

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 213
5349928

BETWEEN DAVID WILLIAMS
 Applicant

A N D TALLEYS GROUP LTD
 Respondent

Member of Authority: Christine Hickey

Representatives: David Williams, the applicant in person
 Raewyn Gibson, advocate for the respondent

Investigation meeting 7 August 2012 in Ashburton

Submissions Received Orally from Mr Williams and in writing from Ms Gibson
 on the day

Date of Determination: 28 September 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Williams was justifiably dismissed for serious misconduct.**
- B. Mr Williams was not unjustifiably disadvantaged by being treated in a disparate manner to other employees disciplined for similar conduct.**
- C. Talleys did not commit any breach of its duty of good faith to Mr Williams.**

Employment relationship problem

[1] Talleys Group Ltd (Talleys) dismissed Mr Williams on 28 March 2011 for breaching Talleys' health and safety policy because he operated a forklift with another employee standing on a pallet on the tines. Talleys considered that in doing so he had disobeyed an instruction from his manager.

[2] Mr Williams alleges that Talleys breached its obligations of good faith and unjustifiably disadvantaged him in his employment. Mr Williams also says that the dismissal was substantively unjustified and procedurally unfair.

[3] Mr Williams wants the Authority to declare that his dismissal was unjustified and a breach of good faith. He claims that he should be reinstated to his job. He seeks lost wages and compensation for humiliation, loss of dignity and injury to his feelings.

[4] At the investigation meeting I heard evidence from Mr Williams and his witness Wayne Patterson and from Leslie Marsh, Kevin Smith, Tony Gimblett and Nigel Jackson for Talleys.

Issues

[5] The issues for investigation and determination by the Authority are:

- (a) Whether a fair and reasonable employer **would** have dismissed Mr Williams for serious misconduct in all the circumstances at the time. This includes an inquiry into whether there was serious misconduct;
- (b) Whether Talleys dealt with Mr Williams in a disparate manner to other employees disciplined for similar conduct;
- (c) Whether the investigation and decision-making processes were fair;
- (d) Whether Talleys breached its obligations of good faith;
- (e) If Mr Williams is found to have a personal grievance, what remedies should be awarded considering:
 - (i) whether reinstatement to his former position is practicable; and
 - (ii) whether he should be awarded lost wages; and
 - (iii) compensation for hurt and humiliation; and
 - (iv) whether any remedies awarded to Mr Williams should be reduced for blameworthy conduct by him contributing to the situation giving rise to his grievance; and

- (f) Whether costs should be awarded to either party, depending on the outcome.

Background facts

[6] David Williams worked as a storeman/forklift driver for Talleys Ashburton in the dry store. By March 2011 Mr Williams had worked at Talleys for approximately 2.5 years. He worked with David Roach, who was his immediate supervisor. Mr Williams was a trained and certified forklift operator.

[7] Mr Williams was employed under an individual employment agreement which included the following clauses relevant to this case:

5.5.1 [Each employee] shall at all times comply with the reasonable orders and instructions given to the employee by the employer including any manager...

5.7 Without limiting actions which would constitute serious misconduct and may result in summary dismissal, the following examples of serious misconduct are given:

5.7.7 Irresponsible or dangerous use of equipment....

5.7.11 Breach of clause 6.6.1 of this contract.

6.6.1 The employee agrees that where required, s/he will observe all safety precautions and procedures ...

[8] The Talleys Company House Rules/Standards of Behaviour are also referred to in the employment agreement. The following extracts are relevant:

The following points constitute serious offences – the penalty for which may be dismissal:

- *Refusing to carry out the lawful instruction of a manager or supervisor,...*

The following constitute less serious offences but will not be tolerated:

- *Failure to follow instructions.*
- *Riding as a passenger on a trolley, forklift or truck, or an operator allowing the same. ...*

Violation of any of the company house rules may lead to disciplinary action ranging from reprimand to immediate dismissal.

[9] On 2 August 2010 Mr Williams and Mr Gimblett attended re-certification training provided by Kevin Smith, the Talleys' forklift mechanic and OSH approved

forklift trainer. Mr Williams passed the course and was issued with a forklift operator's certificate.

[10] The course was conducted in line with the Department of Labour 'Approved Code of Practice for Training Operators and Instructors of Powered Industrial Lift Trucks (Forklifts)' and the 'Safety Code for Forklift Truck Operators'. The Codes include the following:

- Paragraph 2.6 of the Code Of Practice – *Forklift operators have the responsibility to comply with the relevant code of practice and be responsible for their own safety, the safety of others and the safety of property.*
- Paragraph 5.10 of the Safety Code – *Passengers must not be permitted to ride on the forks or load or any other part of a forklift truck.*
- Paragraph 5.11 of the Safety Code – *The use of a forklift as a hoist for personnel must not be permitted unless a work platform complying with NZ Standard 5426 has been fitted.*

[11] In approximately November 2010 Mr Gimblett was appointed to the position of Value Added Department Manager. Part of his role was to manage the dry store. In December 2010 he organised a stock-take of the dry store. It was necessary for a person to be raised to different heights to count the products stored on different racks. Mr Gimblett instructed Mr Williams and Mr Roach that they must not lift a person up on a pallet on the forklift but must instead use a safety cage.

[12] Mr Gimblett, Mr Roach and Mr Williams carried out the stock-take using a safety cage attached to a forklift. They had to use a different forklift to count the highest stock. Mr Williams drove the forklift and Mr Roach stood inside the safety cage. Mr Gimblett stood on the ground and wrote down the amount of stock as it was counted by Mr Roach.

[13] On 25 March 2011 Mr Gimblett wrote his account of what happened on the previous day:

On the 24/3/11 at about 3.10 p.m. I went to the Drystore ...When we got to the Rack, one of the Dave's (sic) (reasonably sure it was Dave Roach) said to just lift him up to the Rack on the forklift to the other Dave, so that he could get them down for me. I told him in no

uncertain terms that this was not to be done and to get the product down with the Forklift so that I could get the cartons that I required. On the 24/2/11 at approx. 3.30 p.m. (about 20 minutes later) I went to the Drystore ... I found Dave Williams Driving the Forklift (sic) with Dave Roach on a pallet of poly hoisted aloft to the height of Rack E which would be approx. 8 metres high at the level of the Pallet.

[14] Mr Williams' evidence, contained in his Statement of Problem which he verified as true, differs to Mr Gimblett's in relation to the timing of what happened on 24 March 2011 and on the height the forklift was lifted to. Mr Williams' evidence is that Mr Gimblett first saw him and Mr Roach when:

Dave Roach was standing on a pallet on the forks of the forklift I was driving placing the rolls of polythene on Rack B, less than 2 m above floor-level. ... As he walked away from us, Tony Gimblett said we were not to lift a person standing on a pallet to do that task.

That afternoon Tony Gimblett asked for 2 packets of cartons. The cardboard Tony Gimblett wanted was on the 3rd row up. Because of the conversation between us that morning, Dave Roach joked to Tony Gimblett and told me to lift him up on a pallet to get the cardboard. Tony Gimblett said not to do that. I would not have done that because the cardboard was too high up for that to be a safe method. I lifted the whole pallet down.

[15] On the afternoon of 24 March 2011 Mr Gimblett went to find Leslie Marsh, the Operations Manager, and reported what he had seen because he considered it an unsafe practice.

The investigation and disciplinary process

[16] Mr Marsh told Mr Gimblett to report the incident to Nigel Jackson, the Compliance Manager (Food and Health Safety). Mr Gimblett did so. It was at Mr Marsh's and Mr Jackson's request that Mr Gimblett wrote his report about the 24 March 2011 events.

[17] On 25 March 2011 Mr Jackson wrote to Mr Williams inviting him to a disciplinary meeting on 28 March 2011 in Mr Marsh's office. The letter stated that the reason for the meeting was Mr Williams' dangerous use of a forklift. He was advised that:

...this is a serious matter and may result in disciplinary action being taken against you, and may ultimately lead to your dismissal.

You have the right to bring a support person to this meeting.

[18] I note that a separate investigation and disciplinary process was held for Mr Roach, who also was dismissed for his part in the 24 March events.

[19] At 7.00 a.m. on 28 March 2011 Mr Williams attended a meeting with Mr Marsh and Mr Jackson. Mr Williams did not bring a support person. Mr Marsh told Mr Williams that he was entitled to have a support person and suggested that as it was a serious issue Mr Williams may like to have one. Mr Marsh offered to adjourn the meeting to allow Mr Williams to get a support person. Mr Williams declined to put off the meeting to get a support person.

[20] Mr Marsh took handwritten minutes during the disciplinary meeting, which I have seen. I accept that Mr Jackson and Mr Marsh both spoke at the meeting. However, the notes do not indicate who spoke apart from when Mr Williams is quoted.

[21] Mr Marsh and Mr Jackson told Mr Williams that Mr Gimblett had reported that Mr Williams was driving the forklift with Mr Roach on a pallet lifted *at the height of row E*.

[22] During the meeting on 28 March 2011 Mr Williams admitted that he had lifted Mr Roach up on a pallet on the forklift on 24 March 2011. He said that he had used the forklift that way for the 2.5 years he had been employed by Talleys. The minutes of that meeting record that Mr Williams said that there was not a forklift that reached high enough and that he was not aware that there was a safety cage available. He also said:

We always do it like this; it takes too much time to get another forklift or the mancage and harness. ... We have always done this and no-one has told us any different.

[23] Mr Williams did not dispute that the above part of the minutes correctly records what he said. However, he said that some things were missing from the minutes. For example, he said he told Mr Marsh and Mr Jackson that he had previously asked for safety gear but that Talleys did not supply it so he kept using a pallet.

[24] Mr Williams was asked to come back at 1 p.m. after Mr Marsh and Mr Jackson had *review[ed] the information before making our decision*.

[25] Mr Williams attended the disciplinary meeting at 1 p.m. There are no minutes of that meeting. However, I accept Mr Marsh's evidence that Mr Williams was asked if he had anything further for Mr Marsh and Mr Jackson to take into account as *mitigation for his conduct*. Mr Williams did not respond and was informed that Talleys had decided to dismiss him. Mr Marsh gave Mr Williams a letter, which said that Talleys had found:

- *Gross misconduct with regards to the health and safety policy by driving a forklift and allowing a man to be standing on a pallet at a height of approximately 15 metres without a safety harness or safety cage*
- *Disobeying a direct instruction from your line manager.*

*The business cannot and will not tolerate this type of behaviour and therefore I have no alternative but to **terminate your employment** with immediate effect.*

[26] Mr Marsh said that he had written the letter before the 1 p.m. meeting but had been prepared not to issue it if, for example, Mr Williams had said that he'd been instructed to lift Mr Roach up on the forklift by his supervisor. If Mr Williams had said that, or something similar, then Mr Marsh would have *investigated further*.

Mr Patterson's evidence

[27] Mr Williams' witness at the investigation meeting was Wayne Patterson, a former employee of Talleys who used to be Mr Williams' supervisor in the dry store. Mr Patterson said that he approached Richard Cleal, the quality manager at the time and asked for a safety cage and harnesses for the dry store but they were not purchased.

[28] Mr Patterson said that Kevin Smith had told him and Mr Williams a number of times they should not lift someone on a pallet. However, he and Mr Williams had always lifted someone on a pallet as it was more convenient because the cage was not always in the dry store area.

[29] Mr Patterson also said that when Peter Leonard was their manager in the dry store Mr Smith had priced a *little scissor lift* for them to use and gave Mr Leonard the price. It was never purchased. Mr Leonard had also told Mr Williams and Mr Patterson off for lifting someone on a pallet. However, Mr Patterson said that Mr Leonard gave them the impression it was OK *so long as he didn't see us*.

Mr Patterson said that sometimes Mr Leonard used to get them to lift him up on a forklift.

Mr Smith's evidence

[30] Kevin Smith is the Talleys' forklift mechanic and is an OSH approved forklift trainer. He conducted the August 2010 forklift training which Mr Williams attended. Mr Smith said that he was *confident* that Mr Williams *was very well aware that no-one is to be lifted via a forklift unless they are in a safety cage.*

[31] Mr Smith's evidence was that he had seen Mr Williams:

... lifting another employee in a pallet with the forklift. When I observed this I told him that he should not do this. I did not report this to management at the time as I took it upon myself to caution David Williams, and direct him to the correct procedure for the tasks as he had been instructed during their forklift course.

[32] Mr Smith agreed that he had collected some information for Wayne Patterson about a Crow Wave, which is a single-man stock picker. He understood that Mr Patterson was going to ask his manager to buy one. Mr Smith said he was:

... trying to alleviate the issue of Wayne Patterson and David Williams going up on a pallet if they couldn't find a cage.

Mr Gimblett's evidence

[33] Mr Gimblett told me that after Mr Williams was dismissed he went back to look at the area in which he witnessed the 24 March 2011 incident. He was sure that Mr Roach had been raised to the level of Rack E which was considerably higher than Mr Williams says it was.

Mr Marsh's evidence

[34] Mr Marsh is the Operations Manager. He said that he knows the dry store layout and the requirements of the dry store.

[35] His evidence, which was not challenged, is that the forklift in the dry store can reach all of the shelves except the top shelf. The forklift kept in the coldstore can reach the top shelf.

[36] He disputed Mr Williams' view that he needed additional equipment, such as a picker and a harness, to place or pick product. He also disputed that a safety cage was needed for anything other than stock takes, which were undertaken twice a year only.

[37] He did not consider that any pallets should have had extra stock placed on them while they were up on the shelves or racks. Doing that led to the situation that Mr Williams and Mr Roach were in whereby they could not remove the pallets or stock from those shelves using the forklift alone without a person being lifted up.

[38] He said that at the 28 March 2011 meeting he specifically put it to Mr Williams that he had raised the forklift with Mr Roach on it up to Row E and Mr Williams did not dispute the height at that meeting.

[39] He accepted that he made a mistake in the dismissal letter when he wrote that Mr Roach had been lifted up 15 metres.

[40] He said that when Mr Williams was employed Talleys had 1 cage on site and 2 safety harnesses. After Mr Roach and Mr Williams were dismissed Talleys bought 4 additional harnesses and 2 more man cages.

[41] Mr Marsh said that no-one in the management team knew before 24 March 2011 that Mr Williams routinely lifted Mr Roach up on the forklift tines.

Mr Jackson's evidence

[42] Mr Jackson said that he was appointed as Compliance Manager of health and safety in August 2009. Prior to 24 March 2011 he was unaware that Mr Williams ever lifted Mr Roach up on the forklift tines.

[43] He said that he formed the view that Mr Williams had whatever equipment he needed to perform his job safely. However, he considered that Mr Williams chose to *operate the forklift in an extremely unsafe manner to save time.*

Would a fair and reasonable employer have dismissed Mr Williams for serious misconduct in all the circumstances at the time?

What is the relevance of the letter of dismissal stating the forklift was raised to 15 metres?

[44] At the investigation meeting Talleys produced photographs of the forklift showing that the maximum level it can lift to is 5.55 metres. The dismissal letter is

clearly flawed in that it states that Mr Williams lifted Mr Roach to 15 metres. It is common ground between the parties that the forklift cannot go that high.

[45] After his dismissal Mr Williams engaged a solicitor to raise a personal grievance of unjustified dismissal. His solicitor wrote to Greg Cox who is Talleys' Personnel Manager. In his response Mr Cox wrote about the issue of the height Mr Roach had been lifted to:

Your client does not deny lifting Mr Roach and it has been established that they were accessing polys at Rack E. Tony Gimblett initially estimated this to be around 8 meters (sic) high but it was actually just less than 6 metres. When Leslie (sic) March wrote the letter of dismissal he thought in feet but wrote the word meters (sic).

[46] I consider that the reference to 15 metres was a genuine mistake. I accept that at the disciplinary meeting Mr Williams was told that the allegation was that he lifted Mr Roach to the height of Row E and that at the time all parties knew approximately how high that was. I consider that the issue of 15 metres played no part in the decision to dismiss Mr Williams.

Was the dismissal justified?

[47] An amendment to section 103A of the Employment Relations Act 2000 (the Act) came into force on 1 April 2011. Mr Williams was dismissed on 28 March 2011. His dismissal pre-dated the commencement of the 2011 amendments.

[48] It is well established that legislation is presumed not to have retrospective effect. Ms Gibson submitted on the respondent's behalf that the relevant statutory test is the one that was in force at the time of Mr Williams' dismissal. I agree that the previous test in section 103A is the correct one to be applied.

[49] At the time of the dismissal section 103A read:

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

[50] In the Employment Court case of *Air New Zealand v Hudson*¹ Judge Shaw found that:

The first element of this section confirms expressly that justification for dismissal must be determined on an objective basis. This means that the matter must be viewed from the point of view of a neutral observer. This element of objectivity is expanded on in the second part of the section. To decide whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances the Court must judge all the circumstances objectively.

[51] Section 103A was also considered by the Full Court of the Employment Court in *Air New Zealand Ltd v V*²

... s 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

[52] Mr Williams told me that he did not have the correct safety equipment available to allow him to lift Mr Roach up to get product out of an *over-full racking system*. Mr Williams acknowledged that they had used a safety cage for the stock-take in December 2010. However, he also said that for part of the stock-take he raised Mr Roach up on a pallet and Mr Gimblett was aware of that at the time. Mr Gimblett denied that he had ever sanctioned lifting a person on a pallet on the forklift.

[53] Mr Williams told me that under Mr Leonard's management they had to keep the floor clear of product so they placed an extra layer or two of 'poly' on top of the loaded pallets when they were already on the racking system. However, when they had done this because of the way the cage was designed they could not lift the pallets out with the fork lift. Mr Williams and Mr Roach continued this practice of over-filling the racks after Mr Gimblett became their manager in Mr Leonard's place.

[54] Mr Williams had repeatedly lifted someone on a pallet for the sake of ease and convenience over the 2.5 years he was employed in the dry store. I accept that he did so while he worked with Mr Patterson and Mr Roach. Mr Williams told me he was *fully aware* that it was not in line with safe practice and that he should not be doing it.

¹ [2006] ERNZ 415, at paragraph 113.

² [2009] ERNZ 185 at paragraph 33.

[55] Mr Williams agreed that after the August 2010 training Mr Smith sometimes saw him lifting Mr Roach on a pallet and told them they should not be doing that. However, he carried on doing it because he believed that he did not have the right gear to pick stock off the racks or replace it on the racks in line with proper safety procedures.

[56] Mr Williams agreed that he had never raised the issue of over-full cages with Mr Gimblett or asked for any extra equipment since Mr Gimblett became the manager. I am satisfied that at the time of the disciplinary process none of the managers knew that some of the racks were overfull.

[57] I am satisfied that at the time Mr Williams was working there was one safety cage available for forklifts at Talleys. The cage was supposed to be kept in the cool store area but would often be used and not put back in the correct place. Mr Williams said he knew that there was a cage but did not know that there were also two safety harnesses on site.

[58] Mr Marsh and Mr Jackson did not know at the time they made their decision to dismiss that Mr Smith had repeatedly seen Mr Williams and Mr Roach lifting and being lifted on pallets and told them to stop a number of times.

[59] Also at the relevant time of the disciplinary meetings Mr Williams made no denial of lifting Mr Roach to the height of Row E but said that he had done it for the whole time he had been employed by Talleys.

[60] I find that it was reasonable for Talleys to accept that on 24 March 2011 before Mr Gimblett saw Mr Williams lifting Mr Roach Mr Gimblett had already told both of them not to get product down in that fashion.

[61] Mr Williams raised in his Statement of Problem his belief that he had not failed to obey Mr Gimblett's instruction. He stated that he had been seen by Mr Gimblett lifting Mr Roach in the morning and was told not to do that so stopped and that he did not do it again as Mr Gimblett alleged.

[62] However, at the time the dismissal decision was made Talleys had no evidence from Mr Williams disputing Mr Gimblett's version of events.

[63] Mr Jackson's evidence was that there was an increased emphasis on safety since he became the Compliance Manager of Health and Safety in August 2010. It was consistent with that renewed emphasis that Mr Williams was required to attend the training course in August 2010 for re-certification. The fact that the training had been provided was known to Mr Marsh and Mr Jackson when they decided to dismiss Mr Williams. In addition, Mr Williams showed no regret for his action/s and gave no assurance that he would not lift anyone on the forklift tines again.

[64] I consider that Mr Williams had a general responsibility as an employee to ensure his own safety and that of his colleagues. I also consider that he had an additional responsibility as a certified forklift driver to always operate the forklift in accordance with safety guidelines of which he was *fully aware*.

[65] Employee safety is a paramount consideration for any employer and a fair and reasonable employer would take any breach of safety regulations very seriously and would be entitled to consider that Mr Williams' actions were serious misconduct.

[66] Mr Williams had not made Mr Gimblett or any of the management team aware that he considered that he did not have the equipment necessary to do his job properly, or that it took too long to get the cage. He did not tell Mr Gimblett, Mr Marsh or Mr Jackson at any time, either before or during the disciplinary process, that the reason that some pallets could not be lifted down by the forklift alone was that the racks were overfull. Although he was *fully aware* of his obligations to follow safe procedures he continued to operate in an unsafe manner.

[67] I consider that the breach of an important safety consideration, with knowledge that Mr Gimblett had at least twice told Mr Williams not to operate that way and in the face of no remorse from Mr Williams was sufficient to provide a basis on which a fair and reasonable employer would, in all the circumstances at the time, decide to dismiss.

Did Mr Williams "disobey a direct instruction from his line manager"?

[68] This appears to have been given as the second reason for dismissing Mr Williams. However, it was not raised as an allegation which could lead to disciplinary action in the letter inviting Mr Williams to the meeting on 28 March 2011.

[69] I consider that Talleys considered the fact that Mr Williams had, after being told not to, raised Mr Roach up on the forklift as an aggravating factor. Talleys was entitled to treat it that way. I do not understand it to have been an additional and separate finding of misconduct amounting to a separate reason for dismissal.

Was the dismissal procedurally fair?

[70] Mr Marsh and Mr Jackson both heard from Mr Gimblett about his allegations of Mr Williams' unsafe practice. They referred to Mr Williams' personnel file and training records to check whether he was aware of his safety obligations. They saw that he held a current forklift driver's certification. I consider that was an adequate investigation.

[71] Mr Williams was given notice of the allegation of misconduct against him and was warned that the outcome of the meeting on 28 March 2011 could be his dismissal.

[72] Mr Williams was given two opportunities to bring a support person with him to the meeting; the first in the letter inviting him to the meeting. He was given the opportunity to adjourn the meeting to get a support person. Mr Williams decided to proceed without a support person.

[73] Mr Williams was given the opportunity to comment on the allegation made by Mr Gimblett.

[74] I find that Mr Marsh and Mr Jackson gave genuine consideration to what Mr Williams said to them before deciding to dismiss him.

[75] I consider that the investigation and disciplinary process was fair.

Did Talleys deal with Mr Williams in a disparate manner to other employees disciplined for similar conduct?

[76] The legal test in assessing whether an employer has subjected an employee to disparity of treatment so as to render a dismissal unjustified is set out in the Court of Appeal case of *Chief Executive Officer v Buchanan (No 2)*³ The Authority must consider whether:

- (a) There was a disparity of treatment;

³ [2005] ERNZ 767

- (b) If so, whether there is an adequate explanation for the disparity; and
- (c) If not, is the dismissal justified despite the existence of disparity?

[77] Mr Roach was dismissed at about the same time as Mr Williams because of his part in the 24 March 2011 events.

[78] Mr Williams alleged that since his dismissal Mr Gimblett had been *seen standing on a pallet on the forks of a forklift in the air* and that Mr Gimblett had replaced Mr Williams or Mr Roach.

[79] Mr Gimblett's evidence, supported by that of Mr Marsh, is that he did not replace Mr Williams or Mr Roach in their jobs but instead was promoted to the position of Planning and Procurement Manager. He also denied ever having being lifted on a pallet on a forklift.

[80] I consider it highly unlikely that Mr Gimblett took part in being carried on a forklift without a mancage or safety harness. In any event, that alleged incident took place after Mr Williams' dismissal and cannot form a part of an investigation into disparity of treatment.

[81] Mr Williams also alleged that *other employees doing the same thing received a warning, whereas I was dismissed.*

[82] Mr Marsh's evidence was that since Mr Williams' dismissal *we have... dismissed two people for acting in this manner and would not hesitate to do so again for the sake of promoting a health (sic) and safe workplace.* I understand that one of these dismissals was of the cool store supervisor in approximately early July 2012.

[83] It is the case that prior to Mr Williams (and Mr Roach) being dismissed two employees in the cool store received warnings for a related matter. Mr Marsh's and Mr Jackson's evidence was that they witnessed a person sitting on a pallet on the tines of a forklift about 2 inches off the ground. They called the cool store supervisor and told him to stop the practice. The forklift driver and the person sitting on the pallet had a record of their discussion with the supervisor put on their personnel files. Mr Marsh's evidence was that the reason those employees were only warned is that when discovered the forklift was stationary. They had a suspicion that the employees

intended to operate the forklift with the person on the pallet. Therefore, the incident was less serious than the 24 March incident.

[84] There was disparity of treatment between the cool store employees (sitting on a stationary forklift) and Mr Williams. However, in all the circumstances I consider that there is an adequate explanation for the disparity. The conduct was different. The incident with the cool store employees was less serious and it was reasonable for them to face less serious discipline than dismissal. It follows that Mr Williams has not proved that he was subject to disparate treatment that renders his dismissal unjustifiable.

Was there a breach of Talley's duty of good faith?

[85] This was not specifically argued at the hearing. In any event, I find that there is no evidence that Talley breached its duty of good faith to Mr Williams.

Costs

[86] Costs are reserved. The parties are encouraged to try and agree costs between themselves. If they are unable to do so and Talley wishes to claim costs it may file a memorandum on costs within 28 days of the date of this determination. Mr Williams will then have a further 28 days to file a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority