

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 162
3025075

BETWEEN KAILASH SHARMA
Applicant

A N D PROGRESSIVE ENTERPRISES
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Christopher Eggleston, Counsel for Applicant
Kylie Dunn and Jamie Crosbie, Counsel for Respondent

Investigation Meeting: 17 and 18 April 2018 at Auckland

Submissions Received: 12 and 25 April 2018 from Applicant
12 and 27 April 2018 from Respondent

Date of Determination: 21 May 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant Mr Kailash Sharma was unjustifiably dismissed from his employment by the respondent, Progressive Enterprises Limited (“Progressive”).**
- B. The dismissal was both substantively unjustified and carried out in a procedurally unfair manner. To remedy the grievance of unjustified dismissal, I order that:**
- (a) Mr Sharma be reinstated to the position of Manager, RaPiD Print at Progressive, based in Auckland, or to a position no less advantageous on a permanent basis, pursuant to s.123(1)(a) of the Employment Relations Act 2000 (the Act):**

- (i) **Reinstatement is to restore Mr Sharma to his former terms and conditions of employment at Progressive;**
- (ii) **Reinstatement is suspended for 14 days from the date of this determination to enable any facilitated mediation to take place.**

C. Within 21 days of the date of this determination, Progressive is to pay Mr Sharma the sum of \$20,000 compensation for humiliation, loss of dignity and injury to feelings as a result of his unjustified dismissal.

D. There is no discreet unjustified disadvantage claim established in relation to the continuation of the disciplinary procedure while mediation through Mediation Services was being organised between the parties.

E. Costs are reserved.

Employment Relationship Problem

[1] The applicant, Mr Kailash Sharma, was employed as a manager of RaPiD Print by the respondent, Progressive Enterprises Limited (“Progressive”) and its predecessors from 1986 until his dismissal on 16 February 2018.

[2] In December 2016, the office manager of RaPiD Print, Ms Chereen Moreau, complained about the manner in which Mr Sharma shouted at and treated members of the RaPiD Print team and some suppliers. There was a disciplinary investigation. On 8 May 2017, Mr Sharma was issued with a final written warning for inappropriate behaviour.

[3] On 11 August 2017, Ms Moreau made a further complaint that Mr Sharma had “covertly bullied” her by overloading her with work, failing to acknowledge that she was overworked and failing to provide her with appropriate support.

[4] Progressive conducted a disciplinary investigation into the complaint and on 16 February 2018 Mr Sharma was dismissed for serious misconduct.

[5] Mr Sharma raised personal grievances claiming his dismissal was both substantively and procedurally unjustified. Mr Sharma also claimed that his

employment had been disadvantaged by Progressive's failure, despite agreement to do so, to halt the disciplinary process while the parties attended mediation.

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

Mr Sharma's claims

[7] In respect of his dismissal, Mr Sharma says it was unjustified both procedurally and substantively and he seeks to be permanently reinstated by Progressive to his former position or placed into a position no less advantageous to him.

[8] In addition, Mr Sharma seeks compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act and reimbursement of lost remuneration under s 128 of the Employment Relations Act 2000 (the Act).

[9] In respect of his claim of unjustified disadvantage Mr Sharma seeks compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Progressive's responses

[10] Progressive denies Mr Sharma's claims. Progressive says Mr Sharma's behaviour in respect of Ms Moreau and her workload issues, was inappropriate and in breach of Progressive's Code of Conduct, Appropriate Workplace Behaviour Policy and Leadership Profile. Progressive says Mr Sharma's conduct was not acceptable for a person in his position and with his experience and authority.

[11] Progressive says Mr Sharma was on a final written warning at the time of Ms Moreau's second complaint. As a result of its disciplinary investigation, Progressive formed the view that Mr Sharma's conduct amounted to serious misconduct for which dismissal was justified. Progressive says it lost trust and confidence in Mr Sharma and dismissal was an option open to it as a fair and reasonable employer in all circumstances at the time the dismissal occurred.

[12] Progressive denies Mr Sharma's entitlement to any remedies. In the event of a finding by the Authority that Mr Sharma's dismissal was unjustified, Progressive strongly resists Mr Sharma's claim to be permanently reinstated. Progressive is of the view that such a remedy would be unreasonable and impracticable for a number of reasons including a mutual loss of trust and confidence, and his position has now been filled.

[13] In the event of a finding of unjustified dismissal, Progressive says Mr Sharma's contributory conduct was such that any award of compensation should be reduced significantly.

The Authority's investigation meeting

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

[15] For the Authority's investigation meeting, witness statements for the applicant were filed by Mr Sharma and his wife, Ms Ranjini Lata Sharma.

[16] For Progressive, witness statements were filed by Ms Chereen Moreau, former Office Manager, Ms Cody Brennan, Culture and People Partner, Mr Jacques Losken, Head of Marketing Operations, Mr Wadim Schreiner, Head of Marketing Strategy and Ms Neena Beekram, Office Manager at RaPiD . In addition, the Authority questioned Ms Petra Ioane front line/receptionist at RaPiD . Mr Stewart Forsyth, independent executive coach and organisational development consultant, participated in the investigation meeting by phone.

