Butler blacklisted him had some merit. It is appropriate to address that when awarding distress compensation because Mr Butler's unlawful actions increased Mr Robb's distress.

[101] I find that Mr Butler's actions aggravated Mr Robb's feelings of hurt, distress and humiliation and I consider it highly likely that by putting this information out into the small community Mr Butler hampered Mr Robb's ability to find alternative employment and thus mitigate the adverse affects of his dismissal. That is a serious matter which adversely impacted on Mr Robb and which he is entitled to be compensated for.

[102] I consider that Transfield's actions towards Mr Robb whilst he was still employed in relation to its disciplinary investigation process and dismissal decision and its actions towards him subsequent to his employment ending (i.e. Mr Butler's unlawful breaches of Mr Robb's privacy) warrant an award of distress compensation of \$5,000.

Orders

[103] I make the following orders:

- (a) Transfield's dismissal of Mr Robb was unjustified; and
- (b) Transfield is ordered to pay Mr Robb \$5,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[104] Mr Robb has been successful and, subject to any submissions of the parties, my preliminary view is that he should be entitled to an award of costs in his favour. The parties are encouraged to resolve costs by agreement.

[105] In the absence of any without prejudice except as to costs offers, and subject to any costs submissions that may be made, I can provide a preliminary indication that I am likely to approach costs in respect of this matter on the basis of the Authority's usual tariff based approach, which would be applied to 1.5 days of investigation time. In which case I am likely to adopt a notional starting point for the daily tariff of \$3,500.

[106] The parties have 14 days within which to agree on costs. If agreement is not reached, then Mr Robb may file a costs memorandum within 21 days of the date of this determination. Transfield then has 14 days within which to file its costs memorandum, with Mr Robb having a further seven days to file a reply costs memorandum.

[107] This timetable will be strictly adhered to and any departure from it requires the prior consent of the Authority. No costs memoranda will be considered outside of this timetable, without the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority