

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 469
5433316

BETWEEN

MOHAMMED SAHIM
Applicant

A N D

MENZIES AVIATION (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Lorne Campbell, Counsel for the Applicant
Kate Ashcroft, Counsel for the Respondent

Investigation Meeting: 1 – 3 October 2014 at Auckland

Submissions Received: 2 and 6 October 2014 from the Applicant
2 and 6 October 2014 from the Respondent

Date of Determination: 18 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Mohammed Sahim, claims that he was unjustifiably dismissed by the Respondent, Menzies Aviation (New Zealand) Limited (Menzies), on 25 July 2013.

[2] Menzies denies that Mr Sahim was unjustifiably dismissed and claims that he was justifiably dismissed on the basis of serious misconduct.

Issue

[3] The issues for determination are whether or not

- Mr Sahim was unjustifiably dismissed by Menzies
- There was disparity in the treatment of Mr Sahim such as to render the decision to dismiss him one which was not available to Menzies as a fair and reasonable employer

Background facts

[4] Menzies is an international aviation company engaged in passenger, ramp and cargo handling services. Its operations include passenger service, flight operations, ramp, cargo imports and exports, cleaning and maintenance.

Health and Safety at Menzies

[5] Mr Butler, Menzies Health and Safety Security Manager at Auckland International Airport, explained that Menzies has a strong health and safety culture. There are six senior managers employed by Menzies in New Zealand of whom he is one, who have nationwide responsibility for health and safety and security matters at Menzies sites.

[6] Menzies was awarded the International Air Transport Association (IATA) Safety Audit for Ground Operations (ISAGO) audit accreditation in 2012 which is a well-known global audit system and standard. Many airports require organisations to hold the accreditation in order to operate. Menzies was very successful in the ISAGO audit, receiving accreditation with zero findings.

[7] Mr Butler explained that much work had gone into raising the standards in cargo operations in order to meet the ISAGO requirements. A culture change had been required particularly in the Cargo area of operations as the previous managers had allowed malpractices to continue without remedial action being taken. He said that with the assistance of Mr Lennox Sam, Cargo Service Manager, and Ms Fiona Scott, Compliance/Training Officer, it had been possible to implement change throughout Menzies including in the Cargo area.

[8] He said aviation is one of the safest and most regulated industries because its operations are developed and refined based on learnings from prior incidents which are publicised globally. Menzies has in place a system used to conduct hazard risk assessments and workplace inspections, the Menzies Operating Responsibly, Safely and Effectively (MORSE) Reporting System. If a serious incident occurs, part of the MORSE reporting system's functionality is to disseminate information worldwide about that incident, including lessons that can be learned.

[9] Health and safety is a live issue in the workplace and signs are posted around the sites. It is considered that there is an open and honest reporting culture with each employee knowing that every incident does not necessarily lead to a disciplinary investigation. Employees are also aware that everything is recorded on CCTV cameras at the Menzies sites.

MORSE system

[10] MORSE was developed by Menzies to allow investigation of all health and safety incidents. Mr Butler said it is a robust system that ensures global consistency, and confirmed that Menzies has prepared a worldwide MORSE user guide which outlines a flowchart, reporting guidelines, category classifications, cause code analysis, preparing safety audits, investigations and incident cause analysis.

[11] The MORSE user guide describes MORSE as an intranet incident database. It is a system for communicating safety information. Menzies has implemented a centralised safety culture which depends on capturing safety issues at the frontline. Mr Butler said no incident, accident, or near miss should be unaccounted for and appropriate investigations should take place.

[12] The system begins with a safety report being entered and an appropriate category classification being selected. MORSE then generates an automatic text and email that is sent to different people at Menzies depending on the classification of the incident. For all categories, MORSE also generates an automatic email that is sent to the relevant line manager. An investigation is then completed and following that, the local manager will review the incident and put procedures in place to prevent recurrence based on what has been learned. All incidents and near misses are to be recorded in MORSE and certain accidents also need to be reported to local enforcing authorities and within certain timeframes.

[13] Mr Butler explained that not every MORSE investigation leads to a disciplinary investigation, as these two investigations are run separately. The reason for this is that Menzies wants employees to fully and freely report any incident or accident without fear of retribution. Employees are informed that it is their responsibility to report any incident affecting safety and to cooperate fully throughout any subsequent investigation.

MORSE category classifications

[14] Incidents are classified in MORSE according to different categorisations from A to E. These categories are updated from time to time, but largely remain the same. The scale of categories (from A down to E) does not represent their relative level of seriousness nor is the categorisation related to initiation of a disciplinary investigation. The categorisation does not relate to responsibility or fault. The categories are:

- (a) Category A – major/serious incident;
- (b) Category B – intermediate incident;

- (c) Category C – minor incident:
 - (i) Includes minor vehicle damage;
- (d) Category D – near miss – dangerous occurrence:
 - (i) Certain incidents in this category require Category A investigations and International Review Board (IRB) review; and
- (e) Category E – non-fault.

[15] Mr Butler said that Menzies IRB, a body made up of Menzies board members and senior safety and security management personnel, reviewed Category A and IRB incidents in Category D that required a full and detailed investigation report. In a review, the IRB holds a telephone conference with management at the relevant site, reviews the investigation notes and asks the site to explain what it has, or has not done, during and after the incident, in terms of the investigation and any outcomes. The investigation is carried out by a safety investigator who provides the IRB with an overview of what has occurred and the preventative measures that have been put in place to prevent recurrence.

[16] Ms Michelle Stuck, Human Resources Manager, explained that there are certain documents in Menzies that highlight the importance of health and safety in Menzies to its employees. A notification as to the importance of health and safety is included in an employee's individual employment agreement and all employees are provided with an employee handbook. The first section of the employee handbook covers health and safety, setting out the obligations of employees to be responsible for supporting good work practices, and the requirements for notifying Menzies under the MORSE policy and procedure when there is an incident.

[17] Ms Stuck explained that when new employees joined Menzies they undergo general training in eight mandatory subjects followed by specialist training in the particular area of operations in which they will be working. Health and safety is one of the eight mandatory subjects and is also incorporated into other subjects. The induction process is carried out by dedicated trainers in each area of the Menzies business, ramp, passenger services and cargo.

Mr Sahim

[18] Mr Sahim had been employed by Menzies for over 10 years, latterly in the position of Cargo Duty Manager and he had responsibility for a number of staff in that position.

[19] He reported to Mr Lennox Sam, Cargo Service Manager, as did two other Cargo Duty Managers. Mr Sam explained that in the Cargo area, leads, loaders, customer service agents

and customer service officers reported to the Cargo Duty Managers who in return reported to him. Mr Sahim's role required him, amongst other things, to assist Mr Sam with disciplinary investigations, including those involving health and safety.

[20] Mr Sam explained that he and the other Cargo Duty Managers shared responsibility for all cargo operations for customer airlines, facilitating cargo on and off aircraft by taking it from the ramp and making it available to the customer airlines. Mr Sam reported to Mr Simon Hinman, Menzies Vice President New Zealand and the Pacific Islands.

Golf Cart Incident 22 July 2013

[21] On Monday 22 July 2013 Mr Sahim went to the import shed in a golf cart driven by Mr Shalen Sami. The purpose of the visit to the import shed was to put up a chain barrier in preparation for a visit by Mr Mervin Walker, Menzies Executive Vice President who was visiting from the UK.

[22] The golf cart is a small vehicle with one seat in it. It is a left hand drive vehicle and Mr Sahim was sitting on the right hand side of the seat. When they reached the import shed, Mr Sami got out of the cart to reach the button to open the barrier. However before he could do so another employee in the shed pushed a button and opened it, so Mr Sami just walked into the shed.

[23] Mr Sahim said that he proceeded to move the golf cart into the import shed in order to clear the entrance way. Although he had not intended to move the golf cart more than a few metres, he had in fact travelled towards the end of the shed which was approximately 40 metres away. Mr Sahim said he turned the steering wheel of the golf cart to avoid hitting the side of the import shed exit door and tried to apply the brakes. After going through the import shed exit door he had to turn again to avoid a parked forklift truck. He applied the brakes again and finally managed to stop with the aid of the brakes and some wooden pallets a few metres away from the forklift truck parked outside the import shed.

[24] Mr Sahim said he got out of the golf cart on the driver's side and examined the it to see if there was any damage. Mr Sami came over to collect a folder he had left in the golf cart and helped him straighten the front wheel which was at an angle. They also noticed that the tie rod was broken. There appeared to be no other damage.

[25] Mr Sahim said he walked back to the main office and spoke to Mr Sam. He had told him he had just had an accident with the golf cart in the import shed and Mr Sam had asked him what had happened. Mr Sahim replied that he must have pressed the accelerator rather than the brakes; however he did not tell Mr Sam that he had been sitting on the passenger side of the golf cart as he knew he had lost control of it.

[26] Mr Sam asked Mr Sahim what damage had resulted, and Mr Sahim had told him that the right tie rod end had snapped. Mr Sahim said Mr Sam had said to him: “*don't worry accidents do happen*”, and said that he should fill in a MORSE form and arrange for the repairs.

[27] Mr Sam said that when Mr Sahim had come to see him he was pale and physically shaken by what had happened, so he tried to reassure him that accidents happen and the main thing was that no one had been hurt. He said that Ms Scott would need to become involved because in accordance with MORSE procedure, an investigation would need to take place. Mr Sam explained that all accidents and near misses were reported in MORSE.

[28] Approximately 30 minutes after Mr Sahim had the accident Mr Hinman and Mr Walker, accompanied by Mr Sam had been visiting the import shed, and Mr Walker had seen the damaged golf cart which had its front wheel smashed in and the 1.5 metre high pallets that had fallen over. He had asked what had happened and had told Mr Sam to do an investigation and go through the process, which Mr Sam said was in any event to occur in accordance with MORSE procedure

[29] Ms Scott said that once the incident had been reported to her she commenced a MORSE investigation with support from Mr Butler. She had visited the import shed and spoken with Mr Sahim briefly to ensure that he was not hurt. At that time the golf cart was still in the pile of stacked pallets into which Mr Sahim had crashed.

[30] Ms Scott said that Mr Sahim had told her that he could not remember what had happened except that he thought he had a lapse of a few seconds. Ms Scott said she suggested that his blood sugar may have been low as a result of his fasting for Ramadhan. However, Mr Sahim responded that he did not know what had happened.

[31] Mr Sahim confirmed at the Investigation Meeting that he had not told Ms Scott where he had been sitting in the golf cart at the time of the incident.

Meeting between Mr Sahim, Mr Sam and Ms Scott

[32] Ms Scott said she had reported the incident to Mr Sam, and later that afternoon she and Mr Sam met with Mr Sahim to discuss the incident. She had explained to Mr Sahim that Menzies was in an investigation process and needed to ascertain the facts which was necessary because of the MORSE system report and because a person could have been hit by the golf cart.

[33] At the meeting Mr Sahim explained that he and Mr Sami had driven from the export to the import shed stopping at the entrance of the import shed where Mr Sami had got out to

open the barrier arm. He had proceeded to move the golf cart into the import shed and had not intended to move it more than a few metres. He did not know what had happened next.

[34] Mr Sahim said that Mr Sam explained they were trying to conclude the MORSE investigation into the accident and asked if he would advise again what had happened, so he explained to them again what had taken place.

[35] He told them he was sitting on the passenger side and slid slightly over to the driver's side, and although did not know what had happened, he felt he had misjudged and hit the accelerator and not the brake.

[36] Mr Sahim said he had apologised and that the meeting had been closed by Mr Sam who explained that he had other people to interview and that he would update him after he had spoken with them.

[37] Later that day, 22 July 2013, Ms Scott said that she and Mr Sam interviewed Mr Sami as a witness to the incident. He had told them that he had driven over to the import shed and got out of the golf cart in order to open the barrier gates. Mr Sahim had then driven through. He thought Mr Sahim had used the accelerator instead of the brake. When asked where Mr Sahim had been sitting in the golf cart, he said the driver's side.

23 July 2013

[38] The following day, 23 July 2013, Ms Scott said she prepared a Safety Report Notice based on the incident report form and the information which had been gathered. Based on what she had known at that stage, Ms Scott said she classified the incident as Category C in the MORSE classification. Category C incidents are classified as minor incidents, which includes minor vehicle damage.

[39] Ms Scott explained that video cameras are stationed inside and outside of the cargo shed and the incident with the golf cart was recorded by these. With the assistance of Ms Tagatanuu, a Cargo Duty Manager, she reviewed the footage of the accident which is common practice in a MORSE investigation.

[40] She said that the CCTV footage had shown a different story to what Mr Sahim had told them in that it had shown Mr Sahim operating the golf cart from the passenger seat at the time of the incident. He had driven through the import shed on the passenger side of the golf cart and continued to the outside area, where he could be seen hitting the pallets. He was then seen moving across to the driver's side, and Mr Sami appearing beside the cart.

[41] Ms Scott said she was dumfounded by what she had seen. Her opinion was that from the position in which the CCTV footage had shown Mr Sahim sitting he would have had very limited control of the golf cart because reaching the pedals would have been very difficult. It would have been easy to push the accelerator instead of the brake, and she said that there was large handbrake which sat in the middle of the golf cart. She had taken still shots of the video footage, showing a number of different angles of the golf cart as Mr Sahim drove it down the length of the import shed and out of the other side.

[42] Ms Scott reported her findings to Mr Sam who had viewed the footage and said that the matter was to be referred to the Human Resources department.

[43] Mr Sam said that he had viewed the CCTV footage which showed Mr Sahim driving from the passenger side of the golf cart and switching to the driver's side following the impact with the pallets. As a result he had been concerned that it was different from the version of events provided by Mr Sahim, especially as there had been other employees working in the import shed at the time of the incident who could have been hit by the golf cart operated by Mr Sahim. As a consequence of Ms Scott's findings he had reported the incident to Ms Stuck.

[44] Ms Scott said she had prepared a file note entitled *Golf Cart Incident Import Shed* and passed the matter to Mr Butler who had taken over the rest of the MORSE investigation and changed the classification of the incident.

[45] Mr Butler explained that on 23 July 2013 he received the MORSE automatically generated Safety Report note of the initial Safety Report, which had been prepared by Ms Scott. He said that, as was usual, the Safety Report was based on the Incident Report form which had been completed by Mr Sahim.

[46] He said that Ms Scott had categorised the incident as Category C and commenced the MORSE investigation on this basis. However her review of the CCTV footage of the incident, which had revealed that Mr Sahim was driving from the passenger side of the golf cart rather than the driver's side had significantly changed the nature of the investigation and at that stage a disciplinary investigation was also initiated.

[47] Mr Butler said that he later updated the Safety Report on 26 July 2013 to state that the CCTV footage showed Mr Sahim driving from the passenger side. Also on that date he had updated the MORSE category classification of the incident from Category C to Category B, to 'intermediate incident' i.e. "*Any vehicle accident that could result in a damage claim but did not have the potential to cause serious harm.*"

Meeting on 24 July 2013

[48] Mr Sam said he met with Mr Sahim on 24 July 2013 and told him that the CCTV footage and photographs of the incident showed that he had been driving from the passenger's seat in the golf cart on 22 July 2013.

[49] Mr Sahim said that Mr Sam had his PC on and there was a CCTV still photograph of him sitting in the golf cart. He said that Mr Sam had told him they had viewed the CCTV footage and noted that he was driving from the wrong side and asked why he would do that.

[50] Mr Sahim said he explained that his intention had been to move the golf cart just inside the import shed and he did not know why he had carried on driving all the way through it. He said that Mr Sam had told him that it had been very reckless and dangerous.

[51] Mr Sam said that although Mr Sahim had previously told him he had moved to the driver's side to drive the golf cart, the CCTV footage showed this not to be the case.

[52] At the Investigation Meeting Mr Sahim confirmed that the CCTV footage had shown him seated on the passenger side of the golf cart.

[53] Mr Sahim said that Mr Sam had told him that a disciplinary investigation would be necessary and that this would be handled by the Human Resources department. He had questioned why Menzies were reporting the incident and investigating it further when Mr Sam had earlier said to him that: "*accidents do happen.*"

[54] Mr Sam explained that there were two reasons why the situation had changed since he had made that comment: first, that the damage to the vehicle had been witnessed by Mr Walker and so an explanation was required, although he stated that this would have occurred in any event as a result of adherence to the MORSE reporting procedures; and second, that Mr Sahim as a Cargo Duty Manager held a position of responsibility and leadership, his actions had been witnessed by other employees and he had not set a good example.

Disciplinary Process

[55] Later that morning Mr Sahim said that Ms Maryna Botha, the Human Resources Adviser, gave him a letter dated 24 July 2013 inviting him to a meeting to be held at 9.30 a.m. the following day. The letter which was signed by Ms Stuck stated that Mr Sahim was invited to an explanatory meeting to explain the incident on 22 July 2013. It stated:

It is alleged that:

- *You were driving recklessly in a company vehicle and/or operating equipment in an unsafe or irresponsible manner.*

[56] The letter continued to advise Mr Sahim that it was a potentially serious matter and that a decision could lead to a written warning, final warning, or dismissal. Mr Sahim was invited to bring a support person or representative to the meeting. The letter concluded:

If you are unable to attend at the time stated above please call me as soon as possible ... to arrange an alternative time.

[57] Mr Sahim said he did not have much time to prepare and get advice, but he had not thought to ask for a delay to the meeting. Mr Sahim agreed at the Investigation Meeting that he knew he had the right to request a postponement if required.

Disciplinary meeting 25 July 2013

[58] Mr Sahim attended the meeting on 25 July 2013 accompanied by Mr Thor Flenskov, Engineering and Manufacturing Union (EPMU) Organiser. Ms Stuck attended the meeting accompanied by Mr Hinman.

[59] Ms Stuck said that she had opened the disciplinary meeting by following the standard process which she usually applied in disciplinary meetings. These included an opening with formalities regarding the disciplinary explanatory meeting letter, including that Mr Sahim had received the letter, understood what would be discussed and was happy to continue.

[60] Mr Sahim confirmed that he had understood that the meeting could be delayed but neither he nor Mr Flenskov had asked for a postponement.

[61] Ms Stuck explained that Mr Sam had been expected to be in attendance however he had been unable to attend because he was at home caring for a sick child and Mr Hinman was attending in his place. She had asked if either Mr Sahim or Mr Flenskov had any issues or problems with Mr Hinman attending rather than Mr Sam, however they had not. Ms Stuck said she also told Mr Sahim that if he felt uncomfortable with anything that was being discussed or did not want to continue, the meeting would be stopped or a break would be taken.

[62] Mr Sahim confirmed that Ms Stuck had conveyed this information to him, however he had not asked for a break during the meeting.

[63] Ms Stuck said she had asked Mr Sahim and Mr Flenskov if they would like to view the CCTV footage collected as part of the investigation, including the still photographs.

However the offer was declined. She said that Mr Flenskov stated that there was no need as Mr Sahim did not deny what had happened and that they were all aware of the supporting evidence and that the purpose of the meeting was to discuss the future steps.

[64] Ms Stuck said she had asked Mr Sahim to explain the events and his actions on the day of the incident. Mr Sahim explained that he had intended only to drive for a few seconds. She said she had queried this as the CCTV footage and still photographs clearly showed Mr Sahim driving the length of the import shed.

[65] Ms Stuck said that Mr Sahim's account of the facts had been that he had been holding onto the steering wheel with one hand (his left hand) whilst driving through the import shed. She had asked Mr Sahim where he had been sitting when driving the golf cart, and he had said he had been in the middle, to the side. She had queried this on the basis that the CCTV footage and photographs showed him sitting hard against the side of the golf cart, with the side bar against his leg. Mr Sahim had nodded in response, which she had taken as agreement.

[66] Ms Stuck had asked how Mr Sahim would have control of the golf cart from the passenger side with only one hand on the steering wheel, while attempting to reach the pedals, straddled across affixed handbrake when the accelerator would be the nearest pedal to him, not the foot brake.

[67] Mr Sahim said he had a few moments of inattention and when he came back to his senses he had realised he was heading towards the exit door of the import shed.

[68] Mr Hinman disputed that it could not only have been a few moments because it was a long distance from one end to the other end of the import shed, and asked whether Mr Sahim had had to lean over the handbrake to reach the foot pedals.

[69] Mr Sahim responded that the handbrake was in the middle but not in the way. However he did say that because he was on the passenger side he might have had to reach further for the brakes because he was not very tall.

[70] Mr Hinman had asked if after the crash Mr Sahim had got off from the driver's side and gone to inspect the damage, and Mr Sahim had confirmed that he had done so.

[71] Mr Hinman said he had spoken about the seniority of the role that Mr Sahim occupied in Menzies, his actions on the day and commented that the potential for an accident or incident to have occurred was great. He had described the culture of safety at Menzies and how paramount it was.

[72] Mr Stuck said that Mr Flenskov had said that Mr Sahim had reported the incident, fully apologised for his actions and did not deny that they were stupid. He had said that Menzies should consider Mr Sahim's service and position before applying too harsh a penalty to the incident.

[73] Mr Hinman had then discussed the lack of control Mr Sahim would have had of the golf cart in the circumstances, and asked if Mr Sahim would drive a car from the passenger's side, to which Mr Sahim had responded: "*Of course not*".

[74] Ms Stuck said she had asked Mr Sahim if there was anything further he wished to add before she and Mr Hinman adjourned the meeting, and remind him of the company policies in the Employee Handbook, in particular the section entitled: "*Personal Conduct*" which stated:

Personal Conduct

All employees shall adhere to proper standards of conduct at all times.

The following actions constitute serious misconduct for which you may be summarily dismissed:

(1) Abuse, misuse, neglect or destruction of Company property or any properties entrusted to the Company.

(13) Speeding or driving recklessly in Company vehicles, or operating equipment in an unsafe or irresponsible manner.

[75] Mr Sahim had asked that Menzies not terminate his employment, and referred to a number of personal issues affecting him and his family.

[76] Mr Hinman had responded that some of Mr Sahim's personal family difficulties were known to Menzies, but that he did not believe that those factors had played a part in his decision to drive the golf cart recklessly on the day of the incident, which had had the potential to cause harm to Mr Sahim and was a safety risk to himself and others.

[77] Ms Stuck had explained that it would be unfair to treat Mr Sahim any differently to any other employee who acted in a reckless manner, breaching health and safety in such a serious manner.

First Adjournment

[78] During the adjournment that followed, Mr Hinman said he and Ms Stuck had discussed Mr Sahim's length of service, his position at Menzies and his actions on 22 July

2013, and any and all contributing factors, including what he had said and what was known about his personal difficulties.

[79] Their conclusion had been that Mr Sahim's length of service and position at Menzies resulted in a higher expectation of his actions. They had considered that he had been unable to provide any reason or satisfactory explanation for his having driven the golf cart from the passenger's side seat. Consideration was taken of previous Menzies employee breaches of health and safety and the relevant action taken.

[80] Mr Hinman said that when the meeting was resumed, Mr Sahim had been advised that his employment was to be terminated on the basis of serious misconduct.

[81] Mr Sahim had been distressed at the decision, and again referred to the personal family difficulties he was experiencing. However Ms Stuck explained that whilst she and Mr Hinman were aware of, and understood, his family issues, his actions could not be overlooked or excused.

Second Adjournment

[82] During a second adjournment called to allow Mr Sahim time to compose himself, Mr Flenskov had asked Mr Hinman and Ms Stuck to consider allowing Mr Sahim to resign, or to be moved to a position with less responsibility, as an alternative to dismissal.

[83] However Mr Hinman said he and Ms Stuck were not prepared to negotiate on that basis given the primary importance of health and safety at Menzies, and their view of the seriousness of Mr Sahim's conduct.

[84] Following the meeting Ms Stuck said Ms Botha had written a 'Letter of Service' and she had written a letter to Mr Sahim confirming the outcome. The letter dated 25 July 2013 stated:

Disciplinary Outcome – Termination of Employment

We met with you on 25 July 2013 to discuss the incident which occurred on 22 July 2013 where you were driving recklessly in a Company vehicle.

After hearing your explanation I had to adjourn to make a decision as to what action needed to be taken, and to take into account the leadership level of your role. I believe that this is a very serious matter; however I took into account what you said in mitigation.

After considering all the information, I had to decide whether there was a case to answer and your actions of driving from the passenger seat with a total disregard for not only your own safety, fellow employee's safety and the misuse of our equipment.

I confirm you were advised that on 25 July 2013 your employment will be terminated immediately. You will be paid for your rostered hours up to and including 25 July 2013 and all other leave entitlements.

Determination

Was Mr Sahim unjustifiably dismissed by Menzies?

[85] Mr Sahim was dismissed on 25 July 2013. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[86] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Menzies must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[87] In accordance with s 103A (3) of the Act the Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...*
- (b) ... the employer raised the concerns that the employer had with the employee ...*
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*

(d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[88] Menzies had a robust attitude to health and safety, which was extremely important to its operation. It had worked hard, particularly in the Cargo area of its operations, to achieve the IATA ISAGO safety audit accreditation in 2012.

[89] Its employees were made aware of their responsibilities in the area of health and safety through the documentation provided to them, the notices displayed in the workplace, familiarisation via the training provided at induction, and familiarity with and exposure to the MORSE reporting system.

[90] Mr Sahim was aware of his responsibilities as regards health and safety from the written Employment Agreement provided to him dated 28 June 2005 which stated at clause 19:

You are responsible for working in a safe manner that does not endanger yourself or other employees or Company property. You are required to follow the Company's health and safety rules and procedures. Failure to comply with the rules and procedures may result in warnings and termination of employment. In some circumstances, failure to follow rules and procedures may result in the summary termination of employment.

[91] Mr Sahim confirmed at the Investigation Meeting that he was aware that safety was a prime consideration for Menzies and that he had seen the updated version of the Employee Handbook which identified moving vehicles as a hazard on site, and which outlined managerial responsibility and stated:

Employer's Responsibilities

... Managers of operational areas take ownership of OSH processes in their workplace.

... to carry out duties in a way that does not endanger their own safety or that of fellow workers.

[92] Mr Butler said that Mr Sahim was familiar with both the MORSE system and with disciplinary investigations concerning health and safety, as he had been involved with such

disciplinary procedures involving his own (Cargo) staff previously. Mr Sahim confirmed at the Investigation Meeting that this was correct.

[93] Mr Sahim had been employed at Menzies for over 10 years, he had experienced the cultural change to health and safety, particularly in the Cargo area, and he had been responsible in his role as Cargo Duty Manager for helping to implement it. He had used the golf cart on many occasions during his employment at Menzies.

[94] I find that Mr Sahim was well aware of the responsibilities pertaining to the role of Cargo Duty Manager in respect of health and safety, and of his own role in ensuring that he set an example to other Cargo employees in adhering to the health and safety policies.

[95] Although Mr Sahim submitted that the incident with the golf cart did not have the potential to cause serious injury, I note that there is no evidence that he had considered and discounted any such risk prior to driving the golf cart through the import shed on 22 July 2013, including having assessed how many employees were in the import shed at the relevant time.

[96] Menzies considered Mr Sahim's actions in driving the golf cart through the import shed whilst seated on the passenger side of the driving seat to have been reckless and to have had the potential to endanger not only himself, but other employees, constituting serious misconduct.

[97] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[98] In the circumstances of the high prominence given to health and safety within Menzies and the extensive knowledge Mr Sahim had of this by virtue of:

- (i) his length of service;

¹ [2011] NZEmpC 160

² *Angus at para [23]*

- (ii) his knowledge of the documentation pertaining to, and training provided in, health and safety;
- (iii) his experience; and
- (iv) his involvement in disciplinary procedures related to health and safety matters,

Menzies concluded that Mr Sahim's actions amounted to serious misconduct.

[99] In accordance with s 103A (3) of the Act, Menzies was required to carry out a fair investigation and follow a fair procedure.

[100] The fact that Mr Sahim had driven the golf cart the length of the import shed was not in dispute. During the investigation part of the process, both Mr Sam and Ms Scott separately and together asked Mr Sahim for an explanation of what had occurred.

[101] Mr Sahim had been unable to provide an explanation, referring to "*a lapse*" and to the fact that he did not have an explanation for what had occurred, other than that he thought he may have pressed the accelerator rather than the brake. Significantly he did not raise during the investigation process his personal family concerns as having been the reason for his actions.

[102] Mr Sam and Ms Scott carried out further investigation, interviewing Mr Sami and viewing the CCTV footage of the incident. Following the discovery from the CCTV footage that Mr Sahim had been operating the golf cart from the passenger side of the vehicle, that matter was elevated to a disciplinary procedure.

[103] Prior to the disciplinary meeting taking place, Mr Sahim had been informed of Menzies' concerns in the letter dated 24 July 2013. I do not accept that Mr Sahim would have been unaware of the potential outcomes since the letter clearly advised him of these. I accept that the suggested time of the meeting, being the following day, did not provide Mr Sahim with much time to prepare and get advice; however he confirmed that he had been aware that he could request a postponement had he wished to do so.

[104] Mr Sahim had experienced representation at the disciplinary meeting in the person of Mr Flenskov. He confirmed at the Investigation Meeting that he understood the meeting could be adjourned at any time, however neither he nor Mr Flenskov had requested an adjournment.

[105] Mr Sam had not been present at the disciplinary meeting as expected and Mr Hinman attended in his place. Neither Mr Sahim nor Mr Flenskov raised an objection to this, although they were provided with an opportunity to do so.

[106] I accept that Mr Hinman was familiar with the issues for consideration at the disciplinary meeting as a result of his being present in the import shed on the day the incident occurred and through update communications from Mr Sam and Ms Stuck, and that no unfairness resulted to Mr Sahim by his attendance. Moreover if either Mr Sahim or Mr Flenskov had been concerned at the time, opportunity was provided for a delay in the meeting proceeding until such time as Mr Sam could be present.

[107] Mr Sahim was provided with an opportunity to provide an explanation. I note that his explanation that the incident had been caused by the stress of personal family concerns at the relevant time, which had resulted in his losing concentration when driving the golf cart, had been provided only at the point where he was aware that the continuation of his employment was in jeopardy.

[108] Despite this late explanation, I find that this was a consideration taken into account by Ms Stuck and Mr Hinman during the first adjournment, also noting that they had some awareness of these issues prior to this time. Also taken into consideration were Mr Sahim's length of service and his position.

[109] I find that Menzies gave genuine consideration to Mr Sahim's explanations and to other relevant factors.

[110] I find that Menzies carried out a fair and reasonable investigation and disciplinary process.

[111] I consider that the decision that Mr Sahim failed to work in a safe manner which had the potential to endanger himself or others one that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

In the circumstances, was dismissal an appropriate outcome?

[112] In *Ministry of Maori Development v Travers-Jones*³ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on

³ [2003] 1 ERNZ 174

reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal.

[113] In *Angus v Ports of Auckland Limited*⁴ the Employment Court observed:⁵:

... The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established ... The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[114] The facts in this case are not in dispute. Menzies considered that Mr Sahim's actions in relation to his driving of the golf cart on 22 July 2013 were 'reckless' as a result of which he had been summarily dismissed as detailed in the letter dated 25 July 2013.

[115] The definition of 'recklessly' was considered by the Court of Appeal in *R v Harney*⁶. The Court stated:⁷

Subject to the requirements of particular contexts, however, we incline to the view that 'recklessly' has usually been understood in New Zealand to have the meaning given in pre-Caldwell textbooks such as 11 Halsburys' Laws of England, 4th ed. Para. 14, and Adams on Criminal Law in New Zealand, 2nd ed. Para 1430. That is to say, foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of the risk".

[116] Consequently I consider that for Mr Sahim to have been driving recklessly, he would have needed to have been aware of the potential danger in driving the golf cart from the passenger side and continued to act knowing the consequences that could ensue.

[117] There is no evidence that Mr Sahim had intended to drive the golf cart from the passenger side or that having intentionally chosen to do so, continued to do so knowing the possible consequences. This is supported in the MORSE safety report, compiled by Mr Butler, Health and Safety and Security Manager, on 26 July 2013 which states the causes of

⁴ [2011] NZEmpC 160

⁵ Ibid at para [24]

⁶ [1987] 2 NZLR 576 (CA)

⁷ Ibid at pg 7

the incident to be: “*R1-Standard Operating Procedure not followed; B4-Poor judgement; R2-Prescribed safe work methods not followed.*”

[118] Whilst I therefore find no evidence to support the conclusion that Mr Sahim drove the golf cart recklessly on 22 July 2013, I do accept that Menzies could reasonably conclude that Mr Sahim drove the golf cart negligently, without due care and attention.

[119] In *Makatoa V Restaurant Brands (New Zealand) Ltd*⁸ the then Chief Judge Goddard observed:⁹

There is also a rule of law that negligence on its own cannot ordinarily justify a dismissal unless it is gross, or amounts to recklessness, or is repeated after warnings, and despite training, or, where the employee refuses to accept guidance .

.... The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer’s interests. It will not generally consist of mere inadvertence, oversight, or negligence, however much that inadvertence, oversight, or negligence may seem an incomprehensible dereliction of duty.

[120] I find that Mr Sahim’s action was a single incident of negligence. Generally a negligent person foresees no risk at all and is stupid or careless, as was admitted by Mr Sahim, whereas recklessness requires foresight of an unreasonable risk. I find that Mr Sahim’s action in driving the golf cart from the passenger side of the seat was not a deliberate action to obstruct or harm Menzies interests.

[121] Mr Sahim had significant service with Menzies and an unblemished work record during that time. He had apologised for his actions, and his distress at the dismissal decision, combined with his concern at the family situations he was experiencing, could have given Menzies the necessary assurance that there would be no repetition.

[122] In all the circumstances, I find that a fair and reasonable employer could not have made a decision to dismiss Mr Sahim.

[123] I determine that Mr Sahim was unjustifiably dismissed by Menzies.

⁸ 2 ERNZ 311

⁹ Ibid at pages 318-9

Was there disparity in the treatment of Mr Sahim such as to render the decision to dismiss him one which was not available to Menzies as a fair and reasonable employer?

[124] In *Chief Executive of the Dept of Inland Revenue v Buchanan*¹⁰ the Court of Appeal outlined three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*¹¹

[125] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[126] In *Samu v Air New Zealand*¹² the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[127] The two matters cited by Mr Sahim involved actions committed by Menzies employees during 2011 and 2012. During this period I accept that Menzies was undergoing a cultural change in the stance towards health and safety, particularly in the Cargo area of operation. In 2012 Menzies has been awarded achieve the IATA ISAGO safety audit accreditation

[128] Prior to this, Mr Butler's evidence had been that there been malpractice among previous managers which he, Mr Sam, and Ms Scott had worked to change. Mr Sahim was aware of the cultural change regarding health and safety.

¹⁰ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

¹¹ Ibid at para [45]

¹² [1995] 1 ERNZ 636 (CA)

[129] Mr Sahim's action in driving the golf cart on 22 July 2013 in light of the cultural change, his knowledge of it, and his responsibility as a Cargo Duty Manager for implementing that change, I find accounted for the disparity of treatment.

[130] I find that in these circumstances, although there has been disparity of treatment, there is an adequate explanation for it.

Remedies

[131] Mr Sahim has been unjustifiably dismissed and he is entitled to remedies.

Lost wages

[132] Mr Sahim obtained alternative employment such as to equal his earnings at Menzies at the time of his dismissal with effect from 23 September 2013.

[133] Mr Sahim is to be reimbursed by Menzies for lost earnings in the sum of \$6,330.16 gross (calculated as \$2,857.36 for the period 25 July to 12 August 2013 and \$3,472.80 for the period 12 August to 23 September 2013) pursuant to s 128(2) of the Act.

Kiwisaver

[134] Mr Sahim is to be reimbursed for the Kiwisaver contribution which would have been made by Menzies in the period 25 July to 23 September 2013 had he not been dismissed in the sum of \$189.90 pursuant to s 123(1)(ii) of the Act.

Redundancy

[135] I am unable to conclude that had Mr Sahim remain employed he would have been made redundant. Mr Sam's evidence was that following Mr Sahim's dismissal, Menzies reassessed its operations in the Cargo area in light of the need to reallocate his work. There is no evidence that prior to this event there had been any taken by Menzies in preparation for a proposed restructuring.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[136] I accept on the evidence presented to the Authority that Mr Sahim has suffered significant distress as a result of the termination of his employment, and that his dismissal resulted in financial hardship to his family.

[137] Menzies is ordered to pay Mr Sahim the sum of \$6,000.00 pursuant to s 123(1) (c) (i) of the Act.

Contribution

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

[139] Mr Sahim had negligently driven a golf cart on 22 July 2013. He had driven it from the passenger side, thereby lacking full control of the vehicle. He had done so without any assessment of the potential for injury to himself or others.

[140] When questioned about the incident, Mr Sahim did not volunteer the information that he had driven the golf cart from the passenger side of the vehicle until confronted with the CCTV footage thereby undermining the trust and confidence Menzies could have in him as part of the Cargo management team responsible for leading the cultural change in health and safety and the expectation that he would lead by example.

[141] I find the actions of Mr Sahim to have been blameworthy and causative of the outcome¹³.

[142] I find contributory fault on the part of Mr Sahim and reduce the remedies awarded by 90%.

Costs

[143] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

¹³ *Goodfellow v Building Connection Ltd t/a ITM Building Centre* [2010] NZEmpC 82