IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 216
5431814

	BETWEEN	RANDALL TODD Applicant
	AND	VIP STEEL PACKAGING (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Helen White, Counsel for the Applicant Daniel Erickson, Counsel for the Respondent
Investigation Meeting:	27 and 28 February 2014
Determination:	5 June 2014

DETERMINATION OF THE AUTHORITY

A. VIP Steel Packaging (NZ) Limited (VIPL) acted unjustifiably in dismissing Randall Todd.

B. Within 28 days of the date of this determination VIPL must settle Mr Todd's personal grievance by paying him the following remedies:

(i) Lost wages for the period from 5 July 2013 to 3 January 2014 (less earnings made by him in that time and less a reduction of 20 per cent to be made for contributory conduct); and

(ii) Compensation for the benefit of health insurance in that period; and

(iii) $5600 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (an amount that has been

reduced by 20 per cent due to contributory conduct).

C. Costs are reserved.

Employment relationship problem

[1] VIP Steel Packaging (NZ) Limited (VIPL) dismissed Randall Todd from his job as stores co-ordinator at its Avondale factory on 4 July 2013.

[2] Another employee – the site's quality safety environmental (QSE) officer, Basant Govind – was dismissed at the same time following an investigation of how the two men had carried out some of their work on 20 June 2013. The Authority jointly investigated the grievance each man raised about their dismissal. Separate determinations about both applications have been issued at the same time.

[3] VIPL Business Manager Andrew Park made the decision to dismiss both men. In a letter dated 17 July 2013 that he wrote setting out his reasons for dismissing Mr Todd, Mr Park said he had lost confidence in Mr Todd's ability to perform his role due to an incident on 20 June 2013 and because Mr Todd's conduct after the incident had not contributed to a safe workplace.

[4] On 20 June Mr Todd worked on a stocktaking exercise with Mr Govind and logistics officer Sharmainne Cassidy. They were counting the stock of steel drums made on site and stored under an open-sided, sloping-roofed canopy. The drums were on pellets stacked closely together and four high. The three employees arranged for Ms Cassidy to count drums at ground level while Mr Govind went up in a 'cage', raised about 3.5 metres high on a forklift driven by Mr Todd, to count along the top of the stacks.

[5] Three sides of the cage were about 900 mm high while the fourth side, the back, had a frame standing a little over two metres tall. The base had two steel 'sleeves' into which the forks were inserted until the back of the cage touched or was close to the hoist or mast of the forklift and then lifted. Two sides of the cage had a length of link chain so it could be shackled to the forklift hoist.

[6] Mr Park believed there were three faults in how Mr Todd carried out his work that day:

(i) he did not connect the two safety chains to the forklift mast before raising the cage with Mr Govind in it; and

(ii) he drove the forklift along the rows of drums with the cage raised resulting in the back of the cage colliding with a roof beam in the canopy and causing the cage (with Mr Govind in it) to move along the forks; and

(iii) he showed a "*lack of judgement*" by continuing to operate the forklift with an unsecured case after the collision.

[7] Mr Park's criticisms of Mr Todd's conduct after the collision with the roof beam were that he gave two different accounts of what happened, those accounts were different from other witnesses, and he had failed to report the incident under VIPL's safety procedures.

[8] Mr Park himself witnessed some of the relevant events on 20 June as he had gone into the canopy area when Mr Govind was up in the cage and Mr Todd was operating the forklift. Mr Park noticed a gap between the back of the cage and the hoist. He directed Mr Todd to lower the forks and to push the cage back against the hoist. He then helped secure the chains. Mr Park did not ask, and was not told, at that time why there was a gap.

[9] Later information suggested the gap resulted from the back frame of the cage colliding with a roof beam and, as a result, the cage moved along the forks. The question of what Mr Todd and Mr Govind knew or saw of that movement at the time of the collision later became a hotly contested issue.

[10] However on 20 June, after seeing the cage was chained, Mr Park left the canopy area to continue with his own duties and Mr Todd raised the cage on the forks with Mr Govind in it so he could continue counting the drums. According to Mr Govind the back of the cage also came into contact with a roof beam on one more occasion shortly before they finished the count.