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

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

The issues

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

- (a) Was Mr Sharma's dismissal by Progressive justified?
 - (i) Did Mr Schreiner have delegated authority to conduct the disciplinary process and to dismiss Mr Sharma?
 - (ii) Did Progressive undertake a fair investigation into allegations that Mr Sharma had acted inappropriately, and that this amounted to serious misconduct?
 - (iii) Could a fair and reasonable employer have concluded that Mr Sharma's conduct amounted to serious misconduct which justified dismissal?
 - (iv) In the event the Authority finds Mr Sharma was unjustifiably dismissed what remedies, including reinstatement, is Mr Sharma entitled to?
- (b) Was Mr Sharma unjustifiably disadvantaged in his employment?
 - (i) Was Progressive justified in continuing with the disciplinary process when the parties had agreed to attend mediation?
 - (ii) In the event the Authority finds Mr Sharma was unjustifiably disadvantaged, what remedies, if any, is he entitled to?
- (c) In the event the Authority finds Mr Sharma has personal grievances for which he is entitled to remedies, was Mr Sharma's conduct a contributing factor which requires a reduction in remedies awarded under s 124 of the Act?

Background facts**Progressive**

[20] Progressive owns and operates 184 Countdown Supermarkets in New Zealand and is the owner and operator of RaPiD Print. RaPiD Print provides in-house

printing services to produce materials for use and distribution in Countdown, Fresh Choice and Super Value supermarkets throughout New Zealand.¹

Mr Losken says the RaPiD Print business is critical for Progressive: “to enable it to advertise its customers and ensure its competitive position. That is why, in my view, it is highly important that the RaPiD Print business is managed appropriately, especially given that it operates as a standalone business to the Progressive organisation.”

Mr Sharma’s employment by Progressive

[21] Mr Sharma was employed initially by Nathan Print, a division of the L D Nathan Group in 1986. Nathan Print supplied in-house printing products for the L D Nathan Group.

[22] Mr Sharma was in the final stages of a computer science degree at Auckland University, aged 23, when he accepted employment as the warehouse manager at Nathan Print. There were further changes in ownership until Progressive purchased the business, including RaPiD Print in 2002.

First Issue

Did Mr Schreiner have delegated authority to conduct the disciplinary process and to dismiss Mr Sharma?

Terms of employment

[23] At the time of his dismissal, Mr Sharma’s terms and conditions of employment were contained in a “Service Agreement” dated 16 January 2007. Mr Sharma is referred to in the agreement as “the Executive”.

Reporting line

[24] Mr Sharma’s role reported to the MD (Managing Director) “or such person as is otherwise designated by the MD”. (Clause 4(c) of Service Agreement). Following the appointment of Mr Losken to his current role in March 2016, Mr Sharma reported to Mr Losken. There does not appear to have been any formal amendment to Mr Sharma’s employment agreement to record a change in reporting line. Mr Losken is not the MD. Mr Losken is Head of Marketing Operations. There was no record

¹ Para 7 Losken witness statement.

produced to the Authority of the MD designating Mr Losken as the person to whom Mr Sharma was to report.

Duties – clause 4

[25] Clause 4 is the duties clause which states:

- (ii) The Executive shall inform himself or herself of and shall comply in all material respects with, all laws as they affect the Company and with all Company Policies and Procedures, in the performance of his or her duties. **However, Company Policies and Procedures do not form part of this contract or operate to impose contractual obligations on the Company*.**

**highlighting is the Authority's*

Termination of the Executive's employment "at any time" – Clause 6

[26] Clause 6 is a termination clause. It provides for termination of the Executive's employment "at any time by the Board or the MD, by notice in writing." The types of conduct and behaviour which trigger the termination of the Executive at any time include: wilful refusal to carry out duties, dishonesty fraud, criminal acts by the Executive which could amount to serious misconduct.

[27] The clause also deals with situations in which the Executive's employment may not be able to continue due to bankruptcy, lack of mental capacity or serious illness.

Termination of the Executive's employment "on notice" – Clause 7

[28] Under Clause 7, the Board or the MD, or a delegate of either, can terminate the Service Agreement by giving the Executive three months' notice, or by payment in lieu.

Termination of the Service Agreement on notice by the Executive – Clause 8

[29] Under Clause 8, the Executive can terminate the Service Agreement by giving "3 months' prior written notice to the Company".

General

[30] **Delegation of powers and responsibilities – Clause 16.**

The Board may delegate to any other person the ability to exercise any function, power or right conferred by this contract on the Board. The MD may delegate to any other person the ability to exercise any function, power or right conferred by this contract on the MD.

Delegated authority

[31] Counsel for Mr Sharma submitted that Mr Schreiner did not have the authority to lawfully conduct the disciplinary process and make the decision to dismiss Mr Sharma for serious misconduct.

[32] From the evidence it appears Mr Schreiner received delegated authority verbally from his manager, Ms Bridget Lamont to undertake the disciplinary investigation and to make the decision to dismiss.

[33] Counsel for Mr Sharma correctly asserts in my view, that Mr Schreiner was neither the Board, nor the MD, and was therefore not authorised to undertake the disciplinary investigation into alleged serious misconduct, or to dismiss Mr Sharma for serious misconduct. Therefore, the submission is that Mr Sharma's dismissal was void and unjustified.

Powers of delegation under the Service Agreement

[34] Clause 6 provides for termination of the Service Agreement by the Board or the MD in circumstances of serious misconduct, dishonesty, serious and wilful negligence or incompetence in the performance by the Executive of his/her duties. There is no provision for this disciplinary responsibility to be delegated by the Board or by the MD to another person.

[35] By contrast, after specifically referring to clause 6 of the Service Agreement, clause 7, without limiting the Company's rights under clause 6, provides for the Service Agreement to be terminated by the Board or the MD, or a delegate of either, by giving three months' notice of termination, or by making a payment in lieu of such period of notice.

[36] Clause 16 confers a general right of delegation. That general right does not, in my view, override the operation of clauses 6 and 7 which provide specifically for delegation of authority in the case of termination on notice (clause 7), not in cases of

termination “at any time” (clause 6) following conduct that could be categorised as serious misconduct.

[37] In instances of summary dismissal following serious misconduct, as in Mr Sharma’s case, the decision of the Board or the MD was required. Counsel for Mr Sharma submits that in such a case, Mr Schreiner was not able to conduct the disciplinary investigation nor was he able to dismiss Mr Sharma.

[38] I accept the submission by counsel for Mr Sharma that the Service Agreement distinguishes between the process to be carried out in a situation of summary dismissal following a finding of serious misconduct and the process to be carried out when termination is to be on notice.

[39] In the first instance, termination of the Service Agreement is made “by the Board, or by the MD, by notice in writing to the Executive”, clause 6. Presumably this process reflects the serious nature of the conduct and the ability to terminate “at any time”.

[40] In the second situation, termination is made by “the Board or the MD, or a delegate of either”, clause 7.

[41] The Employment Court decision in *Hall v Dionex Pty Ltd*² considered the issue of whether or not the decision maker had the necessary authority to investigate the allegations.

[42] The investigator who undertook the disciplinary investigation and made the decision to dismiss in that case was not an employee of Dionex Pty Ltd, Mr Hall’s employer. The question for the Court was whether a non-employer could lawfully undertake the disciplinary process and make a decision to dismiss. This issue was one which had been raised during the disciplinary process and prior to the decision to dismiss was made.

[43] At para [44] Her Honour Judge Inglis states:

The relationship between an employer and an employee is a personal one. The parties to an employment relationship are bound by their contractual, common law and statutory obligations to one another. There is nothing in the Act to suggest that employers can divest

² [2015] NZEmpC 29.

themselves of their statutory obligations or unilaterally confer them externally ... More fundamentally it is unclear how a non-employer could form the view that the necessary trust and confidence in an employee had been damaged to such a degree that dismissal was justified.

[44] In the current situation, Mr Schreiner was not an investigator employed by another company, he was employed by Progressive, albeit in a different department from Mr Sharma. Further, the issue of whether Mr Schreiner had the authority to investigate and dismiss Mr Sharma was not a matter raised by him until after his dismissal.

[45] Despite these distinctions in fact from those in *Hall v Dionex*, it is my view there was insufficient evidence before the Authority to establish that there had been a properly delegated authority in writing conferred on Mr Schreiner to undertake the disciplinary investigation into serious misconduct and to dismiss Mr Sharma. The terms of the Service Agreement regarding processes for its termination are clear. They were there for a reason: to ensure the employer cannot be held responsible for an important decision made by one of its employees without proper delegation.

[46] I do not consider the failure to validly delegate authority to investigate and dismiss Mr Sharma to be a minor defect in process. It was a serious flaw and in my view rendered the disciplinary process and resulting dismissal unjustified.

[47] There were other serious issues with Mr Schreiner's appointment as the investigator and ultimate decision maker which I find were unfair. Mr Schreiner was a recent employee of Progressive who had undertaken one disciplinary investigation, in a completely different jurisdiction some six or seven years before. Mr Schreiner was not sufficiently familiar with the operation of RaPiD Print, was not sufficiently familiar with the policies which applied in this situation and relied heavily on templates provided to him by Mr Jason Tuck, an employment relations advisor.

[48] If I am incorrect in my conclusions concerning Mr Schreiner's lack of delegated authority, it is my view, for the reasons that follow that Mr Sharma's dismissal for serious misconduct was not the action of a fair and reasonable employer.

Second Issue

Did Progressive undertake a fair investigation into allegations that Mr Sharma had acted inappropriately, and that this amounted to serious misconduct?

Performance reviews

[49] During the course of Mr Sharma's employment, he had had annual performance reviews which, until 2017, were all positive. Both Ms Bridget Lamont, General Manager Marketing, and Mr Losken, following his appointment in 2016, rated Mr Sharma's performance as "Effective", "High" and "Exceptional" in the years 2014 to 2017. In June 2017, for the first time, Mr Sharma's performance review noted that in 2018, Mr Sharma needed to focus on team leadership and addressing his communication style. Mr Sharma's rating was noted as "performance improvement required".

Employment of Ms Chereen Moreau – March 2016

[50] On 18 March 2016, Ms Moreau was employed in the RaPiD Print team as a temp reception/administrator. In June 2016, following the departure of the Office Manager, Ms Moreau moved into the temp Office Manager position. Ms Moreau worked part-time during this time while she finished her studies.

[51] On 5 December 2016, Ms Moreau was permanently employed to the Office Manager position. From the period March to December 2016, while she was working part-time, Ms Moreau says she had little interaction with Mr Sharma. However, from the emails provided to the Authority, it appears Ms Moreau and Mr Sharma communicated regularly by email. There were no issues raised by Ms Moreau with Mr Sharma or about Mr Sharma during this time.

First and final written warning – 5 May 2017

[52] In December 2016, Ms Moreau made a complaint about Mr Sharma's behaviour towards members of the RaPiD Print team. Ms Moreau complained that she had seen and heard Mr Sharma yelling and shouting at employees and making rude and inappropriate comments about their work and work ability. Ms Moreau alerted Mr Losken.

[53] Mr Losken investigated Ms Moreau's complaint and concluded that Mr Sharma's actions constituted serious misconduct and that a final written warning was the appropriate outcome.

Warning letter – 8 May 2017

[54] The warning letter to Mr Sharma stated that although Mr Sharma did not accept most of the allegations raised he did accept that he needed to "work with the business on [his] management style." The letter concluded by stating that the final written warning would remain active for a period of 12 months from 5 May 2017.

[55] The letter of 8 May 2017, outlined the standards of behaviour expected of Mr Sharma in the future:

- "Appropriate treatment of team members, as per the Countdown Values and Policies
- The development of a plan, by yourself, and agreed with myself, on how you will treat your team in the future. This may include:
 - What is going to change in your management style;
 - What would high performance look like;
 - How will we know that there has been improvement;
 - How can we support you in making this change: ie leadership courses, consultancy support, more frequent meetings, exposure to the wider business, mentoring, etc. We are committed to provide you with the necessary tools.
 - Appropriate training of all team members to enable them to do their jobs. Take the time to help them understand, with patience. They need to be able to ask questions freely at any time.
 - Appropriate workplace attendance needs to commence immediately ..."

[56] The warning was not challenged at the time by Mr Sharma. The warning itself is not a matter requiring investigation by the Authority.

Professional support for Mr Sharma

[57] Following the issuing of the written warning, Mr Losken sought professional support for Mr Sharma. Ultimately, Mr Stewart Forsyth, an executive coach and organisational development consultant, was contracted to coach Mr Sharma. Mr Forsyth did not provide the Authority with a witness statement. However,

Mr Forsyth answered the Authority's questions by telephone and provided the Authority with email correspondence relevant to the matter.

[58] Mr Forsyth says that EAP Services had a relationship with Progressive and it was through EAP that he was contracted to provide professional coaching services to Mr Sharma. Ms Angela McMillan, Human Resources Business Partner Support from Countdown, one of the members of the Progressive Group, was involved in contacting and recruiting Mr Forsyth as Mr Sharma's professional coach.

Communications between Mr Forsyth and Mr Losken

[59] On 16 May 2017, Mr Forsyth emailed Mr Losken providing him with his contact details and a link to his professional profile. Mr Losken responded on 1 June 2017, apologising for not communicating earlier and informing Mr Forsyth that after he had met with Mr Sharma he would be back in contact.

Mr Sharma's engagement with the process

[60] On 19 June 2017, Mr Losken emailed Mr Forsyth's details to Mr Sharma, stating:

As a business, we have the desire and responsibility to ensure that we have supported you and provided you with every possible tool and means to succeed and address the challenges as in the outcome of the investigation. This is for your benefit, as well as your team's benefit.

I do appreciate that you feel some level of scrutiny and pressure, and are keen to just move on. However, as I explained to you, we would like you to still make contact with Stewart to discuss the challenges you have had, and to get him to help you work through a plan and healing process. This does not necessarily mean a 360 degree process, but will involve in-depth discussion on how to resolve the challenges. Please keep me fully informed of progress, and provide me with a view as to your plan with him.

[61] On 22 June 2017, Mr Forsyth sent an email to Mr Losken explaining that he had met with Mr Sharma, had had a good session and "agreed a draft approach – which he was going to review with you". Mr Forsyth suggested running a short survey of RaPiD Print team members to provide a check on how things were going – "motivating change as well as providing an objective guide to the local climate. I would, assuming you and Kailash agree, work with him over that three-month period to develop and encourage the appropriate behaviour."

[62] Mr Losken was on leave for a week and the plan did not progress. On 19 July 2017 a coaching plan was developed.

[63] In his witness statement, Mr Losken stated that he felt Mr Sharma did not “engage with the process and did not understand the need to address his behaviour”. Mr Losken further stated that he had been told by Mr Forsyth that he had experienced difficulty with Mr Sharma as he was not engaged in the process. This was refuted by Mr Sharma.

[64] At the Authority’s investigation meeting, this supposed lack of engagement by Mr Sharma was not borne out. On 16 May 2017, Mr Losken had been provided with Mr Forsyth’s details as a possible coach to work with Mr Sharma. Mr Losken did not acknowledge Mr Forsyth’s email until 1 June 2017. Mr Losken did not pass on Mr Forsyth’s details to Mr Sharma until 19 June 2017, over a month since Mr Forsyth had contacted him and provided his details.

[65] Upon receipt of Mr Forsyth’s details from Mr Losken, Mr Sharma made immediate contact. Mr Forsyth and Mr Sharma met on 29 June 2017. Mr Forsyth reported to Mr Losken that there had been a good session and an agreement to a draft approach which Mr Forsyth wished Mr Losken to review.

Progression of coaching plan

[66] Mr Forsyth told the Authority that his coaching plan did not progress. Mr Forsyth wished to undertake a mini survey of the RaPiD Print team. Mr Forsyth intended developing a questionnaire for circulation within the team. To do so Mr Forsyth wished to use an “existing staff survey as a baseline in respect of leadership and behaviours around team work in the RaPiD Print business.”

[67] When questioned at the Authority’s investigation meeting about his interactions with Mr Sharma, Mr Forsyth said they were “Reasonably positive. I tried to be supportive and future focused and to create an atmosphere to make positive changes to help him keep his job ... He seemed motivated and committed. There were some signs that he was not really convinced he had done the wrong thing.”

[68] On 18 August 2017, Mr Losken sent an email to Mr Sharma and copied Mr Forsyth. Mr Losken confirmed next steps. For the week commencing 4 September

2017, Mr Sharma was to arrange a catch up with Mr Forsyth to finalise details of the coaching plan. In the week commencing 11 September 2017, Mr Sharma was to arrange a time to meet with both Mr Forsyth and Mr Losken to discuss the plan and progress.

[69] The email concluded by informing Mr Forsyth that because there had only been 9 respondents to the “Voice of Team Survey”, the minimum threshold was 10, it could not be used. Therefore, there would need to be an “alternative manner of receiving RaPiD Print team feedback”.

[70] The coaching plan with Mr Sharma did not progress.

[71] In my view, the lack of progression of the coaching plan was not because Mr Sharma did not engage in the process, he did. In my view, Mr Losken was not proactive in the process. Mr Forsyth was not able to access the “Voice of Team Survey” information so that he could undertake his own mini survey of the team. This team feedback was a critical element in the process Mr Forsyth was undertaking with Mr Sharma.

[72] Accordingly, I disagree with the evidence of Mr Losken and the submission by counsel for Progressive that “Mr Losken experienced difficulties with Mr Sharma throughout the process”. This statement was not supported by the evidence of Mr Sharma and Mr Forsyth, nor the documentary evidence.

[73] The 8 May 2017, warning letter required a change in Mr Sharma’s management style. Progressive committed to providing Mr Sharma with the necessary tools to enable this to occur. The coaching plan was to assist Mr Sharma with his leadership and management style. The coaching plan did not proceed, through no fault of Mr Sharma.

[74] This, in my view, was a breach by Progressive of its legal duty and its obligations of good faith to Mr Sharma under s4(1A) of the Act. These breaches by Progressive are relevant to the second complaint made by Ms Moreau on 11 August 2017 during the period of time that Mr Sharma and Mr Forsyth were working on the coaching plan. It is also relevant to Mr Sharma’s subsequent dismissal for “inappropriate behaviour”.

Second Complaint – 11 August 2017

[75] Ms Moreau says that following her permanent appointment as Office Manager, she began experiencing difficulties with Mr Sharma. Ms Moreau told the Authority that she did not believe Mr Sharma understood the Office Manager role. Ms Moreau said Mr Sharma made requests of her which put her under a great deal of stress and increased her workload. Ms Moreau says that she became overwhelmed by her workload, felt that she was being bullied, and on 3 August 2017 left RaPiD Print and did not return.

[76] On 11 August 2017 Ms Moreau made a formal written complaint to Mr Losken. The letter set out her complaint that she was being “covertly bullied” by being overloaded with work and not supported by her manager, Mr Sharma.

[77] On 5 September 2017, Ms Moreau provided a supplementary statement to her initial statement of 11 August 2017. She provided further details of what she says amounted to covert bullying by Mr Sharma.

Ms Moreau’s workload issues

[78] From the evidence, Ms Moreau sent an email to Mr Sharma on 11 July 2017 asking to meet with him about work issues. Mr Sharma emailed back a few minutes after receiving Ms Moreau’s email, agreeing to a meeting, and ensuring that Ms Moreau had cover during the course of the meeting. At the meeting Ms Moreau raised a number of issues concerning systems at RaPiD Print. One of the systems was the Green Tree software.

[79] Another issue of concern for Ms Moreau at the time related to her appointment as the health and safety representative. Ms Moreau felt she was unable to undertake that task due to her workload and on 18 July 2017 she resigned from that position.

[80] On 31 July 2017 Ms Moreau sent an email to both Mr Sharma and Mr Losken recording that she felt the systems and processes at RaPiD required a major overhaul. Ms Moreau also sought clarification on boundaries for roles and tasks that related to reception and office manager. Ms Moreau also referred again to the need to upgrade Green Tree. The email concluded by stating:

BOTTOM LINE ...

GreenTree needs an urgent overhaul and a contingency plan needs to be put in place to cover leave or sick leave of more than one day for the Receptionist and/or office manager.

Receptionist and office manager can't fill the gap for the Warehouse Team and Production Team until systems are changed and job descriptions are clarified.

I look forward to your comment and to us working together to create and deliver a superior customer experience.

[81] Mr Sharma acknowledged Ms Moreau's email within an hour of receiving it. Mr Sharma's response was that he would get back to her with his thoughts once he had had a chance to catch up, following some days off.

[82] Mr Sharma immediately arranged for the external Green Tree consultant, Ms Mary Ann Zorovic, to come to RaPiD Print to discuss Ms Moreau's concerns concerning Green Tree. A meeting was organised for 4 August 2017. Ms Moreau initially agreed to attend the meeting but on 2 August 2017 sent an email to Mr Sharma informing him that she would not be accepting the invitation "as there are more urgent areas that need my full attention and that is the backlog in my work". Mr Sharma urged Ms Moreau to attend the meeting, but she did not. Mr Losken also did not attend the meeting, despite being invited.

[83] Ms Moreau was due to have a performance review with Mr Sharma on 3 August 2017 but on that day she left the office and did not return, claiming that her workload had become overwhelming.

Preliminary investigation by Mr Schreiner

[84] Mr Schreiner conducted the investigation into Ms Moreau's complaint against Mr Sharma. Mr Schreiner is employed by Progressive as the Head of Marketing Strategy. Mr Schreiner has been in that role since 15 May 2016. Mr Schreiner's role is that of "marketing strategy, customer insights and store format marketing."

[85] At the Authority's investigation, Mr Schreiner said that he had conducted one disciplinary investigation in respect of inappropriate behaviour in the workplace when employed in South Africa in 2011-2012.

[86] Mr Schreiner accepted that he did not have expertise in New Zealand employment relations, but was given “a couple of sessions” with Mr Tuck, who explained the process that he was to undertake, gave him relevant documents, templates and manuals to use.

Meeting with Ms Moreau – 30 August 2017

[87] Ms Moreau laid a complaint on 11 August 2017. Mr Schreiner met with Ms Moreau and her support person on 30 August 2017 to “hear her version of events”. Ms Moreau was asked to provide a supplementary statement which she did on 5 September 2017.

[88] After hearing from Ms Moreau, Mr Schreiner interviewed 4 other RaPiD Print team members, in early to mid-September 2017.

[89] On 6 September 2017, Mr Sharma received an email from Ms Lamont informing him that Ms Moreau had lodged a formal complaint against him. The email stated:

Wadim Schreiner has been asked to lead this process and he will be in contact with you as soon as possible to provide some detail on the nature of the complaint and the process moving forward. Chereen has raised some concerns in the form of a formal complaint, which we are obliged to look into. We are in a pre-investigation phase, and as such are in the process of gathering information from Chereen and some other parties named in her complaint, in order to understand more about her concerns.

[90] By the time Mr Sharma received Ms Lamont’s email informing him of the pre-investigation process and that Mr Schreiner was leading it, Mr Schreiner had already completed his interviews with Ms Moreau.

[91] Mr Schreiner concluded on the basis of his preliminary investigation that the allegations by Ms Moreau did not amount to “covert bullying”. Rather, Ms Moreau’s complaint amounted to “allegations of inappropriate behaviour which, if proven, could amount to serious misconduct”. Mr Schreiner determined to continue his investigation.

Disciplinary investigation

[92] Progressive conducted a lengthy disciplinary investigation over a number of months to ascertain whether or not Mr Sharma's behaviour in the workplace constituted serious misconduct for which he could be dismissed.

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

Invitation to attend disciplinary meeting

[94] On 15 September 2017, Mr Sharma received a letter from Mr Schreiner inviting him to attend a disciplinary meeting on 19 September 2017 to:

... discuss an allegation that you have been in breach of Company policy and procedures, as well as manuals. Specifically our Code of Conduct, Appropriate Workplace Behaviour Policy, Company Values and Leadership Profile. The allegation of serious misconduct which we need to discuss is regarding your alleged inappropriate behaviour towards Chereen Moreau. The overall allegation is that you have failed to acknowledge that Chereen is overloaded and overwhelmed with the workload in her job, despite being made aware of these issues, and you have contributed to Chereen's workload with a disregard for these issues. You have also failed to acknowledge the impact this may have on Chereen and you have failed to provide support to address these issues.

It is alleged that this behaviour is inappropriate for a manager and leader in our business and is in breach of the Company's Code of Conduct, Appropriate Workplace Behaviour Policy, as well as the Company's Values and Leadership Profile.

[95] There followed a number of allegations that Ms Moreau had apparently raised with Mr Sharma concerning aspects of her workload and which it was alleged he had failed to acknowledge.

[96] Investigation meetings were held on 4 October 2017, 3 and 21 November 2017. Mr Sharma was represented at each of these meetings. Mr Schreiner was assisted in respect of the employment processes during the meetings, variously by Ms Cody Brennan and Ms Wendy McKenzie from Progressive.

[97] Mr Schreiner formed a preliminary view that most of the allegations against Mr Sharma had been substantiated and amounted to serious misconduct. Mr Sharma was sent the investigation report on 24 November 2017.

Meeting on 20 December 2017

[98] A meeting was held on 20 December 2017 so that Mr Schreiner could obtain a response from Mr Sharma to his preliminary findings. The meeting was adjourned for the parties to discuss attending mediation. A mediation date was obtained for 6 March 2018.

Dismissal meeting 16 February 2018

[99] At a meeting on 16 February 2018, Mr Sharma was dismissed for serious misconduct. Mr Schreiner confirmed the dismissal in a letter of the same date in which he stated

“... I concluded that the allegations of inappropriate behaviour against you are substantiated and that your actions constitute serious misconduct. I have also considered your view as to the outcome of this process. In particular, I focused on your length of service with the business and your previous work history. Unfortunately, this also included consideration of a final written warning which remains in effect.”

[100] Mr Sharma’s dismissal took effect immediately and he was paid three month’s salary in lieu of notice.

Third Issue

Could a fair and reasonable employer have concluded that Mr Sharma’s conduct amounted to serious misconduct which justified dismissal?

The test of justification

[101] By raising personal grievances and bringing them to the Authority for investigation and determination, the Authority is required to apply the test of justification under s 103A of the Act. Under this test, the question of whether Progressive’s decision to dismiss Mr Sharma was justifiable, must be determined on an objective basis, by considering whether Progressive’s actions and how Progressive

acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.³

[102] In applying s 103A, the Authority must also consider four particular factors set out in s 103A(3) as well as any others it thinks appropriate. The four particular factors in s103A(3) relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the complaints, provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses.

[103] The test in s 103A is to be applied with the proviso that a dismissal or an action by an employer must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.⁴

[104] The Employment Court in the recent decision of *Hayashi v Sky City Management Limited*⁵ referred to the legal principles to be applied when determining whether or not a dismissal was justified.

[105] At paragraphs [22] to [27] of *Hayashi*, the Court referred to the test of justification in s103A of the Act and its application by the Employment Court in a number of notable decisions. At para [27] Judge Perkins stated:

In summary, the principles and requirements applying to SkyCity's decisions in the present case and to be applied in the Court's inquiry pursuant to s103A of the Act are:

- (a) There may be more than one fair and reasonable response applied by a fair and reasonable employer in all the circumstances at the time; if the employer's response is one of these, the dismissal (or disadvantage) must be found to be justified.
- (b) The Authority or the Court should assess, objectively and carefully, the conduct of both employee and employer, and the employer's response to the conduct.
- (c) Relevant circumstances which the Court may look into are those of the employer, the employee, the nature of the employer's enterprise and any other relevant circumstances.

³ s 103A Employment Relations Act 2000 (the Act).

⁴ s 103A(5).

⁵ *Hayashi v Sky City Management Limited* [2018] NZEmpC 14 at para [21] to [27].

- (d) The focus of the Court's inquiry must be on the actions of the employer and how the employer acted. The Court must be satisfied that the employer adopted a logical chain of reasoning which was transparent and reasonable from the facts at the time of the inquiry.
- (e) The inquiry includes considering the factual rationale for the employer's belief; and whether the employer had clear evidence it could safely rely on, whether it conducted reasonable enquiries, and whether the consequences for the employee were reasonable.
- (f) The right to employment is a substantial right requiring protection. Therefore, the starting-point for a dismissal to be valid is that it must be justifiable and fair.

These statements of the law have been revisited in *Grace Team Accounting Limited v Brake*, which concerned a redundancy but nevertheless dealt with interpreting the requirements of s 103A.⁸ The Court of Appeal concluded that⁹

... in the present context under s 103A of the Act [t]hat section requires the Employment Court to decide objectively whether the actions of the employer meet the "fair and reasonable employer's" standard. The Employment Court cannot discharge that responsibility by saying if the employer considers it was reasonable, then it must be so.

[106] The Authority has been required to consider a substantial amount of information relating to Mr Sharma's employment by Progressive, his interactions with staff and suppliers, and the work environment at RaPiD Print. The Authority was also provided with information concerning the working relationships and behaviours of staff in the RaPiD Print team.

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

[108] Ms Moreau's allegations were that she was being covertly bullied by Mr Sharma. The covert bullying related to an overloading of work by Mr Sharma. Mr Schreiner acknowledged during the course of the Authority's investigation meeting that there was no attempt to investigate whether Ms Moreau was in fact overwhelmed with her workload. This surely should have been the subject of his investigation.

[109] Mr Losken, to whom Mr Sharma reported, was copied into emails by Ms Moreau concerning her workload. However, Mr Losken took no steps to consider whether there were workload issues and whether Ms Moreau was overwhelmed.

Policies

[110] It is not clear why Mr Schreiner did not utilise the Appropriate Workplace Behaviour Policy. That policy deals with “workplace bullying”. Ms Moreau had complained about bullying by being overloaded with work.

[111] Under the Workplace Behaviour Policy, Bullying includes “deliberately and unreasonably overloading with work or deliberately and unreasonably withholding work or information which is vital for effective work performance ... setting unreasonable timelines or constantly and unreasonably changing deadlines ...”.

[112] The policy goes on to state that bullying does not include reasonable management action taken in a reasonable manner. This includes:

- Setting reasonable performance goals, standards and deadlines
- Rostering and allocating work where requirements are reasonable
- Transferring a team member for operational reasons
- Allocation of work in accordance with terms and conditions of employment and company practices

... reasonable directions by management

[113] Mr Schreiner chose not to investigate the complaint as a bullying complaint and so did not consider or investigate whether Mr Sharma’s actions as Ms Moreau’s manager fell within the behaviours which did not constitute bullying.

[114] Mr Schreiner decided that Mr Sharma’s overall behaviour was inappropriate, he lacked awareness and did not acknowledge the impact of his behaviours on Ms Moreau, he was in a leadership position and his behaviour was in breach of Progressive’s policies and Code of Conduct. Overall Mr Schreiner considered Mr Sharma’s behaviour to amount to serious misconduct.

Serious Misconduct

[115] A fair and reasonable employer could not have characterised Mr Sharma's conduct as deeply impairing or destructive of the basic confidence or trust essential to the employment relationship in order to justify dismissal.

[116] While Progressive does not have a disciplinary process in the Service Agreement applicable to Mr Sharma's employment, clause 6 indicates the type of conduct which amounts to serious misconduct. It includes "negligently, wilfully, persistently or materially refusing or failing to perform or observe any reasonable direction or instruction by the Board or the MD... or neglecting, refusing or failing to perform or observe any material terms or provisions of the Service Agreement."

[117] Clause 6(d) refers to conduct which amounts to "dishonesty, fraud, wilful misconduct, wilful breach of duty, serious and wilful negligence or incompetence in the performance of duties and responsibilities...".

[118] Mr Sharma was dismissed for inappropriate behaviour, not conduct falling within the type contained in clause 6.

[119] Mr Sharma was an employee of Progressive and its predecessors for over thirty years. Mr Sharma received one warning during the course of his employment, a final written warning in 2017. The professional support which Mr Losken promised Mr Sharma would receive following the warning was not provided. In my view, there is little point in issuing a warning, requiring changes and improvements, offering assistance and professional support, then failing in your obligation to provide that professional support.

[120] Mr Sharma was in the process of developing a plan with Mr Forsyth and receiving professional support from him when a further complaint was made by Ms Moreau. The complaint related to Mr Sharma's conduct as manager of the RaPiD Print Team and Ms Moreau's workload. In my view Progressive failed in its obligation to provide the promised professional support. Progressive then sought to rely on the final warning to dismiss him for serious misconduct.

[121] For all these reasons, I conclude the dismissal to be procedurally unfair and substantially unjustified.

Fourth issue

In the event the Authority finds Mr Sharma was unjustifiably dismissed what remedies, including reinstatement, is Mr Sharma entitled to?

Reinstatement

[122] Mr Sharma seeks reinstatement. Reinstatement is no longer the primary remedy under the Act, but it is an important remedy for an employee.⁶ Section 125 of the Act provides for reinstatement “if it is practicable and reasonable”.

[123] In *Lewis v Howick College Board of Trustees*⁷ the Court of Appeal affirmed the view that “... practicability is capability of being carried out in action, feasibility, or the potential for the re-imposition of the employment relationship to be done or carried out successfully”.

[124] The Employment Court in *Angus v Ports of Auckland Limited*⁸ stated in respect of “reasonableness” that the requirement for reasonableness invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned. This approach has been adopted by the Employment Court in the decision of Judge Ford in *H v A Limited*⁹.

[125] Mr Sharma has been unable to obtain a similar position to that which he had as manager of RaPiD Print. This is because RaPiD is the only internal printing house of its kind in New Zealand. Progressive has replaced Mr Sharma with another long-term employee of Progressive. The appointment commenced on 12 March 2018.

[126] There is a compelling case for Mr Sharma’s reinstatement, given the unique nature of his employment with RaPiD Print and his otherwise long and successful career of more than thirty years with Progressive and its predecessors.

[127] Progressive has replaced Mr Sharma by making an internal appointment to his role. Progressive was aware of the proceedings on foot and that Mr Sharma was strongly seeking reinstatement to his former role. I do not consider the replacement to be an impediment to Mr Sharma returning to his previous position. Further,

⁶ *H v A Limited* [2014] NZEmpC 189 at para. [108].

⁷ [2010] NZCA 320.

⁸ [2011] NZEmpC 160.

⁹ (supra) para [112].

Ms Moreau who made both complaints about Mr Sharma which led to the warning and to his dismissal no longer works at Progressive.

[128] Reinstatement is reasonable and practicable and is an appropriate remedy in the circumstances.

[129] I consider that Progressive should instigate and facilitate a mediation between Mr Losken and Mr Sharma to ensure the coaching plan being worked on with Mr Forsyth is finalised and put in place to ensure future working relationships within RaPiD Print are preserved.

Order for reinstatement

[130] Pursuant to s 123(1)(a) of the Act, I order the reinstatement of Mr Sharma to the position of Manager, RaPiD Print at Progressive based in Auckland or to a position no less advantageous on a permanent basis.

[131] Reinstatement is to restore Mr Sharma to his former terms and conditions of employment at Progressive.

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

Loss of income under s 128 of the Act

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

[134] Mr Sharma was paid three months wages in lieu of notice upon dismissal on 16 February 2018, which means he has been paid almost exactly up the date of this determination. There will be no order for loss of income under s 128 of the Act.

Compensation under s 123 of the Act

[135] Mr Sharma seeks a significant award for compensation for the hurt and humiliation he has suffered as a result of his unjustified dismissal. Mr Sharma spoke

of the incredible shock to him and the distress to his family caused by his dismissal. This was confirmed by his wife.

[136] At the time of his dismissal a family member had just arrived from Australia to stay with Mr Sharma and his family. Mr Sharma says he was too embarrassed and ashamed to tell him what had happened. Mr Sharma is a religious man. As President of the Shiva Temple, being dismissed for serious misconduct was very difficult and embarrassing for him.

[137] Mr Sharma says he lost his appetite and was unable to sleep. As the primary breadwinner, Mr Sharma was also very concerned about his family's financial circumstances.

[138] I am satisfied that an award of \$20,000 is justified in the circumstances and this is to be paid within 21 days of the date of this determination.

Fourth issue

Was Mr Sharma unjustifiably disadvantaged in his employment?

[139] Mr Schreiner did not wish to suspend the disciplinary process until the mediation date on 6 March 2018. Mr Schreiner says there was never an agreement that the disciplinary process be suspended while the parties attended mediation. Mr Sharma disagrees and claims Progressive's actions amounted to an unjustified disadvantage under the Act. I do not agree. Progressive was conducting a disciplinary investigation, it was concerned the date for mediation was over two months away and declined to suspend its investigation in the interim. Mediation is a voluntary process and in my view, Progressive was not obliged in the circumstances to suspend its process to accommodate a mediation.

[140] This in my view did not disadvantage Mr Sharma.

Fifth Issue

In the event the Authority finds Mr Sharma has personal grievances for which he is entitled to remedies, was Mr Sharma's conduct a contributing factor which requires a reduction in remedies awarded under s 124 of the Act?

[141] In considering the appropriate remedies to resolve the grievance, including reinstatement, as sought by Mr Sharma, the Authority must also examine the extent to which Mr Sharma's actions or conduct contributed to the situation that gave rise to his dismissal.

[142] I do not consider Mr Sharma contributed to his dismissal. The disciplinary investigation was flawed. There was no attempt by Mr Schreiner, Mr Losken or anyone else at Progressive to investigate whether or not Ms Moreau's workload was excessive as claimed. Mr Sharma had received a warning, had acknowledged he needed to work on his leadership with the team and was actively engaged in developing a coaching plan with Mr Forsyth. The coaching did not progress. This was Progressive's obligation, and one which it failed to fulfil. Mr Sharma did not receive the professional support promised before Ms Moreau made a further complaint about him. There will be no reduction in remedies.

Costs

[143] Costs are reserved. Mr Sharma has fourteen days from the date of this determination to file a memorandum as to costs. Progressive has fourteen days from receipt of Mr Sharma's memorandum to file memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority