

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 153  
5447996

BETWEEN            KANA SHANMUGANATHAN  
Applicant  
  
A N D                POWERNET LIMITED  
Respondent

Member of Authority:    Helen Doyle  
  
Representatives:        Mary-Jane Thomas and Elizabeth Fraser, Counsel for  
Applicant  
Janet Copeland and Lucia Vincent, Counsel for  
Respondent  
  
Investigation Meeting:    6 August 2014 at Invercargill  
  
Submissions Received:    15 August 2014 from Applicant  
25 August 2014 from Respondent  
  
Date of Determination:    2 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.    Kana Shanmuganathan's demotion was unjustified and disadvantaged him.**
- B.    The application for reinstatement to his managerial role is declined.**
- C.    PowerNet Limited is ordered to pay Kana Shanmuganathan lost wages in the sum of \$1,875 gross and compensation in the sum of \$2,000 without deduction.**

**D. Costs are reserved and failing agreement a timetable has been set for an exchange.**

**Prohibition from publication**

[1] Kana Shanmuganathan was assessed at the request of PowerNet Limited (PowerNet) by an industrial psychologist in 2012. The parts of the psychologist's report which are not referred to in this determination are prohibited from publication.

**Employment relationship problem**

[2] Mr Shanmuganathan was employed by PowerNet in March 2000 as a Senior System Controller. On 27 January 2001 he was appointed to System Control Manager for PowerNet in Invercargill.

[3] On 14 November 2011 Mr Shanmuganathan was dismissed from his employment with PowerNet. He was reinstated on an interim basis in a determination dated 23 December 2011 - [2011] NZERA Christchurch 2011. The substantive application for permanent reinstatement was the subject of mediation with agreement being reached in February 2012. The agreement included that Mr Shanmuganathan was issued with a final written warning dated 14 November 2011. This was to remain on his file for a period of two years through to 14 November 2013 and covered a variety of matters including that Mr Shanmuganathan would comply with all lawful and reasonable instructions of PowerNet leadership team and would remain familiar with, comply and adhere in every respect to all PowerNet policies and procedures.

[4] On 19 April 2012 a disciplinary issue arose and an investigation was commenced with Mr Shanmuganathan in relation to some instructions around safety briefings. Jason Franklin was appointed as Chief Executive of PowerNet on 16 January 2012. Mr Franklin concluded after a disciplinary process that although the action was serious misconduct there would be no disciplinary action taken because of the previous litigation and the importance to develop a constructive working relationship. Mr Shanmuganathan was reminded in writing by Mr Franklin to follow all lawful and reasonable instructions.

[5] On 17 September 2012 Mr Shanmuganathan was invited by Mr Franklin to attend a disciplinary meeting about a refusal to obey a lawful and reasonable instruction to seek prior written approval from his manager before attending a meeting

on 27 August 2012 as a representative of PowerNet. Mr Franklin in his letter referred to background to the need for such approval to attend meeting. He had had a discussion in February 2012 with Mr Shanmuganathan about the importance of focussing all his time and attention on system control matters. Mr Shanmuganathan then attended a civil defence meeting and enrolled in civil defence training in contravention of the direction without approval from his manager. There was no disciplinary action taken but a memo was sent by Mr Franklin on 15 March 2012 and signed by Mr Shanmuganathan on 16 March 2012 that provided he *must not represent PowerNet on any external committees, forums, working groups or teams without the prior written approval of the General Manager Network Operations.*

[6] A conclusion was reached by PowerNet that the refusal by Mr Shanmuganathan to obey a lawful and reasonable instruction in respect of obtaining approval amounted to serious misconduct but in a letter dated 1 October 2012 from Mr Franklin to Mr Shanmuganathan, Mr Franklin also stated:

*We are concerned that the frequency and severity of non-compliance suggests that there may be some underlying medical issue or other barriers that are impacting on your ability to follow lawful and reasonable instructions. We are concerned that this behaviour may in turn seriously undermine decision making in your current role. Given its very safety sensitive nature this is a significant worry for us.*

*Accordingly we are proposing to arrange for you to be assessed by an Industrial Psychologist to determine whether there are any clinical explanations for your behaviour.*

[7] The disciplinary outcome was put on hold until after the report was provided. Mr Shanmuganathan attended a consultation with Psychologist, Geoff Shirley.

[8] Around this time Ms Thomas on behalf of Mr Shanmuganathan laid a bullying complaint about Gary Pritchard, General Manager – Network Operations. Mr Pritchard had responsibility for Mr Shanmuganathan. The complaint was that Mr Shanmuganathan was being micro-managed. A solicitor, Angela Morgan Roberts from an Invercargill legal firm, was asked to independently investigate the bullying complaint. She concluded firm management rather than workplace bullying in her report.

[9] Trish Hazlett is the Human Resource Manager at PowerNet. She has held that position since 14 January 2013. Her predecessor, Janet Ellis, left PowerNet before the September 2012 disciplinary process was completed. It was not until new issues

arose with Mr Shanmuganathan in late June 2013 that Ms Hazlett realised the issues from 2012 had not been closed off. Copies of the bullying report and the Shirley report were provided to Ms Thomas for the first time under cover of letter dated 8 July 2013 from Ms Copeland. I accept that the delay in provision was not deliberate although quite unfortunate. Ms Copeland confirmed in her letter that the disciplinary matter that arose in September 2012 was concluded and no further action would be taken in respect of that and the bullying complaint in light of the bullying report. I was not satisfied from the evidence further issues about bullying or the Shirley report were raised until after the events which are the main consideration of this determination. There was a concern raised by Ms Thomas that Mr Shanmuganathan had not been interviewed by Ms Morgan Roberts and the report about bullying therefore was inadequate.

[10] On 22 July 2013 there was an investigation meeting held with Mr Shanmuganathan about whether disciplinary action should be taken with respect to using a company vehicle/cell phone for personal use notwithstanding an explicit instruction not to do so.

[11] The notes show that Mr Shanmuganathan asked Mr Franklin at a meeting not to take the matter to a disciplinary meeting and advised that he would follow instructions in the future. Mr Franklin, it is recorded, advised that should there be further instances he would need to seriously consider Mr Shanmuganathan's ongoing employment especially if he could not commit to following reasonable requests and that he did not want to be having to talk to him again about his behaviour.

[12] Ms Hazlett said that at the time of the investigation meeting in July 2013 meeting PowerNet was very mindful of the Shirley report and the relationship between Mr Shanmuganathan and Mr Pritchard. Mr Pritchard was not therefore involved in the investigation of the issues at that time in light of the relationship issues and Mr Franklin and Ms Hazlett extensively coached Mr Shanmuganathan on why company procedures were in place, why they applied to everyone and tried to get him to understand why he was not exempt.

[13] Mr Shirley in his report was of the opinion that Mr Shanmuganathan had some traits that were relevant to his non-compliance with PowerNet's rules and regulations. Faced with conflicting ideas Mr Shanmuganathan is more likely to do what he thinks

is appropriate. Mr Shirley said that in respect of safety in his work it would not compromise the quality of Mr Shanmuganathan's technical work. Mr Shirley made some recommendations in his report. These included care in explaining rather than micro management with rule compliance to try to increase empathy with the position of PowerNet so that Mr Shanmuganathan could genuinely understand and accept the rationale behind the rules. It was suggested that compliance may be improved by using a coaching model but that his relationship with his manager has a problematic history and he was not the best choice for coach.

[14] On 6 December 2013, PowerNet alleged that there had been serious misconduct on the part of Mr Shanmuganathan with respect to an email provided to Mr Pritchard and two other senior managers together with a refusal to undertake a performance review on 27 November 2013.

[15] A disciplinary process followed at the conclusion of which PowerNet demoted Mr Shanmuganathan from his management role to a system controller role for at least a 12 month period.

[16] Mr Shanmuganathan says that he has been unjustifiably disadvantaged by his demotion and seeks to be reinstated to his position of System Control Manager, reimbursed lost wages and awarded compensation in the sum of \$20,000.

[17] PowerNet says there was serious misconduct on the part of Mr Shanmuganathan in refusing to carry out reasonable work instructions, in refusing to undertake a performance review and using offensive language or behaviour at the place of work in an email presented to Mr Pritchard and sent in breach of an explicit instruction to two other senior managers. In deciding a disciplinary outcome PowerNet placed some reliance on the three earlier incidents following a final written warning dated 14 November 2011 where it says Mr Shanmuganathan did not follow reasonable instructions.

### **The issues**

[18] The issues for determination are as follows:

- (a) Was there a full and fair investigation into the actions of Mr Shanmuganathan at the conclusion of which a fair and reasonable employer could conclude there was serious misconduct;

- (b) Was demotion what a fair and reasonable employer could have done in all the circumstances at the time?
- (c) If Mr Shanmuganathan's employment was affected to his disadvantage by an unjustified action of PowerNet then what remedies is he entitled to and is reinstatement practicable and reasonable?

**Was there a full and fair investigation into the actions of Mr Shanmuganathan at the conclusion of which a fair and reasonable employer could conclude there was serious misconduct?**

*The performance review November 2013*

[19] Mr Shanmuganathan and members of the System Control team were advised before 27 November 2013 they should complete the self-assessment sections of the performance review form prior to their scheduled performance review. Mr Shanmuganathan did not raise any concerns or questions with Mr Pritchard about the performance review or with any other person prior to the meeting on Wednesday, 27 November 2013.

[20] PowerNet had made a decision in October 2013 to amalgamate with its associated company Power Services Limited. As a consequence of that it was known to Mr Shanmuganathan and his team at the time of the performance review that Mr Pritchard's role would change to General Manager Customer Metering and Distribution Services and that Keith Burns would become the General Manager Technical and Network Performance. That meant that Mr Shanmuganathan would very shortly no longer be managed by Mr Pritchard but would be managed by Mr Burns. His performance review in all likelihood was the last formal contact he would have had with Mr Pritchard.

[21] It was the view of senior leadership that performance reviews should be completed with the existing management because they were the best people to review the preceding six months performance and would use these in their handover to incoming managers.

[22] Mr Shanmuganathan attended the scheduled meeting for his performance appraisal on 27 November 2013 at 2pm with Mr Pritchard.

[23] Mr Shanmuganathan placed his performance review paperwork on the table together with an email. It is helpful to set the email out in full:

*Hi Gary*

*I am disappointed and disgusted with the review I had with you in the last Performance Review.*

*My work, energy and performance were not recognised and will continue in that manner under you.*

*Also over a number of years you made it a point I received no annual increments under your leadership.*

*You have tried every thing in your capacity to humiliate me including giving substantial increment to my assistant who's salary is now more than mine.*

*Now I can say with great pleasure you have failed miserably as a leader to me and to my team in System Control in every sense. On other hand I am standing proud where I am on my own strength.*

*Roy was picked up by me from where he was, trained and polished by me. He will not be where he is without my leadership and guidance – please remember that. And I am very proud of that too.*

*With the new restructure in progress and changes to senior management, I am looking forward to work and continue to provide my very best.*

*My team in System Control and I are looking forward to better and **happier** days under Keith Burns who will be our new Manager.*

*As such I don't think there is any value in my completing the latest Performance Review as requested.*

*Sorry to say the above but that's the truth.*

*Kana*

[24] Mr Pritchard noticed the email was addressed not only to him but also to Ms Hazlett and Mr Burns who was as earlier explained going to be Mr Shanmuganathan's new manager. The email had not at that point been sent electronically but printed out.

[25] Mr Pritchard in his written evidence stated that he was upset by what the email said and found it offensive and objectionable and the tone insulting and demeaning. He said he was mindful of the need to be cautious and reflective and told Mr Shanmuganathan that his email and its content would be addressed separately but that they needed to complete the performance review. Mr Shanmuganathan accepted that Mr Pritchard asked him at the meeting to retract the comments in the email and not to send it electronically.

[26] Mr Pritchard noted that Mr Shanmuganathan had not completed the self-assessment sections prior to the meeting and explained that Mr Shanmuganathan had

to complete the paperwork in order for the performance review process to be completed.

[27] He said that Mr Shanmuganathan in response to a direct instruction to complete the paperwork, said no on two occasions. Mr Pritchard then said that they would just complete the review without the self-assessment section completed and then he said Mr Shanmuganathan advised he would take the document away and consider whether or not he would complete the self-assessment section. In his evidence, Mr Shanmuganathan did not accept that he said he would consider doing it but rather that he said he would complete it.

[28] The meeting was rescheduled on the basis that Mr Shanmuganathan would complete the paperwork and return the following day for a performance review.

[29] After the meeting with Mr Pritchard, Mr Shanmuganathan went to talk to Ms Hazlett. He advised Ms Hazlett that he had just met with Mr Pritchard in relation to his performance review and he wanted to know if he was still required to complete his review given that the amalgamation with Power Services was about to be implemented and Mr Pritchard would no longer be his manager.

[30] Ms Hazlett advised Mr Shanmuganathan that he needed to complete his performance review with Mr Pritchard and that the instruction Mr Pritchard had given him was reasonable. Mr Shanmuganathan then showed Ms Hazlett a printed copy of the email he had shown to Mr Pritchard. Ms Hazlett advised Mr Shanmuganathan that she was concerned his email was not appropriate and suggested it would be in his best interests to withdraw it.

[31] Mr Shanmuganathan told Ms Hazlett that he wanted Mr Pritchard to know the truth about how he felt about his management of him. Shortly after Mr Shanmuganathan left the office, Ms Hazlett saw that she had an email from him. It was the same email that Mr Shanmuganathan had shown her that morning as set out in para. [23] above. It had also been set to Mr Burns.

[32] Ms Hazlett said that she was surprised to receive the email electronically because she had told Mr Shanmuganathan it was not appropriate. Ms Hazlett read the email again and sent Mr Shanmuganathan an email advising that she was concerned that he had given the email to Mr Pritchard before seeking advice on the appropriateness of his actions. She wrote that there was an appropriate process to

follow when an issue was to be raised and that that was not the appropriate manner in which to do it. She advised that Mr Pritchard was still Mr Shanmuganathan's appointed leader and that his instructions needed to be followed in regard to completing a performance review.

[33] Mr Pritchard also spoke to Ms Hazlett about the email but it was after she had responded to Mr Shanmuganathan in the manner set out above.

[34] On 28 November 2013, Mr Pritchard wrote to Mr Franklin, to express his dissatisfaction of Mr Shanmuganathan's refusal to undertake a performance review on 27 November 2013, the contents of the email he was provided with and that the email was sent electronically notwithstanding that Mr Shanmuganathan was told not to send the email.

*6 December 2013 letter*

[35] Mr Franklin sent Mr Shanmuganathan a letter dated 6 December 2013 which advised of a disciplinary meeting. The letter referred to two examples of serious misconduct being refusal to carry out reasonable work instructions and using offensive language or behaviour at the place of work in Mr Shanmuganathan's employment agreement. The actions that were of concern were then set as not following your manager's reasonable instructions and presenting him with what appeared to be a totally inappropriate and offensive email and copying other senior managers into that email. That was described in the letter as not the behaviour expected of a senior person and leader in the organisation.

[36] Mr Shanmuganathan was advised that while the issue will be considered on its own following his explanation past issues will also be taken into account as to whether disciplinary action should be taken and at what level. There was reference to instances since the 14 November 2011 final written warning. Mr Shanmuganathan was invited to attend a meeting on 10 December at 2pm so that he could give an explanation. He was advised to bring a representative/support person.

*10 December 2013 meeting*

[37] Mr Franklin attended the meeting with Ms Hazlett. Mr Pritchard was also present. Mr Shanmuganathan attended without representation. It was unwise for Mr Pritchard to have attended the meeting in the circumstances. In terms of fairness

though I am satisfied that Mr Franklin conducted the meeting and that Mr Pritchard was essentially there as an observer. Mr Franklin confirmed Mr Pritchard did not contribute to the disciplinary meeting and that Mr Franklin made the disciplinary decision.

[38] Mr Shanmuganathan's explanation was that he felt the performance review would not be of any value based on previous experiences of performance reviews and he felt disillusioned and that nothing he did would be any good in Mr Pritchard's view and so he did not see the point in undertaking another review.

[39] Mr Shanmuganathan explained that he had drafted the email and put it in front of Mr Pritchard because he wanted him to discuss it prior to undertaking the performance review. Mr Shanmuganathan stated that Mr Pritchard did not wish to discuss the email and instead kept asking him to go away and undertake the self-assessment. He said that he copied the email to Ms Hazlett and Mr Burns to be open and upfront before a new start with a new manager after Mr Pritchard chose not to discuss the email with him. He also said that he had not been given a pay rise for several years and he felt the fact his assistant was now earning more in salary was humiliating.

[40] There was some discussion that since Mr Shanmuganathan's reinstatement in 2012, there had been several issues with him and no salary increases were granted to people where there had been performance issues throughout the year. Mr Franklin said that any decision on pay increases was made by him and not Mr Pritchard.

[41] Mr Shanmuganathan, when questioned as to whether he would be happy receiving an email like the one he sent to Mr Pritchard, stated that he would not receive one like that as his performance was not in question by his staff. He said his performance in the control room was of the standard required and could not be faulted. Mr Shanmuganathan stated that he believed his approach was okay and that Mr Pritchard as a senior manager should have been able to discuss it with him.

[42] Mr Shanmuganathan was advised that Mr Franklin would consider his responses and come back to him with an outcome on Thursday.

*13 December 2013 letter*

[43] Mr Franklin set out in his letter the background to the concerns, the explanations given by Mr Shanmuganathan and his response to the explanations and a preliminary decision. The concerns PowerNet had with Mr Shanmuganathan's actions are found in the first paragraphs of the letter. They can be summarised as presenting Mr Pritchard with an email regarded as extremely inappropriate and inflammatory and intended to undermine his leadership. Sending the email despite being asked to retract it to Ms Hazlett and Mr Burns and that the contents of the email showed an unwillingness to follow the reasonable instructions of Mr Pritchard. Mr Pritchard had requested the attendance of Mr Shanmuganathan at a performance review meeting and to fill out the self-assessment but that was not filled out and the email given instead. Given that there was no earlier conversation about undertaking a performance review that was what Mr Pritchard knew Mr Shanmuganathan was coming to the meeting to do.

[44] In his letter Mr Franklin did not accept Mr Shanmuganathan's explanation that the email was not inappropriate or offensive, and an open and transparent way of raising concerns about earlier performance reviews with Mr Pritchard. It was concluded that the behaviour was serious misconduct because it was offensive behaviour at work. It was set out in the letter that it was acceptable to raise a dispute with a manager but the actions Mr Shanmuganathan had taken showed a serious lack of judgement and therefore were inappropriate and unacceptable. Further than it was of concern that even after the discussion Mr Shanmuganathan still considered his actions were appropriate and acceptable and that he thought that one of his team members could appropriately communicate to him in the same way. Mr Franklin wrote that that brings into question the appropriateness of Mr Shanmuganathan continuing in a management or leadership role in the organisation.

[45] There was reliance placed on three other instances where Mr Franklin had concluded that there was a failure to follow a reasonable and lawful instruction after the final written warning on 14 November 2011. Mr Franklin acknowledged that the final written warning had expired but that the behaviour had not changed and Mr Shanmuganathan had continued to act in a manner that is not acceptable to a person in a management role. He wrote that his lack of judgement in a leadership role needs to be addressed. There was reference to the action warranting dismissal or a

final written warning but that it was believed demotion was an appropriate disciplinary outcome.

[46] The preliminary decision was to stand Mr Shanmuganathan down from his management role to operate as a system controller for at least a 12 month period. During this time there would be assessment of Mr Shanmuganathan's ability to follow the instructions of a new manager and PowerNet would work with him on appropriate leadership skills. If at the end of the 12 month period it was considered that Mr Shanmuganathan demonstrated the required skills and could show appropriate leadership then there would be an assessment of the potential for him to return to a management role.

[47] The proposed demotion would result in Mr Shanmuganathan's base salary reducing to \$85,000, a drop of \$15,000 from his previous salary but the remaining terms and conditions of employment would remain the same. Mr Shanmuganathan was advised he could respond to the preliminary decision by no later than 5pm on Tuesday, 17 December 2013.

*17 December 2013 letter responding to preliminary decision*

[48] Mr Shanmuganathan in his reply to the proposed preliminary disciplinary outcome stated the reason for going to Mr Pritchard with the draft email was to discuss the issues openly and in a transparent manner and there were no other ill intentions. He did not believe his behaviour was offensive and he thought he could raise and discuss with Mr Pritchard issues without fear. He did not accept that he walked away or was adamant that he would not follow instructions given by Mr Pritchard and that the following day they met and completed the performance review.

[49] He also noted that he had apologised to Mr Pritchard. He wrote that he had taken on board that there were other and better ways that he could have accomplished the matter and that the email was a temporary lapse of judgement and he had apologised for any offence to anyone and that he regretted it greatly. Mr Shanmuganathan also wrote that there would be no further issues of him not following instructions. He wrote of moving forward with a clean sheet with the new incoming manager Mr Burns.

[50] Mr Shanmuganathan wrote that he did not believe that he should be stood down from his current position and that he had never had an issue with his team and his management of his team.

*Disciplinary outcome letter 18 December 2014*

[51] Mr Franklin wrote to Mr Shanmuganathan and advised that he had considered the written submission. Mr Franklin noted the commitments that there would be no further issues of not following instruction but took into account that these commitments had been made previously and behaviour had not changed. He noted instances in April and September 2012 and July 2013 and reassurances by Mr Shanmuganathan that he would follow instruction in the future but that it would appear that the reassurances are not genuine and incidents of a similar nature reoccur within 4 to 6 month timeframe.

[52] Mr Shanmuganathan had placed some emphasis in his response on the fact that he would be working with a new manager, Mr Burns. Mr Franklin wrote that he had difficulty believing there would be a difference with a change in manager because incidents of this nature had occurred under different managers and chief executives.

[53] The preliminary decision to stand Mr Shanmuganathan down from his role was confirmed and from when Mr Shanmuganathan returned after the Christmas break, he was to work day shifts as a system controller in a training role until he was deemed to be able to competently operate on the control desk.

[54] Mr Shanmuganathan was advised that PowerNet would assist him to improve his leadership behavioural skills and his performance would be reassessed at the end of the 12 month period. If at the end of 12 months it was considered he had demonstrated the required skills and could show appropriate leadership behaviour, then there would be a reassessment of the potential for him to return to a management role.

*The test in s 103A of the Employment Relations Act 2000 and good faith obligations*

[55] Mr Shanmuganathan says that his employment was affected to his disadvantage by an unjustified action of PowerNet in demoting him. PowerNet accepts that its action in demoting Mr Shanmuganathan disadvantaged him but says

that its actions were justified and what a fair and reasonable employer could have done in all the circumstances at the time.

[56] The Authority is required in determining the justification of PowerNet's actions to do so objectively by applying the test in s 103A of the Employment Relations Act 2000 (the Act). 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 demotion occurred. The statutory good faith obligations inform in s 103A.

[57] In applying the test the Authority must consider four factors specifically set out in s 103A(3) summarised below:

- (a) Having regard to the resources available to PowerNet, whether it sufficiently investigated the allegations against Mr Shanmuganathan before taking action against him.
- (b) Whether PowerNet raised the concerns it had with Mr Shanmuganathan taking action against him.
- (c) Whether PowerNet gave Mr Shanmuganathan a reasonable opportunity to respond to the concerns before demoting him.
- (d) Whether PowerNet genuinely considered Mr Shanmuganathan's explanation before demoting him.

[58] The Authority may also, as provided under s 103A(4) of the Act, consider any other factors it thinks appropriate and under s 103A(5) must not determine an action to be unjustifiable because of defects in the process followed if they were minor and did not result in the employee being treated unfairly.

[59] The statutory duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are responsive and communicative. An employer proposing to make a decision that is likely to have an adverse effect on the continuation of employment must provide the employee with relevant information.

*Conclusions about a full and fair process and whether a fair and reasonable employer could conclude there was serious misconduct on the part of Mr Shanmuganathan?*

[60] Ms Thomas submits that the process used to reach a decision that there was serious misconduct and then to demote was unfair and unreasonable.

[61] Ms Thomas submits that there was no regard during the investigation to the fact that Mr Shanmuganathan had raised an earlier bullying complaint about Mr Pritchard on 8 October 2012 about an unacceptable level of micro management or the Shirley report.

[62] I accept that a fair and reasonable employer could have been expected to have considered the relationship difficulties and the psychology report in assessing the seriousness of Mr Shanmuganathan's conduct.

[63] The conduct relied on as serious misconduct is amongst the examples found in clause 14 of Mr Shanmuganathan's individual employment agreement. It was concluded there was conduct by Mr Shanmuganathan in breach of two of these. The first was a refusal to carry out reasonable work instructions and the second was using offensive language or behaviour at the place of work.

*Refusal to follow the reasonable instruction of Mr Pritchard to undertake a performance review on 27 November 2013*

[64] Mr Pritchard set time aside for the purpose of undertaking a performance review with Mr Shanmuganathan on 27 November 2013 and had clearly advised him beforehand to complete the self-assessment as part of the performance review. It was concluded that if Mr Shanmuganathan was concerned about the requirement to undertake a performance review he should have let Mr Pritchard or Ms Hazlett know his concerns before the meeting. Instead it was not until the meeting itself that it was clear Mr Shanmuganathan refused at least initially to undertake a review of his performance with Mr Pritchard.

[65] Objectively assessed a fair and reasonable employer could conclude in a technical sense this was a failure to follow an instruction and Mr Shanmuganathan should have raised his concerns before the meeting itself. Good faith obligations require those in an employment relationship to be responsive and communicative. Mr Shanmuganathan had undertaken similar reviews with Mr Pritchard without complaint and it could not be

said to be in the absence of expressed concerns before the 27 November 2014 meeting to be an unreasonable request. It was certainly not unlawful.

[66] A fair and reasonable employer could and should though have had regard to the fact Mr Shanmuganathan did agree with Mr Pritchard to undertake a review the next day after he had confirmed the requirement to do so with Ms Hazlett.

[67] Assessed against the relationship difficulties with Mr Pritchard and particularly the recommendations by Mr Shirley that Mr Shanmuganathan needs to understand and accept the rationale behind the rules in question and that there is a need for care in explaining, I do not find that a fair and reasonable employer could conclude that initial reluctance/refusal to undergo a performance review with Mr Pritchard was serious misconduct.

*Was the email offensive?*

[68] Mr Pritchard complained to Mr Franklin that he had found the email to be offensive and unacceptable.

[69] Objectively assessed I find a fair and reasonable employer could have concluded it was offensive. The most offensive part objectively assessed was a statement that Mr Pritchard had failed in every sense as a leader not only to Mr Shanmuganathan but to his [Mr Shanmuganathan's] own team. That was a considerable step from personal concerns about performance reviews and pay increases.

[70] Ms Thomas submits that a reasonable employer with the psychologist report and what she describes as a woeful inadequate bullying investigation should have taken steps well before this point to address matters. I agree it would have been desirable for steps to have been taken to address matters.

[71] Mr Shanmuganathan knew though that he would not continue to be under the management of Mr Pritchard when he provided the email.

[72] PowerNet did take into account even without direct reference to the Shirley report that Mr Shanmuganathan was told by Ms Hazlett when he went to her for advice that the email was inappropriate and that she was concerned Mr Pritchard had

already seen it. She gave sensible advice to withdraw the email. That additional advice by Ms Hazlett was in line with the recommendation in the Shirley report and Mr Pritchard's own instructions to Mr Shanmuganathan to retract the email. It is difficult to see what else could have been done to assist Mr Shanmuganathan's understanding about the inappropriateness and offensive nature of the email. A fair and reasonable employer could conclude safely that Mr Shanmuganathan chose not to follow clear advice to retract or withdraw the email from both Mr Pritchard and Ms Hazlett.

[73] I find that a fair and reasonable employer could have concluded the email presented to Mr Pritchard and read as a whole was unacceptable and offensive.

*Failure to follow a reasonable work instruction to not to send the email electronically*

[74] Mr Pritchard asked Mr Shanmuganathan not to send the email electronically and although Mr Shanmuganathan got a second view on the inappropriateness of its content he nevertheless sent it electronically. This was a clear breach of a reasonable instruction. I find that it was open to a fair and reasonable employer to have rejected Mr Shanmuganathan's explanation that he did this to be open and upfront before a start with a new manager, Mr Burns, after Mr Pritchard refused to discuss the email with him. There was I find objectively assessed no good explanation advanced by Mr Shanmuganathan as to why Mr Burns would need to be, in disregard of clear instructions, copied into the email. I find that a fair and reasonable employer could have concluded that the action of copying Mr Burns in to the email had the effect of undermining Mr Pritchard in his leadership role.

[75] Mr Pritchard gave a reasonable and lawful instruction to Mr Shanmuganathan about not forwarding the email electronically particularly in light of its contents. Ms Hazlett independently explained to Mr Shanmuganathan that the email was inappropriate and should be withdrawn. Mr Shanmuganathan accepted her advice about undertaking a performance review but not about the email. That would support a conscious decision to nevertheless send the email.

*Conclusion on serious misconduct*

[76] I have not found that a fair and reasonable employer could conclude in all the circumstances at the time that the initial refusal to undertake a performance review was serious misconduct. I have already found that a fair and reasonable employer could have concluded that the content of the email was offensive. A fair and reasonable employer could have concluded in the circumstances in light of the nature of the email that a refusal to follow a reasonable instruction not to send it electronically to two other senior managers was serious misconduct. It is conduct that is destructive of the basic trust and confidence that is essential in an employment relationship –*Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 487.

*Allegation that reasons were wrongly relied on in the decision to demote*

[77] Ms Thomas submits that reasons were wrongly relied on by PowerNet to demote.

*Reliance on the expired final warning and other issues that had arisen since that time*

[78] Ms Thomas submits that PowerNet could not rely on the final warning dated 14 November 2011 as it has expired and that despite acknowledging that it had expired it nevertheless took it into account. Ms Thomas referred to reference to the final written warning in the preliminary outcomes letter dated 13 December 2013 as below:

*It appears that despite a final written warning, which we acknowledge has now expired, your behaviour has not changed and you continue to act in a manner that is not acceptable for a person in a management role. Your lack of judgement in a leadership role now needs to be addressed.*

[79] Ms Thomas also submits that reliance on the three issues that arose since the final written warning is unreasonable, substantively unfair and based upon behaviour that was historical. She submits that no disciplinary action was taken in relation to all three matters and Mr Shanmuganathan had no warnings at all on his file at the time of his demotion.

[80] The Employment Court in *Butcher v OCS* [2008] ERNZ 367 at 383 considered at [55] a submission that *OCS* had wrongly relied on an expired verbal

warning to dismiss the plaintiff. Judge Travis accepted that a recently expired warning for the same conduct cannot be completely disregarded as it is part of all the circumstances which have to be considered under s 103A. In *OCS* the reliance by the defendant was not on the expired warning but on a direction contained in the same documents that any repetition of the same conduct could result in dismissal.

[81] PowerNet concluded serious misconduct in respect of the events surrounding the performance review and email and then in reaching a decision as to outcome considered the issues that had arisen since the by then expired final written warning in April and September 2012 and July 2013 and the disciplinary and/or investigatory meetings that followed. The April and September 2012 matters resulted in findings of serious misconduct but no disciplinary action was taken. Mr Shanmuganathan was reminded in April 2012 again to follow lawful and reasonable instructions issued to him. The September 2012 matter was delayed to obtain a psychologist report and then a disciplinary outcome overlooked essentially. In July 2013 Mr Shanmuganathan was advised following an investigatory meeting that should there be further instances [of not following instructions] in the future then Mr Franklin would need to seriously consider his ongoing employment.

[82] PowerNet concluded that behaviours following the final and expired warning in respect of clear instructions and the need to follow company policies and procedures had not changed. It had put Mr Shanmuganathan on notice from the outset of the disciplinary process that the November 2013 issues would be considered on their own but the past issues would be taken into account in the final decision as to whether disciplinary action should be taken and at what level.

[83] I find that the behaviour since the final written warning is part of the circumstances that PowerNet was entitled to consider under the test in s 103A of the Act as to a disciplinary outcome. Equally a fair and reasonable employer could be expected to have considered a situation where there had been no issues arising since the expired November 2011 warning in making its decision as to a disciplinary outcome. I do not find that there was unfairness in that respect in reaching the decision to demote.

*Two reasons for demotion not put to Mr Shanmuganathan*

[84] During the investigation meeting Mr Franklin was asked by the Authority what matters he had considered in making his decision to demote Mr Shanmuganathan. Amongst other matters I have recorded in my minute book that Mr Franklin said *a major issue leaving Kana in a leadership role was felt he had lost the respect of his team. The team were aware of ongoing disciplinary issues.* He referred to knowledge of the team with issues about the cars [the July issues].

[85] I do not find though it was specifically put to him and it does not appear in the preliminary outcomes letter that Mr Franklin had concluded Mr Shanmuganathan had lost the respect of his team.

[86] I have carefully considered this matter. Mr Shanmuganathan did have an opportunity to respond to about the appropriateness of him continuing employment in a management or leadership role in the organisation given the view of PowerNet that his behaviour in a management role was not acceptable – doc W. There were also concerns raised about Mr Shanmuganathan's judgement in a leadership role.

[87] There was a specific concern that even after discussion on the lack of appropriateness around the actions with the email Mr Shanmuganathan still believed his actions were appropriate and that it would be appropriate for one of his team members to communicate with him in the same way. In his written response to the preliminary outcome dated 13 December 2013 Mr Shanmuganathan wrote that he had no issue with his staff and has the respect of his team, contracting team and outside organisation. He wrote that he should not be stood down from his current position and has never had an issue with his team and management of his team.

[88] Mr Franklin found that a lack of respect of his team and being a poor example to them was a major impediment to leaving Mr Shanmuganathan in a leadership role. In those circumstances the failure to put that concern is a procedural flaw and not a minor one. It did cause unfairness because it impacted on whether demotion was an appropriate outcome and Mr Shanmuganathan did not have an opportunity to respond to that concern.

[89] The other reason Ms Thomas said was relied on unfairly was that the system control function was an extremely safety sensitive area and the example that Mr Shanmuganathan set to his team when he did not follow instructions was of concern.

[90] The safety sensitive nature of the role is certainly one of the circumstances that may need to be considered if there is a manager who does not follow instructions or procedures. There was nothing raised though with Mr Shanmuganathan that there was a safety concern as opposed to his behaviour being unacceptable in a management role. It was not, I find, clearly put to Mr Shanmuganathan the employer's concerns that the behaviour of not following instructions/policies and procedures could cause problems in the control room and that Mr Shanmuganathan may not make the right decision in that environment. The significance of that has to be seen in the context that Mr Franklin said at the disciplinary meeting on 10 December that it was not the control room performance which was the issue but that [Mr Shanmuganathan] believed giving an inflammatory and accusatory email to Mr Pritchard is an acceptable way to deal with an issue.

[91] At the Authority investigation meeting the evidence supported the concerns relied for the disciplinary outcome were wider than those put at the disciplinary meeting outcomes letter to Mr Shanmuganathan.

[92] In many respects, these matters to one side, the procedure carried out by PowerNet was what a fair and reasonable employer could have been expected to undertake in all the circumstances.

[93] The two concerns though that were relied on for demotion but were not put to Mr Shanmuganathan for his explanation did not meet the minimum procedural fairness requirement of s 103A (3) (b) of the Act. Mr Shanmuganathan could not therefore respond to the concerns and have that response considered – s 103A (c) and (d). I do not find that these failings were minor or that they did not cause unfairness to Mr Shanmuganathan.

[94] I have also found though that a fair and reasonable employer could not have found if it had carried out a full and fair investigation that Mr Shanmuganathan's failure to participate in the performance review process was serious misconduct.

[95] I do not find for those reasons PowerNet acted as a fair and reasonable employer could have done in all the circumstances in investigations leading to the demotion of Mr Shanmuganathan.

**Was demotion what a fair and reasonable employer could have done in all the circumstances at the time?**

[96] There is an ability to demote in Clause 14.2 of Mr Shanmuganathan's employment agreement. It provides that where an act of serious misconduct has not resulted in summary dismissal as an alternative to a warning PowerNet can redeploy the employee to an alternative position, demote the employee from their current position and require the employee to stand down from their role for a specified time.

[97] I have found a fair and reasonable employer could conclude conduct in respect of the email was serious misconduct.

[98] I have found that there was a failure by PowerNet to meet some of the s 103A tests. The defects were not minor and as they were concerns relied on to reach the disciplinary outcome it could not be said that they did not result in Mr Shanmuganathan being treated unfairly. The full Court in *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 stated at [26] that a failure to meet any of the s 103A tests is likely to result in a dismissal/ disadvantage being found to be unjustified.

[99] I find in this case that the decision to demote was unjustified because of the procedural flaws which denied Mr Shanmuganathan an opportunity to explain why he should not be demoted.

[100] In those circumstances with a fair and reasonable employer could not have justifiably demoted Mr Shanmuganathan. Where there is procedural unfairness but substantive justification the situation is regulated by s 124 of the Act that requires a reduction of remedies if the action of an employee contributed to the situation giving rise to the grievance.

[101] Mr Shanmuganathan has established a personal grievance that he was disadvantaged in his employment because he was unjustifiably demoted. He is entitled to consideration of remedies.

## **Remedies**

### *Reinstatement*

[102] Reinstatement is provided for in the Act in s 125 and the Authority may, whether or not it provides for any other remedies specified in s 123, provide for reinstatement if it is practicable and reasonable to do so. Practicability requires several factors to be considered in determining whether reinstatement of Mr Shanmuganathan back to a leadership role will be successful. It includes previous performance of the leadership role, future working relationships and the conduct for which Mr Shanmuganathan was demoted. Reasonableness requires broad consideration of the respective equities of the parties' case.

[103] The demotion was on the basis that there would be some work undertaken to determine if Mr Shanmuganathan could improve his leadership behavioural skills over a 12 month period and then he would be reassessed as to progress in December 2014. Mr Shanmuganathan has undertaken a Four Quadrant Leadership course in July 2014 and in September the evidence was that he would undertake the Leadership in Action Course.

[104] Reinstatement is the main remedy sought by Mr Shanmuganathan. On his behalf Ms Thomas submits reinstatement is both practicable and reasonable because the period since the demotion and the Authority investigation meeting is not lengthy and does not make reinstatement impracticable. There are no proven tensions between Mr Shanmuganathan and his former team and they remain supportive of him. There is no issue about Mr Shanmuganathan's ability to lead a team or operate his position in accordance with health and safety requirements. That he would no longer be under the management of Mr Pritchard and there are no significant relationship issues between Mr Shanmuganathan's current manager Mr Burns and acting System Control Manager Roy Duffin.

[105] Ms Copeland submits that reinstatement by the Authority to a leadership role is not practicable and reasonable as PowerNet has lost the trust and confidence necessary for an employee in a senior management role.

[106] She refers to Mr Franklin's written evidence in which he states there is no confidence that Mr Shanmuganathan would follow instructions. Mr Franklin refers in

his written evidence to the electricity industry being highly safety sensitive and that the main leadership behaviour is leading from the front by explicitly following instructions and company procedure to ensure there is no margin for error. He says that the ongoing modelling of a lack of regard for rules and procedures demonstrates that repeated non-compliance is not acceptable with policy and direction and that it is his firm view that Mr Shanmuganathan's team are well aware of the behaviours and that he has lost the respect of confidence of the team members.

[107] Mr Franklin accepts that Mr Shanmuganathan has valuable knowledge and experience to provide to the organisation but that it remains to be seen whether he can demonstrate a change in behaviour and decision making so that PowerNet could have confidence if in a leadership role he would follow lawful and reasonable instructions.

[108] I found Mr Shanmuganathan to be an open and truthful witness. He did not deny issues that had taken place. When I asked him about the three issues from the time of the final written warning he said that at all times he was acting in the best interests of PowerNet. Consideration of the material at each of those times showed that was clearly not the view of PowerNet about the instructions/policies and procedures not being followed. PowerNet knows that Mr Shanmuganathan is predisposed to justify a rule/direction departure and to a degree have attempted in the past to work with him about that. Some leniency has been shown and there was commendable insight that there may be underlying features to the behaviour.

[109] I have taken into account Mr Shanmuganathan's view that he has not lost the respect of his team and that there seemed no concern about the work he performed as a System Control Manager or safety. I find though that there is a real concern that members of the team seeing or hearing about their manager not following rules may form a view that is acceptable behaviour. That could be of concern in the safety sensitive area in which the team works.

[110] Mr Shanmuganathan gave a commitment to PowerNet in the past to follow lawful and reasonable instructions but issues arose again and have necessitated investigation. That goes I find to the practicability and reasonableness of reinstatement to a leadership role and the trust and confidence that PowerNet can have in him to follow instructions in the future.

[111] Mr Shanmuganathan says his relationship with Mr Pritchard is at the heart of the difficulties but the evidence supports there were earlier issues arising under other management and under another Chief Executive. The close management did not prevent the behaviour that was of concern but did lead to deterioration in the relationship. Given the real concerns in this case about trust and confidence that close management/supervision would have to continue if Mr Shanmuganathan was reinstated to a leadership role.

[112] Mr Shanmuganathan sent an email with inappropriate and offensive content electronically to two senior managers despite a clear instruction not to from Mr Pritchard. This demonstrated a continued lack of insight by Mr Shanmuganathan into his conduct. It brings his judgement into question as a leader. Without insight into behaviours it is less likely there will be a change in them. That is a matter that impacts on the reasonableness of reinstatement to a leadership position where there is more discretion whether to follow the rules because of the position but a greater responsibility to set a good example to the team.

[113] Mr Shanmuganathan in his oral evidence said he was surprised when he was asked to attend disciplinary meetings. He referred to a fear factor that each time he did something he would be *charged* and called up for disciplinary action. Mr Franklin said that he had spent more time managing Mr Shanmuganathan's issues than any other employees.

[114] The issues that have arisen every few months and the disciplinary/investigative meetings that have followed have taken a toll on both Mr Shanmuganathan and PowerNet. These time consuming investigations are also matters I find that go to the practicability of reinstatement to a leadership role.

[115] PowerNet have to have considerable trust and confidence in Mr Shanmuganathan for a leadership position. I am not satisfied in the circumstances for all the above reasons that the remedy of reinstatement to a leadership role in PowerNet at this point in time is practicable and reasonable.

[116] PowerNet is to undertake the assessment in December 2014 as to whether Mr Shanmuganathan is suitable for a management role after completing his training. I find that they are best placed to undertake that assessment.

[117] The application for reinstatement is declined.

*Lost wages*

[118] I am not prepared in the circumstances of this case to exercise my discretion and award lost wages greater than three months. Subject to any findings about contribution Mr Shanmuganathan is entitled to three months lost wages. The annual drop in income for Mr Shanmuganathan was \$15,000. \$15,000 divided by 52 weeks is a loss of \$288.46 per week which multiplied by 13 weeks is \$3,750 gross.

*Compensation*

[119] There was limited evidence about hurt and distress. I accept though that Mr Shanmuganathan did suffer humiliation as a result of his demotion. It was clearly stressful for him to move from a managerial position to one without that responsibility. Subject to any findings about contribution he is entitled to the sum of \$4,000.

*Contribution*

[120] Mr Shanmuganathan's actions contributed to the situation that gave rise to his personal grievance in a blameworthy way. He provided his manager with an offensive and inappropriate email at a meeting at which his manager was entitled to consider a performance review was to be undertaken. Instead of retracting and withdrawing it he sent it electronically despite a reasonable instruction not to do so. Ms Copeland submits that the level of contribution should be 100%. Taking into account though that I have not found a fair and reasonable employer could have concluded one of the allegations was serious misconduct and there were procedural issues I find that the contribution should be assessed lower than that at 50%.

*Orders*

[121] Applying that contribution therefore to the remedies PowerNet Limited is ordered to pay Kana Shanmuganathan:

- (a) Lost wages under s 123 (1 (b) of the Act in the sum of \$1,875 gross.

(b) Compensation under s 123 of the Act in the sum of \$2,000 without deduction.

**Costs**

[123] I reserve the issue of costs. Agreement may be able to be reached failing which Ms Thomas is to lodge and serve submission as to costs by 17 October 2014 and Ms Copeland is to lodge and serve submission in reply by 7 November 2014.

Helen Doyle  
Member of the Employment Relations Authority