[11] Mr Park did not find out about the cage colliding with the roof beams until the following Monday morning, 24 June. That morning he asked Mr Govind why there was a gap between the cage and the back of the hoist on 20 June. Mr Govind then

told him of two collisions and Mr Park decided to hold a formal investigation into the conduct of both Mr Govind and Mr Todd.

[12] Ms Cassidy was not subject to a formal investigation about her role in the events of that day but Mr Park did later interview her as a witness. Mr Park had asked her on 21 June about the gap between the hoist and the cage but she did not tell him then that she had heard the cage collide with a roof beam. Neither did she fill out any incident report about events that day.

[13] Similarly, Mr Park did not complete a 'near miss' report (on 20 June or the next day) about having seen the gap between the cage and hoist and intervening on 20 June. On 10 July, six days after he dismissed both Mr Todd and Mr Govind, Mr Park did complete and submit a "*flash report*" setting out his account of events and his subsequent investigation and dismissal of the two men. The flash report was in a form or template provided in the VIPL safety manual that included a note stating: "*This report must be sent out on the day of the incident*".

The Authority's investigation

[14] The Authority's investigation received written and oral evidence from Mr Todd; Mr Govind; Ms Cassidy; Mr Park; VIPL human resources consultant Andrea Smith; VIPL production manager Andrew Waelen, who attended one of Mr Park's three investigative or disciplinary meetings with Mr Govind; VIPL project manager Alan Dorset, who attended those three meetings as Mr Govind's support person; and VIPL production scheduler Kerry Roberts, who was Mr Todd's support person in three investigative or disciplinary meetings with Mr Park.

[15] Each witness, under oath or affirmation, confirmed their written statements and answered questions from the Authority member and the parties' representatives. The representatives also provided closing submissions.

[16] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all the evidence and submissions received but has made findings of fact and law and expressed conclusions on the issues for resolution.

[17] In light of the evidence and submissions, those issues were:

(i) Had VIPL fully and fairly investigated its concerns about Mr Todd's conduct?

(ii) Following that investigation, was its decision to dismiss him one a fair and reasonable employer could have made (including whether VIPL's actions towards Mr Todd were justifiably different from its treatment of Ms Cassidy and Mr Park in respect of the incident on 20 June 2013)?

(iii) If the answer to (i) and/or (ii) was 'no', what remedies were then due to Mr Todd, considering:

  (a) lost wages; and

  (b) compensation for the loss of the benefit of health insurance; and

  (c) compensation for hurt and humiliation?

(iv) Should any remedies awarded to Mr Todd be reduced due to blameworthy conduct by him that contributed to the situation giving rise to his grievance?

(v) Should either party contribute to other party's costs of representation?

Was VIPL's investigation full and fair?

[18] A dismissal was justified if that was what a fair and reasonable employer could have done in all the circumstances at the time. In applying that test the Authority must have considered whether VIPL sufficiently investigated its allegations about Mr Todd's conduct, whether he was given a reasonable opportunity to respond to all VIPL's concerns, and whether Mr Park (on behalf of VIPL) genuinely considered Mr Todd's explanation before dismissing him. The Authority must have regard to the resources of VIPL and have only taken account of any defects in the process followed by VIPL that were more than minor and that then resulted in Mr Todd being treated unfairly.[1]

[19] VIPL submitted that, apart from some minor procedural flaws, its investigation of Mr Todd's conduct met the statutory standard. Mr Todd was given notice of the meetings held with him, advised that he could bring a support person (although VIPL accepted, as a matter of best practice, this could also have referred to a representative as well), checked his account with other witnesses, advised him of preliminary findings and gave him the opportunity to comment on those and other matters that he wished to have taken into consideration, and provided an opportunity for further feedback on Mr Park's conclusions before Mr Park decided to dismiss him.

[1] Section 103A of the Act.

[20] While that fairly summarised the superficial procedural steps taken, I concluded the investigation conducted by Mr Park, with Ms Smith's assistance, was not sufficiently full and fair for the following reasons:

(i) Mr Park's role as witness and fact-finder tainted the process he followed and the conclusions he drew; and

(ii) Mr Park drew unfair inferences from a demonstration of events that was not clearly established as the same or sufficiently similar to the actual event; and

(iii) Mr Park believed Mr Todd had accepted or conceded points that were not clearly and fairly put to him; and

(iv) Mr Park approached the investigation with a pre-conceived notion of the outcome being dismissal.

(i) Witness and fact-finder

[21] A manager making a disciplinary decision may rely on her or his own observations of the conduct in question but must be able to show that involvement, as both witness and decision-maker, was such that an objective observer would conclude she or he had brought an unbiased mind to considering and deciding the outcome.[2]

[22] VIPL submitted Mr Park was involved as witness to only part of the events in question – having seen the gap between the cage and the hoist – and was unaware of a collision between the cage and a roof beam. That is correct but his initial impression from what he saw of events that day had an effect on how he viewed explanations later given by Mr Todd.

[23] The most obvious example was Mr Park's belief that the gap he saw between the cage and the hoist when he came into the canopy area on 20 June was between 500 and 600 mm wide. This differed from Mr Todd's account that the gap was 300 mm at the most, and more like 200 mm. The significance of the difference was, firstly, that it affected the likelihood that Mr Govind, Mr Todd and Ms Cassidy did or should have noticed the gap immediately after the collision, and, secondly, it affected the level of potential danger (of the cage falling off the forks). While Mr Park said he accepted Mr Todd's narrower assessment, that difference of opinion had immediately cast a shadow of doubt on Mr Park's mind – as I understood his evidence – that Mr

[2] *Walker v Firth Industries* [2014] NZEmpC 60 at [45] (EC) and *Allen v C3* [2012] NZEmpC 124 at [25]-27].

Todd was either misleading him or was incapable of understanding the potential danger of the situation Mr Park had himself seen that day. It was a matter of impression but inevitably coloured Mr Todd's credibility in Mr Park's eyes.

[24] There were practical alternatives to Mr Park carrying out VIPL's investigation. The company was part of a wider commercial group employing a number of managers and human resources advisors. It had the resources to have another unit manager or one of those advisors conduct the investigation.[3] If it had done so, more may have been made by such an investigator of Mr Park's own role and activities on the day and subsequently (which provide context to assessing both the safety risk and appropriate sanctions). This could have included the following questions:

(a) If, as Mr Park asserted, Mr Govind and Mr Todd should have known to complete an incident report about what happened that day, why did Mr Park himself not fill in such a report about what he later described (in his 10 July flash report) as the "*unsafe act*" of working with a cage not secured by chains to the hoist?

(b) Similarly, why, when he saw Mr Todd knock a drum off a pallet when using the forklift to load a container the next day, did Mr Park not fill out an incident form for what he himself called a 'near miss' event (yet later criticised Mr Todd for not doing so)?

(c) If Mr Park had carried out a proper risk assessment himself before going up in the cage with an auditor – as he did later on 20 June, with Mr Todd as the forklift driver raising the cage – why did he use a cage that was later found to be unwarranted and too rusty for safe use (and why had he not noticed either point when he previously used the cage to look at work being done by a contractor clearing leaking guttering on the canopy roof)?

(d) Why did Mr Park from the outset decide to investigate only the actions of Mr Todd and Mr Govind, and not also those of Ms Cassidy (as she was in the work area and involved in the same stocktaking work and not accepting, as I have not, that Mr Park left her out because Ms Cassidy was off work on the day he decided to start the investigation)?

[25] That each such question could have been asked demonstrated a reasonable level of doubt that, objectively assessed, Mr Park brought an unbiased mind to his investigation and disciplinary decisions. The point about filling in incident reports –

[3] Section 103A(3)(a) of the Act.

expressly required by VIPL's safety manual – was not petty or minor. Mr Park considered one step requiring the manager (himself) to be notified could be dispensed with in relation to the cage gap (20 June) and the dropped drum (21 June) because he saw those events. However that did not dispense with the next step of VIPL's incident reporting procedure that required all incidents (defined as including 'near misses') to be reported – on a report form – and "*completed by the supervisor or manager and submitted to the health and safety co-ordinator within 24 hours of the incident*". The step was fundamental to the integrity of a safety system so that such information about actual or potential situations and practices was then available to senior managers, safety advisors and human resources managers for audits and follow-up rather than being held (and potentially overlooked or tolerated) on particular sites. That sense of perspective was lost by Mr Park taking the role of witness and decision-maker. As a judge in his own cause, he then did not hold himself to the same standard about lodging incident reports that he found Mr Todd and Mr Govind so unsatisfactorily fell below.

(ii) Unfair inferences from a demonstration

[26] During an investigatory interview on 25 June Mr Park had Mr Todd demonstrate what Mr Park understood were two versions of events as they occurred on 20 June – one version given in an earlier interview with Mr Govind and one version given by Mr Todd.

[27] They went into the canopy area. Mr Todd used the forklift with the cage in the manner that he said the event occurred on 20 June – with the forklift stationary while the cage was raised and scraped the roof beam. On that demonstration the back of the cage connected with the beam with enough force to bend the frame (which had not happened on 20 June) but the cage did not move forward along the forks. From that Mr Park concluded vertical force alone (caused by raising the cage vertically but not while the forklift was moving horizontally along the ground) could not have created the gap he saw. On that basis he considered Mr Todd's explanation was incorrect.

[28] He then had Mr Todd raise the cage high enough to connect with a roof beam and move the forklift backwards at idle speed until the cage collided with the beam. He said that was the account of events given by Mr Govind and resulted in the cage

sliding easily along the forks. However Mr Todd, in his evidence to the Authority, disputed the accuracy of that part of 'demonstration' on 25 June, saying that he was directed to raise the cage to a higher height than it was positioned on 20 June. As a result he said that a larger portion of the back frame connected with the sloping roof beam (catching more of an edge than it did on that earlier day). In turn that led to a greater (and more noticeable) movement of the cage along the forks than had occurred on 20 June.

[29] Both demonstrations resulted in different outcomes than had occurred on 20 June – a bent frame and a greater movement – but Mr Park relied on them to make negative conclusions about Mr Todd's explanation. Significantly Mr Park had neither Mr Govind nor Ms Cassidy present at the demonstration to confirm or contradict whether the two scenarios were the same as, or different to, what they saw or heard on 20 June.

(iii) Points not clearly put or accepted

[30] The discussion with Mr Todd during and about the demonstrations also caused another significant problem in the fairness and reliability of Mr Park's investigation and conclusions. His evidence during the Authority investigation led me to conclude Mr Park confused what Mr Todd said during the demonstration on 25 June, about what he could see there, as being admissions about what he saw or was aware of on 20 June. This related to two points – firstly the gap between the cage and hoist that Mr Park saw when he entered the canopy area and secondly whether there was a sufficient length of forks under the cage to operate safely.

[31] The notes of interviews with Mr Todd – taken by Ms Smith and provided in evidence for the Authority's investigation – did not, when fairly and properly read, disclose an admission that he could see, and did see, the gap on 20 June immediately after the collision with the roof beam and before Mr Park came into the work area. There was an ambiguous reference (in what Ms Smith admitted were her incomplete and non-verbatim notes) stating that "*it was obvious that the cage had moved*" but it was not clear whether that was a note of something Mr Todd said or was something Mr Park said. Another comment she noted, which appeared to record a comment made by Mr Todd, was "*I did not realise the cage had moved*".

[32] During the demonstration on 25 June Mr Todd did make comments about being able to see the cage move however that was, I considered more likely than not, about what he could see in that demonstration, not on 20 June. Similarly, when he was recorded as saying "*he could see that the cage was still fully supported by the forks*" he was referring to what he could see in the demonstration.

[33] To the extent that there was any doubt about the notes and reliance of them, I have decided that in Mr Todd's favour. Ms Smith said she had not checked or confirmed her notes with Mr Todd and that, if employees wanted notes of what was said in meetings, they should take their own. That approach has its own obvious risk if an employer seeks to rely on the contents of such notes later on (including in an Authority investigation). Later confusion and contention is avoided where the interviewer or note taker confirms with the employee at some stage before the end of the disciplinary investigation that his or her answers to questions are accurately recorded, at least on the key words (and without imposing an onerous requirement for verbatim 'minutes' in every case).

(iv) Pre-determination

[34] Mr Park's witness statement referred to an earlier safety incident in May 2013 involving a different employee seen standing underneath a six tonne load of steel body sheet being moved overhead by a crane. A disciplinary investigation of that incident resulted in the employee being issued with a final written warning.

[35] Mr Park talked about the outcome of that disciplinary process at a regular staff meeting with his senior leadership team at the site. Mr Govind, Mr Todd, Ms Cassidy, Mr Waelen and Ms Roberts attended the meeting. Mr Park recalled that he "*made it clear to staff that any future serious breaches of health and safety would result in dismissal*". He said he told them that they "*must demonstrate safety leadership going forward*".

[36] Considered in the totality of the evidence, both from him and others, Mr Park's comment revealed the approach he subsequently took in his disciplinary investigation of Mr Todd was unfairly focussed on dismissal as an outcome.

Was the decision to dismiss reasonable?

[37] VIPL submitted that, summarising the reasons for Mr Todd's dismissal given in the 17 July letter to him, its decision was reasonable because he:

(a) admitted failing to chain the cage to the forklift hoist.

(b) drove the forklift carelessly by driving along the row with the cage raised and resulting in a collision.

(c) showed lack of judgement by continuing to operate the forklift with an unsecured cage.

(d) failed to report the incident.

[38] The facts concerning two of these reasons – (a) and (d) – were admitted by Mr Todd. He accepted he had not secured the cage chains and had no explanation for not doing so. There were no other known instances of him having made such an oversight before. He also accepted, in his first interview with Mr Park, that he had not filled out a 'near miss' incident report but said that he had never been in a position to need to fill out a form before and did not know how to fill out a hazard form. That excuse would have been unacceptable had VIPL shown Mr Todd was trained in the requirements of its safety procedure for incident reporting and had Mr Govind, Mr Park and Ms Cassidy not also have failed to put in an incident report.

[39] However I have concluded that a reasonable employer could not have fairly reached the conclusions that Mr Park did as expressed in reasons (b) and (c).

[40] Mr Park's 17 July letter said the version of events given by "*other witnesses*" (and noting the plural) corroborated each other and contradicted Mr Todd's version of events about the impact between the cage and the beam.

[41] There were two other witnesses – Ms Cassidy and Mr Govind.

[42] Notes from an interview Mr Park conducted with Ms Cassidy on 27 June record her saying that she heard but did not see the collision. She said she looked up afterwards and "*assumed* (my emphasis) *that the beam must have hit the back of the frame while the fork truck was reversing*". She had previously seen the forklift reverse down the row while she was counting pallets. She also told Mr Park that, at the time of the collision, she was "*down the row and her view was obscured by the hoist mast, [so] she was not in a position to tell that the cage had moved off the mast*".

Neither could she recall a second collision although she believed there "*might have been*" one.

[43] Ms Cassidy's observations – if correctly recorded – did not corroborate Mr Govind's account but were treated by Mr Park as if they did.

[44] Similarly Mr Park's conclusion that Mr Todd showed a lack of judgement by continuing to operate the forklift with an unsecured cage was not reasonably reached on the information available to him. This was the most important point as I considered Mr Park had not established to the necessary balance of probabilities that Mr Todd did know and had then, with that knowledge, deliberately continued to work as he did. Instead Mr Park's conclusion was based on an assumption. It was at odds with the information available to Mr Park from all three witnesses – Mr Govind, Ms Cassidy and Mr Todd – about what they saw from their respective perspectives immediately following the impact. All three agreed that they were not aware of the resulting gap between the back of the cage and the hoist until Mr Park had come into the area and directed the forks to be lowered. At that point each of them recalled seeing the gap. Despite that level of actual corroboration between three witnesses, Mr Park concluded (as he stated in his 17 July letter) that Mr Todd had "*stopped the forklift, leaned out the driver's seat to check the cage, [seen] that the cage had been dislodged 300 mm along the forks*" and had asked Mr Govind if he was OK but then "*made the judgement call that there was still plenty of forks under the cage so it was safe to continue working*". It was not a conclusion supported by what Mr Todd had told him or events as recalled by Ms Cassidy or Mr Govind. Mr Govind had said Mr Todd asked him if he was OK after the cage frame hit the roof beam but was not asked and did not confirm that Mr Todd had looked out or was in a position to be able to see the cage had moved. Mr Govind also clearly stated he did not know at that point that the cage had moved. At best, Mr Park's conclusion Mr Todd knew then that the cage had moved came from Mr Park's mistaken understanding of what Mr Todd had said during the 25 June demonstration.

Disparity

[45] VIPL submitted Ms Cassidy was effectively a bystander to the relevant events, as she was not in the cage or in control of the forklift. In not filing an incident report, it said she had done only one thing wrong and not, as the two men had, a number of

things wrong. On that basis it submitted any apparent disparity in Mr Park's treatment of her, in comparison to the investigation and dismissal of Mr Todd and Mr Govind, was superficial.

[46] The difference however is that, from the outset, Mr Park took no demonstrable steps to even consider Ms Cassidy as a potential subject of a disciplinary investigation. He excluded her without inquiry. But, rather than amounting to an unjustified disparity, that reflected a level of pre-conception or pre-determination he brought to his inquiries regarding the two men. Its other relevance was that he demonstrated that he considered the appropriate level of sanction for matters such as not filing an incident report after witnessing a 'near miss' incident – which was the one thing Ms Cassidy, in VIPL's submission, did wrong – was informal counselling. He 'had a word' with her, while for Mr Todd such an oversight was another factor, in Mr Park's view, that warranted Mr Todd's dismissal.

[47] VIPL also submitted there was no disparity of treatment between Mr Park and Mr Todd. Mr Park's circumstances, it said, were markedly different as he was not involved in the stocktake work using the cage and the forklift, except to take immediate action to make the situation safe when he saw the gap on 20 June. And while Mr Park had later used the cage himself that day, going up in it with the auditor, he had checked the safety chains first. Also, if Mr Park was at fault for not doing an incident report about what he saw on 20 June, VIPL submitted that was one failing compared to the many failings of Mr Todd and Mr Govind on and after that day.

[48] I doubt a reasonable employer could fairly frame Mr Park's conduct so narrowly. There were a number of aspects of his own role and activities on 20 June and subsequently that such an employer would want to objectively assess in relation to both the seriousness of Mr Todd's activities and the appropriate levels of sanction. They could have included the questions suggested earlier at paragraph [27] of this determination.

[49] Considering in more detail just the reporting point in relation to disparity, Mr Park was a manager who walked through a work area and noticed the gap between the cage and hoist. It was a situation that he described in his 10 July 'flash report' as "*an unsafe act*" and "*the unsafe situation*" that he saw. It was serious enough for him to

call an immediate halt to the activity. But after helping link up the chains, he did not appear to regard it as a matter that required an incident report.

[50] However his 10 July 'flash report' said that it "*became obvious there was a failure of the people involved to understand and apply the company health and safety policy and procedures, namely* (my emphasis) *to report all incidents and/or injuries to their Supervisor or Manager*". There are two problems with Mr Park's belated observation. Firstly, it misstated the policy that Mr Park professed to be familiar with and by which he was himself bound. VIPL's policy said incidents were to be reported on a particular form "*by the supervisor or manager and submitted to the Health and Safety Co-ordinator within 24 hours of the incident*." Mr Park was the manager in that situation of seeing what he had described as an unsafe act and he did not provide the required report to the co-ordinator (who in this case was Mr Govind) in the required time frame. Secondly, an omission to provide an incident report was (in Mr Park's assessment) so important a breach of company policy that he gave it as a reason for dismissing Mr Todd. No disciplinary sanction applied to Mr Park for the same omission. In short, Mr Park held Mr Todd to a standard that Mr Park did not observe himself. It was a disparity, it was not adequately explained, and, if the dismissal were solely for the reason that Mr Todd had not provided a report about events that day, it would not have been justified.[4]

An unjustified decision

[51] For the reasons given above, relating to how Mr Park carried out his investigation of allegations about Mr Todd's conduct and the decisions he made on the basis of that investigation, I concluded VIPL had not met the burden of showing a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.[5] The defects in what Mr Park did and how he did it were more than minor and resulted in Mr Todd being treated unfairly.

[52] Of the four reasons VIPL gave for Mr Todd's dismissal, only his admitted oversight by not connecting the safety chain was established, on the information available at the time and if fairly assessed by Mr Park, as a matter that a reasonable employer could have fairly concluded was misconduct. It was a single incident, with

[4] *Chief Executive of the Dept of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at [45].
[5] *W&H Newspapers Limited v Oram* [2000] 2 ERNZ 448 (CA) at [32].

no known prior occurrence or repetition, was inadvertent and would not generally amount to serious misconduct.[6] Mr Todd, who was 65 years old and had 11 years' service with VIPL at the time of the dismissal, had an otherwise unblemished disciplinary record.

[53] In all the circumstances at the time, his dismissal on the basis given by Mr Park was not an action that a fair and reasonable employer could have taken. Mr Todd had a personal grievance for which he was entitled to have remedies considered.

Remedies

Lost wages

[54] Mr Todd's evidence established that he made reasonable endeavours to mitigate his loss of wages as a result of his dismissal. He was fortunate to be able to use other experience he had to secure a cricket coaching role that generated income of $3000 a month from September onwards. His only other income was from superannuation. His 'NZ Super' rate increased as a result of losing his weekly earnings from VIPL but, having discussed that factor with counsel at the investigation meeting and reflected on it, I concluded that change in rate had no bearing on the level or amount of the award for lost wages that VIPL must pay. Rather, if the award of lost wages then had an effect on what Mr Todd was entitled to have received as his NZ Super rate during the period covered, he would have to address that matter with Work and Income and with IRD in due course.

[55] Mr Todd had hoped to work for VIPL for a further two years before retiring however I considered the appropriate period for an award of lost wages, broadly assessed and allowing for the contingencies of life, was six months. Under s123(1)(b) and s128(3) of the Act VIPL must pay Mr Todd what he would have, but for his dismissal, earned or been paid in the period for the weeks from 5 July 2013 to 3 January 2014. From that amount VIPL may deduct $12,000 Mr Todd earned from his coaching work.

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[6] *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EC) at 319.

Compensation for loss of a benefit

[56] Under s123(1)(c)(ii) of the Act VIPL must also compensate Mr Todd for the lost value of the Southern Cross health insurance provided as a term of his employment. The evidence was unclear as to whether that was the payment of the amount of the premium for an individual policy paid by the employee or whether that was paid directly by the employer as a part of a group policy. If a payment for the value of an individual premium was paid, VIPL should pay the equivalent dollar amount for the six month period. If the company paid under a group policy, it should reimburse Mr Todd for the value of any actual medical and related health costs incurred in that period that would otherwise have been covered by the relevant company policy.

Compensation for humiliation, loss of dignity and injury to feelings

[57] Mr Todd's evidence of the effect of his dismissal on him was relatively understated and stoical, in the manner typical of a man of his generation and background, which included service in the armed forces. However I considered his description of feeling "*bitterly disappointed*" and finding it "*pretty hard*" to tell his two sons and a few friends about his dismissal demonstrated that he had found the experience humiliating and had suffered a loss of dignity and injury to his feelings. Taking the particular circumstances of the case and the general range of awards I concluded $7000 was the appropriate award of compensation under s123(1)(c)(i) of the Act.

Reduction for contribution

[58] Mr Todd accepted throughout, including at the Authority's investigation meeting, that he made an error by not chaining the cage and deserved some disciplinary sanction for that oversight. He conceded, in answer to a question from VIPL counsel, that if he had received a final written warning, he would not have objected.

[59] Taking that into account and the fact that he – along with Mr Govind, Ms Cassidy and Mr Park – did not meet the requirements of VIPL's safety procedures in

how they dealt with the 20 June incident, he contributed towards the situation that gave rise to his grievance. Under s124 of the Act those actions required a reduction of the remedies awarded which I have set at 20 per cent – but in relation to the lost wages and distress compensation elements only (not lost benefits).

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs themselves. If they are not able to do so and an Authority determination of costs is necessary, Mr Todd has 28 days from the date of this determination to lodge and serve a memorandum on costs. VIPL would then have 14 days to lodge a reply memorandum. The parties could expect the Authority to determine costs on its usual daily tariff basis, subject to what their memoranda might say about factors in the particular case requiring an upward or downward adjustment of that tariff on the basis of the principles stated in *PBO v Da Cruz*.[7]

Robin Arthur
Member of the Employment Relations Authority

[7] [2005] 1 ERNZ 808 (EC).