IN THE EMPLOYMENT COURT
AUCKLAND

AC 20/09
ARC 30/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	COLIN DAN ALLEN Plaintiff
AND	TRANSPACIFIC INDUSTRIES GROUP LIMITED (TRADING AS "MEDISMART LIMITED") Defendant

Hearing: 6 and 7 April 2009
(Heard at Auckland)

Appearances: Simon Mitchell, Counsel for Plaintiff
Catherine Stewart and Gemma Mayes, Counsel for Defendant

Judgment: 4 May 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of proceeding

[1] The issue for decision in these challenges to the Employment Relations Authority's determination of Colin Allen's personal grievance is whether Mr Allen was dismissed justifiably. That decision must be made by applying s103A of the Employment Relations Act 2000. In this case, the particular test is whether Mr Allen's dismissal, and how his employer went about it, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. If the dismissal was unjustified, the Court must decide the remedies to which he is entitled.

[2] This case illustrates well the statutory requirement to determine justification for dismissal in all the circumstances at the time it took place. In the Authority and at the hearing in this Court, both parties called and relied on evidence relating to pre-dismissal events but which was not known to the employer at the time of dismissal. Such evidence is not necessarily irrelevant to the question to be decided as, for example, is evidence of what the employer ought reasonably to have known but did not. New material can also be relevant to questions of remedies. However, it is necessary to dissect carefully and discard as irrelevant to the statutory test, evidence which either seeks to second-guess the employer's decision using other facts or reinforce that decision by evidence not relied on at the time.

[3] Mr Allen has elected not to challenge the Authority's determination, issued on 10 March 2008, that he was dismissed unjustifiably. Rather, his attack is on its conclusion that he was completely at fault for the events that led to his dismissal so that, apart from the declaration of unjustifiability just mentioned, Mr Allen received no remedies.

[4] The plaintiff has identified what he says are particular errors in the Authority's findings of fact that led it to conclude that he was completely responsible for his dismissal. These include a finding by the Authority that Mr Allen was not at work as he should have been at a particular time on a particular date. Next, the plaintiff challenges the Authority's conclusion that he lied in evidence to it. Finally, the plaintiff says that the Authority concluded erroneously that his actions amounted to contributory fault leading to his dismissal.

[5] However, the employer has also challenged the Authority's conclusions that were adverse to it and in particular the determination that the dismissal was unjustified. This resulted in a direction for a hearing de novo as being the most just way for the Court to hear and decide the whole spectrum of issues raised by the parties. So all issues between the parties are at large again.

Relevant facts

[6] Until he was dismissed on 30 January 2007 Mr Allen had worked as a driver for Transpacific Industries (NZ) Ltd which trades as "Medismart Ltd". At the time of his dismissal Mr Allen's duties involved driving a truck during a night shift from the company's plant in East Tamaki collecting medical waste for disposal from various Auckland hospitals.

[7] Particular features of Mr Allen's work include that he was paid for the time between when he clocked in and when he clocked out of work. There was no, or only minimal, external supervision of his job performance and no systematic oversight of the hours claimed by him. Although Mr Allen was permitted two 20-minute paid refreshment breaks and a 1 half-hour unpaid meal break, when and how these were taken were left largely to him. The employer deducted automatically half an hour's pay each day from the amounts calculated between the clock-in and clock-out times to reflect the unpaid meal break. There was some flexibility about the times at which Mr Allen could start work. He had his own dedicated truck. So long as his claimed hours, calculated from the clock-in and clock-out times, were accurate, he serviced the company's customers allocated to his night "run", and completed accurately the paper work related to delivery of empty bins and collection and disposal of full ones, Mr Allen was left largely to his own devices. He was trusted to do his work as his employer expected him to.

[8] The company operated an "honesty system" in relation to employee hours. Employees were asked to clock in when they started work and clock out when they finished work. There were no supervisory or independent checks on the accuracy of the times during which work was performed. The "clock in" system consisted of what must be a now antiquated punch card time clock that stamps a date and time onto a card placed in the machine for that purpose. At the start of each working week, employees would take blank clock cards from a supply and write their names at the top of the cards in handwriting. The cards would thereafter be maintained beside the time clock to be punched twice daily before being removed at the end of the pay week for the purpose of wage calculations. This system was described

correctly as an unsupervised arrangement dependent on the honesty and accuracy of reporting by the employees affected. The company did not make any systemic observations of who may have clocked in or clocked out employees' time cards each day.

[9] In late 2006, company managers became concerned at what they perceived to be the increased and increasing costs of business through a combination of greater hours claimed to have been worked by employees and lower productivity levels for those times. It undertook some investigative measures including placing a GPS tracking system in one of the company's trucks to ascertain the efficiency of its operations but there is no indication of the results of those investigations.

[10] On Wednesday 24 January 2007 Mr Allen was due to start work at about 9.30 pm. His time card was clocked in at 9.29 pm. Later that evening a supervisor, Pearce Murray, reported that Mr Allen appeared not to have arrived for work until at least 11 pm and perhaps as late as 11.15 pm.

[11] Mr Murray's report to the company caused a check to be made of Mr Allen's attendance on the following night of Thursday 25 January. The company's logistics manager, Wayne Dawn, noted that at about 9.45 pm he had seen Mr Allen's time card which recorded that he had clocked in at work at 9.33 pm that night. However, Mr Dawn could not find Mr Allen on the site and the truck that Mr Allen usually drove had not left the plant.

[12] Mr Dawn attempted unsuccessfully to telephone Mr Allen on his company and personal cell phones but he left messages for Mr Allen to contact him. At about 10.40 pm Mr Dawn received a telephone call from Mr Allen who explained that he had needed to return home after arriving at work because he had left behind his keys used for entering hospitals and other premises in the course of his work. A few minutes later Mr Allen arrived at the plant and, as requested by Mr Dawn, presented a new card showing that he had clocked in at 10.45 pm. His original card showing a clock-in time of 9.33 pm had been removed by Mr Dawn. Mr Allen was paid as if he had begun work at 10.45 pm.

[13] A meeting between Mr Allen and company management was arranged for the following morning, Friday 26 January, for the purpose of discussing where he had been at the purported clock-in time of 9.33 pm on the Thursday. Mr Allen worked through until about 9.30 am that morning and then went to the company's meeting at about 11 am. From what he had been told, it was to deal with his absence from work on the previous evening.

[14] After Mr Allen had confirmed that he did not want a representative present with him, he was asked to account for his absence from the plant on the previous evening until about 10.48 pm. He explained that after having arrived at work and having clocked in, he discovered that he had left his access keys or cards at home together with his docket book. He explained that he drove home and while returning to East Tamaki, received a voicemail message from his supervisor and then rang Mr Dawn. Mr Allen suggested that if there was a problem with what he had done, the time taken to go home and return should be deducted as meal or refreshment time.

[15] The company's questions then turned to the events of the evening of 24 January. Until then, Mr Allen had not been aware that his conduct on that evening was under investigation. He explained that he had clocked in at about 9.30 pm and, after having undertaken preparatory work for his run, left in his own car for a meal break at the local Wendy's restaurant. He explained that after he returned to the plant following an absence of about 30 minutes, he began his run. Mr Allen named two employees whom he believed may have seen him at work from about 9.30 pm and could have corroborated his account. He also nominated another driver whom he said would have been at the plant from about 10 pm that night with whom he conversed.

[16] At this first meeting Mr Allen was suspended on full pay until 30 January when another meeting was arranged to be held. Having become aware of the allegation of a second absence from work, Mr Allen had a union official with him as his representative at the second meeting on 30 January. Because they had only been interviewed by the company a matter of a couple of hours earlier that day, the accounts of Messrs Mark Cebalo and Piu Haananga were only in handwritten form

so that Mr Allen was only told what they had said about their recollection of his presence at work. Their accounts neither helped nor hindered his position.

[17] When asked whether he had anything further to add by way of explanation, Mr Allen said that he had already told the employer on 26 January what had happened on 24 and 25 January. He was not asked further questions or told of any further evidence that the employer had gathered or conclusions it had reached.

[18] The management representatives took a short adjournment to consider their position and then advised Mr Allen that he was to be dismissed summarily. Mr Allen's union representative intimated that a personal grievance would be brought.

[19] Mr Allen was dismissed for having falsified company records (his time card) on the two occasions in the previous week (24 and 25 January) when the company believed that he was not at work although he had claimed to have been so by making it appear that he had clocked in.

[20] The reasons for Mr Allen's dismissal were set out in writing and included the company's assessment that it was *"highly likely that you were* ***not*** *on site and had* ***not*** *clocked in at the times on your card. Management also concluded that there was a high probability of collusion, and will investigate this as a separate item"*. The company described Mr Allen's actions as *"the falsifying of company documents"*.

The Authority's determination

[21] The Authority concluded that the employer did not conduct a proper inquiry into this alleged misconduct and, in particular, it did not have evidence that was sufficiently convincing to support the serious allegations of dishonesty against Mr Allen on two separate occasions. That was in part because the employer failed without reasonable excuse to interview a material witness whose name and involvement in the matter was raised by Mr Allen with the company when it was inquiring into the allegations. Statements made by this material witness, Harry Sylva, were obtained by the company only after Mr Allen was dismissed.

[22] The Authority said that it was bound to consider justification in the light of all the circumstances known to exist at the time the dismissal occurred. This excluded what Mr Sylva might or might not have said if asked during the company's inquiry because this was not a circumstance known to it when Mr Allen was dismissed. The Authority declined to take into account Mr Sylva's statements about events leading to Mr Allen's dismissal except on questions of contribution to the situation that gave rise to his grievance.

[23] It was clear to the Authority that the grounds relied on for dismissal related to Mr Allen's conduct on both days. The Authority rejected a submission that Mr Allen's dismissal was justified by his conduct only on the second day. Rather, the Authority concluded that his actions were regarded by the employer as a continuing course of misconduct. The Authority said that it could only be speculation as to what the employer may have done if it had ignored events on 24 January but had found, nevertheless, that Mr Allen had falsified his timesheet on 25 January.

[24] In the foregoing circumstances the Authority concluded that the employer had not met the statutory test of satisfying it that the manner in which it reached the conclusions about Mr Allen's conduct was what a fair and reasonable employer would have done in all the circumstances at the time. The Authority said that a neutral observer would have regarded it as unfair and unreasonable for the company to confine its inquiries about the events of 24 January to only some witnesses but excluding Mr Sylva.

[25] The Authority concluded that although the company's decision to dismiss was based on its finding of what happened on both dates, it was probable that if Mr Allen's explanation about 25 January had been accepted he would still have been dismissed as having falsified records on 24 January. These events on that date were described by the Authority as the *"major driver"* of the decision to dismiss. The Authority found Mr Allen's actions on 24 January to be *"blameworthy to a high degree"* and were causative of the decision to dismiss him. The Authority found that although Mr Allen did not contribute to the employer's failure to interview Mr Sylva, which omission caused his dismissal to be unjustified, it said that it would also be unjust for the employer to be required to remedy that grievance in all the

circumstances. It concluded: *"The degree of contribution by Mr Allen for his actions on 24 January alone is, in my view, so high that there should be no entitlement to any remedies."*

[26] The Authority Member made very strong findings from his own investigations and assessments about what happened on the evening of 24 January. That was despite having acknowledged that the s103A test is an examination of what the employer did and how. It concluded that Mr Allen had *"deliberately lied"* to it. It found that Mr Allen *"has given false evidence to cover up his absence from the plant on 24 January at 2129 hours, or 9.29pm, when his card was clocked in. I find it likely that someone else clocked the card in and not Mr Allen. I therefore find that his actions in knowingly allowing that card to remain unaltered as to the true time he arrived at work, amounted to falsification of company documents. This was serious misconduct for which the Employment Agreement provided dismissal as a punishment".*

[27] Although the account of Mr Allen's wife confirming his return home had not been provided by Mr Allen to the company's investigation, Mrs Allen did give this evidence to the Authority. It accepted her as a witness of truth when she confirmed her husband had returned home and she passed him the keys and a notebook. The Authority found that the absence of this account given to the company before the dismissal was Mr Allen's responsibility. However, the Authority concluded:

> *Given my findings about the nature of Mr Allen's evidence in relation to 24 January, I conclude that he has not told the truth about clocking in at 2133 on 25 January either. On balance, I consider it likely that Mr Allen did not clock in at 2133 hours, or 9.33pm, that night as shown on his timecard. Someone else presented his timecard for that purpose. Mr Allen's actions were blameworthy in allowing the card to record that he had clocked in at the time shown.*

[28] The Authority said that even if it was wrong about its conclusion of events on 25 January, Mr Allen was *"blameworthy to a high degree in leaving the plant without clocking out and in consequently travelling back to his house in his employer's time."* The Authority concluded that even if Mr Allen's account of events was correct, this was done with the intention that the trip would not be discovered and that he would not forfeit the time from his wages. The Authority

concluded that Mr Allen was blameworthy in not leaving a clear message with the supervisor about where he was going and why, and was blameworthy in not remaining in cell phone contact while he was on the journey so that his supervisor might find out why he was not at work.

[29] The Authority reserved costs, encouraging the parties to agree on these.

[30] I regret to conclude that the Authority's determination and the grounds for it do not follow the statutory requirement of s103A of examining the substance of, and procedure leading to, the employer's decision to dismiss against the objective standard of what a fair and reasonable employer would have done and how, in all the circumstances at the time of the dismissal. It is not for the Authority to reconsider and re-determine the evidence supporting or contradicting the decision to dismiss on its merits. There are also several clear inconsistencies in the Authority's reasoning including, but not limited to, its acceptance on the one hand of Mrs Allen's account of her husband's return home on the evening of 25 January and the reasons for that and, on the other hand, the Authority's strong finding against Mr Allen that he lied to it in giving this same account. There are other inconsistencies in the Authority's reasoning. Although the parties chose only to challenge those findings adverse to each, the hearing was treated as one de novo. It is therefore unnecessary to further examine closely the Authority's reasoning.

The employment agreement

[31] The Medismart Limited Collective Employment Agreement for Service Persons and Plant Operators 1 July 2006 – 30 June 2007 provides, at clauses 5.4 and 5.5 that employees subject to it (including Mr Allen) were entitled to both a one half-hour unpaid meal break and to a paid rest break or breaks not exceeding 20 minutes in total for each day at work. The *"duration"* of these paid rest breaks was said to be at the discretion of the employer: whether this means the times at which they are taken, rather than their length that is prescribed, is unclear. I assume the latter intention so that employees were entitled to no less than 50 minutes rest per shift.

[32] Clause 22 provides for a ***"DISCIPLINARY PROCEDURE".*** This is said to make an employee *"aware of what you are doing wrong and provide you ample opportunity to make improvements"*. Clause 22.2 also provides: *"... In determining appropriate discipline, the severity of the offence, the quality of your work, your attitude, your prior disciplinary record and any other factors* [the employer] *deems appropriate may all be considered"*.

[33] At clause 23 (***"MISCONDUCT WHICH COULD RESULT IN DISMISSAL"***) the collective agreement sets out examples of breaches of the employment agreement by employees including, at (i):

> ***Falsifying Company Documents***
>
> *Deliberately falsifying timesheets or other Company documents. This includes wages, accident, leave records, vehicle log-books etc.*

[34] I accept that the time clock system was a manifestation of those "timesheets" in practice and that information was given by employees when clocking in and clocking out indicating the times of beginning and finishing work. By qualifying *"falsifying timesheets"* with the adverb *"Deliberately"*, the parties to the collective agreement intended that serious misconduct would include more than providing erroneous information on the timesheets. By imposing a requirement of deliberation, the parties intended that false information would amount to serious misconduct if it was provided with the intention of misleading the employer including to make a payment or payments of wages in reliance on that misleading information. So, to meet the test of *"Deliberately falsifying timesheets"* in any particular case the employer would have to be satisfied to the appropriate standard that not only was the information wrong but that it was given in the knowledge that it was wrong and with the intention that this would be acted upon by the employer. Although criminal definitions and standards are not strictly applicable to such provisions, the description of the prohibited activity by the employer's counsel to the Employment Relations Authority as *"time-card fraud"* encapsulated aptly the necessary mental elements of the prohibited conduct.

[35] Clause 23.2 (*"**The Investigation**"*) sets out a code for the employer to follow in cases such as this. Its features include:

- advice to the employee of the allegation;

- an opportunity for the employee to have a representative or witness present during any meetings;

- an opportunity for the employee to comment on or explain the allegation.

[36] The structure of the clause is that the foregoing steps are those in a preliminary investigation. Once they have been taken and considered, the company may decide to investigate the allegation further. Clause 23.3 provides that if the alleged breach is sufficiently serious, an employee may be suspended on full pay while this further investigation takes place.

[37] Clause 23.4 provides that if the company is not satisfied with an employee's initial explanation or the results of its preliminary investigation, the employee will be required to attend a formal disciplinary meeting. Representation is also allowed for at this stage. The clause provides: *"You will be given plenty of time to comment on or explain the matter"*.

[38] Finally, at clause 23.5, the agreement provides that the person conducting the meeting will then consider the employee's explanation and decide whether disciplinary action should be taken.

[39] Clause 23.6 provides that in cases of *"serious misconduct"*, an employee will be liable to dismissal without notice. There are then a series of lesser sanctions provided for that are not in issue in this case.

Relevant legal principles

[40] The first and most important of these is s103A of the Employment Relations Act 2000. This prescribes the tests for determining justification for dismissal. The Court must determine whether the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time it took place and how a fair and reasonable employer would have done so. The relevant circumstances are

not only those in fact known to the employer at the relevant time but also those which a fair and reasonable employer would also have known at the relevant time had the employer made proper inquiries about the events that resulted in dismissal.

[41] The employer must have had more than mere suspicion but need not have had proof beyond reasonable doubt of Mr Allen's alleged breaches. At the time of dismissal the employer must have had either clear evidence upon which a reasonable employer would safely have relied or must have carried out reasonable inquiries which left the employer on the balance of probabilities with grounds for believing that the employee was at fault and the employer must have had such a belief: *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand Ltd* [1990] 3 NZILR 584 (CA): (1990) ERNZ Sel Case 549: [1990] 3 NZLR 549.

[42] Another important principle applicable to this case concerns the quality of evidence necessary where the allegation of breach is of particular gravity. In *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23: (1990) Sel Cas 885: [1991] 1 NZLR 392, the Court of Appeal affirmed the principle as it had been stated by the Labour Court as follows:

> *It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave. This does not involve proof beyond reasonable doubt, nor does it involve some kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt. It involves only an awareness on the part of the grievance committee of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the act of serious misconduct, that the proof of that act must be convincing in the way we have described. That is because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.*

[43] Although that was said to be applicable to the considerations of a grievance committee under the Labour Relations Act 1987, the way in which justifications for dismissal are determined has developed so that the initial obligation rests with the employer in conducting an investigation that may lead to dismissal which decision is

then able to be reviewed, applying the tests set out in s103A, by the Employment Relations Authority and, as here, by the Employment Court.

Decision

[44] Section 103A emphasises both process and substance by requiring an employer to do what a fair and reasonable employer would do in all the circumstances and how a fair and reasonable employer would do so. Logically, process precedes a decision on substance. It is often said that if an employer gets the process right, the employer will get the result right. Although that does not follow immutably one from the other, the cases show that using a fair and reasonable process will usually enhance the chances of getting the result right.

[45] In this case I have been left with an abiding impression that at a superficial level an apparently fair and reasonable process was undertaken by the employer before determining to dismiss Mr Allen summarily. However, when that is examined more closely, the company may be seen to have been simply going through the motions without sufficient regard to a fair consideration and balancing of the results of its inquiries. Put another way, and indeed as the Employment Relations Authority found in respect of one inquiry that the company failed to make, it did not wish to make any findings that pointed away from its suspicion of organised employee fraud and did not do so. In the course of that inquiry, the employer ignored relevant evidence, made assumptions about Mr Allen's actions that it did not check with him or others, applied irrelevant considerations to its conclusion of fraudulent conduct, and, although confirming its suspicions about organised employee fraud, so concluded without probative evidence and indeed contrary to evidence that it ignored.

[46] The employer cannot be criticised for being concerned about losses of productivity and increasing wage costs. Nor can it be criticised for suspecting that one of the contributing factors may have been the incorrect recording of start and finish times by employees that may have led to them being paid for periods when they were not at work. Although logic would dictate that if an employee was claiming for time when he was not at work and that someone else must have been

clocking him in and/or out, the implications of this suspicion were very serious for all employees potentially involved. This required not only a fair investigation but one that could establish the probability of such a serious situation as was commensurate with the gravity of the suspicion.

[47] It was fundamental that the company could not allow its investigations only to fit the initial hypothesis of fraudulent employee conduct. It is important in such cases that the obligation on the employer to investigate and conclude fairly and dispassionately by reference to evidence, is not overborne by the apparent enormity and outrageousness of the suspicion. Although some employees act dishonestly and shamelessly towards their employers including by making fraudulent claims, the majority of employees do not do so. Employees are entitled in employment law to a presumption of innocence of such allegations unless and until there is probative evidence of a strength commensurate with the gravity of the allegation. The importance of open-mindedness and preparedness to modify suspicions and even preliminary views cannot be over-emphasised.

[48] It may be timely to recall the words of Megarry J in *John v Rees* [1970] Ch 345, 402 applied in this country by the High Court in an administrative law case, *Bradley v Attorney General* [1988] 2 NZLR 454, 483, but which are nevertheless applicable to employment law:

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*

[49] As to the events of Thursday 25 January, the employer concluded that someone else had clocked in Mr Allen's card at about 9.30 pm but that he did not

begin work until about 10.45 pm. It did not consider or, if it did, give any credence to Mr Allen's explanation that when he arrived at work he realised that he had left at home the access cards to customers' premises and returned to his home to collect these. Among the reasons for disbelieving this explanation was Mr Allen's confirmation that such forgetfulness was a very rare occurrence. Also significant to the employer was that these access cards ought to have been left by Mr Allen in his work vehicle and so available to others in the event of his sickness or other inability to attend work. That may have been so but Mr Allen was not dismissed for failing to leave his access cards in his truck and this would, in any event, not have constituted good grounds for summary dismissal. Nor, too, would his forgetfulness in (rarely) leaving his access cards and other materials at home.

[50] It was held against Mr Allen that he was not contactable on the company's cell phone that had been issued to him for work purposes. However, this ground for disbelieving Mr Allen's explanation of the events of 25 January was not put to him. Rather, the company assumed that because he was not contactable on its mobile phone, his explanation for the evening's events was not credible. Had that assumption been put to Mr Allen for his comment, I find his response would have been as he told the Court. He left his cell phone in his truck at his employer's premises when he returned home in his own vehicle to collect the access cards. He said that he thought company policy was that mobile phones should remain with company vehicles and not be taken home by employees. Again, Mr Allen was not dismissed for not being contactable by mobile phone. Nor, in my assessment, would it have provided sufficient grounds to have dismissed him even if the employer had concluded after a proper investigation that this was a breach of company rules.

[51] If company investigators had put to Mr Allen their tentative conclusion that his unavailability to be contacted by mobile phone (company or personal) was a factor that might cause them to doubt the veracity of his explanation for the evening, I am satisfied that he would have told them what he told the Court. The company's premises are in East Tamaki and Mr Allen lived at Kawakawa Bay. Mr Allen explained that cell phone coverage through the mostly rural areas between East Tamaki and Kawakawa Bay is intermittent and, even when present, unreliable so that a cell phone may ring but, when answered, a call is lost. This has not been

contradicted or doubted by company evidence. It would not be surprising that Mr Allen did not return a call made to him for more than 30 minutes after the call was made in these circumstances. It is significant also that Mr Allen was able to be contacted on his own cell phone rather than the company's work phone. That indicates he was carrying an operable cell phone at the relevant times.

[52] This factor that the company found significant in disbelieving Mr Allen's explanations of where he was on the evening, ought to have been put to him. Had he made the explanation that I am satisfied he would have, the employer could not fairly and reasonably have concluded, as it did, that he had conspired with another employee to clock him in to work and that he was not intending to be there until later so as to obtain remuneration fraudulently.

[53] The most significant piece of independent evidence concerning Mr Allen's whereabouts on the evening of 25 January was the advice that a work colleague provided to Mr Allen's manager in response to an inquiry about where the plaintiff was. The manager was told that he had left the premises in connection with the *"keys"* and would be returning. That account confirmed Mr Allen's explanation that he had been at the premises but had left to get his keys. I have been driven to the conclusion that this evidence was ignored as inconvenient by the company because it did not suit its predetermined view that Mr Allen was part of a conspiracy to defraud the company by falsely recording working times. It did not help that the other employee who provided the explanation was suspected of being one of Mr Allen's co-conspirators although this was never established and the man still works for the defendant.

[54] Other examples of the company's failure to inquire further from Mr Allen about assumptions it made in disbelieving his account of events include the following in relation to 24 January. Mr Allen explained that after he arrived at work on the Wednesday evening, he loaded two empty bins onto his truck. The managers thought this was such an unlikely explanation that they did not believe him. But the managers did not put to him what they assumed about his practice of always loading the empty bins onto his vehicle at the end of the shift so that he would be ready to begin work immediately at the start of the following shift. Had that important

assumption that was held against Mr Allen been given to him for comment, I am satisfied that he would have given the explanation that he gave to the Court about this part of the evening of 24 January.

[55] Mr Allen said that when he arrived at work, two red bins belonging to a particular customer (unlike the majority of bins that belong to the defendant) had just been washed and put out for collection. Mr Allen said he was concerned that other drivers took such bins indiscriminately and that they should be reserved for the particular customer that owned them. In these circumstances he explained that he took the just washed red bins to his truck and loaded them onto it to ensure that they would not be taken by other drivers from the pool of bins at the plant. That appears to be a reasonable explanation, even for an unusual practice on the part of Mr Allen. But the employer deprived itself of the opportunity to consider the reasonableness of that explanation by failing to put to Mr Allen its belief that his invariable practice was to load his truck at the end of a shift so that any suggestion of doing so at the start of the shift, as he had explained, detracted from the credibility of that explanation.

[56] Similarly, the company made assumptions about when Mr Allen completed his paper work so that when he accounted for some of his time on the evening of 24 January by saying he was completing outstanding paper work, the company managers did not believe him. They believed that other drivers completed their paper work while making collections and deliveries. They claimed that even if Mr Allen did not do so but left his paper work to do at home, as was his evidence of his practice, it was so unlikely that he had completed paper work at the depot before leaving that his explanation that he was working in this fashion on Wednesday 24 January was to be disbelieved.

[57] Had this assumption been put to Mr Allen for his comment, I am satisfied that he would also have made the same explanation to company managers that he made to the Court in evidence. The paper work system requires a short explanation. For each customer to whom empty bins are delivered and from whom full bins are collected, drivers compile records from which customers are subsequently invoiced by the company. These records disclose the numbers and types of bins delivered and

collected together with the weight of waste material collected. That latter detail will only be known when a driver returns to the plant and weighs the bins of waste on a scale before their contents are sterilised, pulverised and disposed of. Drivers record these details in docket books. Completed dockets for each customer on each day are then sent to the company's office for processing.

[58] Although some drivers complete the dockets on their rounds, it was Mr Allen's habit to note these details in a small notebook while doing his rounds and to write up his dockets from those notebook records at home after the end of each shift. He would then deliver the dockets to the office at the beginning of the following shift.

[59] Mr Allen explained that after his work shift on 23/24 January he was tired or otherwise distracted and did not complete his paper work at home as usual after finishing work on the morning of 24 January. He said, rather, that he completed his dockets in the cab of his truck parked outside the plant at the start of his shift on the evening of 24 January. He made that explanation to company investigators when asked what he had been doing at work during a period when the company had assumed he was not there. Because, however, of its assumption that this explanation was so uncharacteristic of Mr Allen's work methods, the company disbelieved him without offering him an opportunity to disabuse it of that disbelief. This was as part of reaching its conclusion that he had not been at work at all when he said he was, but engaged in a conspiracy to defraud the company of the wages that he had claimed for this period.

[60] I am satisfied, also, that the company did not comply with the procedure set out in the collective agreement for the investigation of allegations of misconduct and, independently, did not treat Mr Allen as would have a fair and reasonable employer. Mr Allen began his work shift on the late evening of Thursday 25 January 2007. He worked for about 12 hours, finishing his shift at 9.30 am on Friday 26 January. He was then required to attend a meeting to investigate what were serious allegations of misconduct but held only 1½ hours after he had finished that 12-hour shift. Given the seriousness of the allegation, that was an unreasonably short period to allow Mr Allen to both rest after his shift and to prepare himself for what

transpired to be (and indeed was always going to be) a very important investigative meeting. It was an unfair and unreasonable requirement of Mr Allen. It breached the collective agreement's requirement for a proper opportunity to comment on or explain the allegation at that preliminary stage.

[61] But even more seriously, I am satisfied that until he arrived at the meeting, Mr Allen was unaware that the events of Wednesday 24 January were also of concern as were those of the evening of Thursday 25 January and about which he was aware his employer wished to speak with him. The only advice that Mr Allen received about this meeting was by a telephone call from his supervisor late on the previous evening while he was working. The oral advice was that the employer wished to discuss the events of earlier that evening. It is not surprising, in these circumstances, that Mr Allen regarded what he believed was to be the subject of the meeting as of minor moment, a *"joke"* to use his word. By this I understood him to mean a matter of such minor moment and easily explained that he would not be troubled by it. Although he elected not to have union representation as he was told he could and to which he was entitled, that is probably not surprising because he believed that his employer wished to know about the events of only one evening and these were readily explicable in his view. After it had become apparent to Mr Allen at the meeting on 26 January that there was another allegation he obtained union assistance for the employer's next inquiry meeting on 30 January.

[62] A fair and reasonable employer would have both told Mr Allen precisely the ambit and nature of its concerns and would have allowed him more time to prepare for a significant meeting than 1½ hours at the end of a tiring 12-hour night shift. The defendant did neither and it would not be surprising that Mr Allen was unable to allay his employer's concerns at that meeting.

[63] Although still largely ignored by practitioners and, as in this case, by the Authority in determining justification for dismissal, there are the statutory requirements for parties to employment relationships to act in good faith. They have given statutory effect to several of the principles of procedural fairness developed over more than 30 years by the courts as part of the common law of employment. These are particularly appropriate when the Authority must examine the fairness and

reasonableness of the process leading to a dismissal or disadvantage under s103A. Section 4 (*"Parties to an employment relationship to deal with each other in good faith"*) applies to an employer's investigation of allegations of misconduct in employment against an employee: s4(2)(a); s4(4)(bb) and (5).

[64] The particular good faith obligations breached by the employer in this case in its investigation of serious allegations against Mr Allen that had the potential to lead to his dismissal, included those set out in s4(1A)(b) and (c). The employer's failure or refusal to put to Mr Allen the important reasons for its conclusions that his explanations were false and that he had thereby deliberately falsified timesheets, breached the requirement in s4(1A)(b) to be responsive and communicative with him. So, too, did these failures breach s4(1A)(c) in that the employer was proposing to make a decision on the allegations of misconduct that would or was likely to have an adverse effect on the continuation of Mr Allen's employment. The foregoing failures did not provide him with access to information relevant to the continuation of his employment about the decision and did not afford him an opportunity to comment on the information before the decision was made.

[65] Although there is a statutory regime for the imposition of penalties for certain breaches of good faith under s4A, that is not an issue in this case. However, the s4 obligations on employers in conducting inquiries into misconduct will have consequences when evaluating the fairness and reasonableness of that process. An employer who acts in breach of the statutory good faith obligations may find it difficult to justify a subsequent dismissal or disadvantage in employment because a fair and reasonable employer will not generally act towards an employee in contravention of the law.

[66] Section 103A requires the Court to consider justification in terms of what a fair and reasonable employer would have done, and how such an employer would have done it, in all the circumstances at the time of the dismissal. So the focus is on what the employer knew or ought reasonably to have known at the time of dismissal. Ms Stewart, counsel for the defendant, accepted that it was not only a question of the employer's honest belief in what had happened as a result of a fair and reasonable inquiry undertaken into those questions, but also into what the employer ought

reasonably and fairly to have inquired into that will form the basis of justification under the s103A test.

[67] Although in this case, as in many, there has been much evidence given with the benefit of hindsight about events leading to the dismissal, the focus must be on what the employer honestly believed from the information that it knew or ought reasonably to have known if a fair and reasonable inquiry had been carried out. So, in that light, much of the evidence about conflicting accounts given by another employee, Harry Sylva, who was not interviewed by the employer before Mr Allen's dismissal, is of marginal relevance. The Authority focused considerably on the employer's failure to interview Mr Sylva whose name had been given by Mr Allen at the first interview as someone who Mr Allen believed was present at the plant at about 10 pm on Wednesday 24 January. The Authority Member was very critical of the company for failing to interview Mr Sylva and its reason for doing so being that it assumed that he could not have contributed relevant information because he would not have been able to have been back at the plant before about 10.15 pm on that evening.

[68] Contrary, however, to the Authority's conclusion, I do not consider that the employer's failure to interview Mr Sylva was so reprehensible. It was reasonable for the employer to have assumed that Mr Sylva could not have been back at the company's East Tamaki premises before 10 pm at the earliest on 24 January. However, it is clear that he had returned there by about 10.15 pm and there were concerns about Mr Allen's whereabouts until at least 11 pm on that evening. Mr Sylva was a relevant witness to the employer's inquiry, if not about events before 10.15 pm, then potentially as to where Mr Allen was between 10.15 pm and 11 to 11.15 pm. But, as illustrated by the evidence he gave in this Court, Mr Sylva was such an utterly unreliable witness that it would not be safe to count on the accuracy of what he might have said if he had been interviewed by the employer's managers before 30 January when its inquiry concluded.

[69] So although the employer concluded reasonably that Mr Sylva would not have been able to confirm Mr Allen's account of his attendance at the plant before 10.15 pm, Mr Sylva would nevertheless have been a potentially important witness of

the position during the following period of between 45 minutes and one hour. A reasonable employer investigating these allegations against Mr Allen would have interviewed him before deciding whether the plaintiff was at work during that period.

[70] As to the events of 25 January, the employer's conclusion was likewise flawed. A fair and reasonable employer would not have concluded that Mr Allen was not present when his card was clocked in and that someone else had clocked him in and that he did not arrive at work for more than an hour after that. As with the events of the previous evening, there is no evidence of deliberately falsifying time records and indeed such evidence as the employer had, pointed to Mr Allen's presence at its premises before leaving to return home to collect forgotten access equipment. But again, Mr Allen was not dismissed for having to clock out and/or to inform his supervisor that he was returning home. As with the events of 24 January, Mr Allen was dismissed for falsifying time records in concert with another or others. In fact the evidence that the employer obtained or ought reasonably to have obtained showed that Mr Allen's clock-in time was correct as was the second clock-in completed that evening at his supervisor's request.

[71] Although the employer's case of justification was not advanced in the alternative, in the sense that the events of either one of the evenings alone would have justified dismissal, I have nevertheless considered this. Given Mr Allen's entitlement to paid and unpaid breaks during each shift, I do not consider that a fair and reasonable employer would have dismissed him for returning to work up to 45 minutes late from a meal break on 24 January. Nor, whether alone or cumulatively with his breach on 24 January, do I consider that a fair and reasonable employer would have dismissed Mr Allen for failing to clock out and/or advise his supervisor when he returned home to collect his access cards on 25 January. These were breaches that a fair and reasonable employer would have concluded and, in terms of the employment agreement, for which Mr Allen would have been liable to sanction. But fair and reasonable consequences of any or all of these breaches would not have included dismissal.

[72] The grounds for Mr Allen's dismissal were that he deliberately falsified records relating to his time at work for which he was to be paid. In particular, the employer concluded that, in collusion with another or others, Mr Allen arranged for his time card to be clocked in when he was not at work and to cause him to be paid for such periods. These were extremely serious allegations of dishonesty in employment which, if true, would have been destructive of the employer's trust and confidence in the employee and would have justified summary dismissal.

[73] However, although company managers may have suspected the existence of a racket participated in by more than one employee to clock in others, those suspicions were not confirmed or otherwise shown to have a basis in fact. A fair and reasonable employer would not have concluded that Mr Allen was a part of such a rort.

[74] The defendant has not met either of the cumulative tests of justification for dismissal set out in s103A and I confirm the Authority's conclusion that dismissal was unjustified, albeit for very different reasons.

Remedies

[75] Although I agree with the Authority that Mr Allen's remedies for unjustified dismissal are affected by s124, I find they must be reduced rather than eliminated as the Authority concluded.

[76] Mr Allen contributed to the circumstances that gave rise to his grievance of unjustified dismissal. The employer was entitled to conclude that Mr Allen was away for more than 30 minutes for an unpaid meal break on the evening of 24 January. Even accepting Mr Allen's account of when he left the East Tamaki plant, it was open to the employer to conclude, fairly and reasonably, that he was absent for more than 30 minutes, the period of his unpaid meal break. But Mr Allen was not dismissed for taking a meal break that was too long and therefore receiving pay for a period when he was not working. He was dismissed for deliberately falsifying his time records by having someone else clock him in when he was absent. A fair and reasonable employer would not have so concluded on the evidence before it or that it ought to have taken into account on 30 January.

[77] On the evening of 25 January 2007, having clocked in to work at 9.33 pm, he should have clocked out again to go home to retrieve his keys. He was not then working for his employer. Rather, he was paying the price for having forgotten to bring his keys for which the employer should not have been expected to have paid him. Although Mr Allen had a reasonable explanation for his absence from work, he did not have and could not have had a reasonable explanation for not recording properly his absence from the workplace for personal reasons. Mr Allen did not, however, contribute in a blameworthy sense to the employer's conclusion that someone else had clocked him in and that he was attempting thereby to be paid for time when he was not at work. A further balancing factor is that his supervisor required him to clock in when he arrived at the East Tamaki plant at about 10.45 pm that evening. Mr Allen did so and did not acquire any unearned wages for the period that he was absent.

[78] In addition to reducing the remedies to which Mr Allen might otherwise have been entitled because of his blameworthy contributory conduct, his evidence establishing lost remuneration and other consequences of his dismissal was less than satisfactory. Unions and others representing dismissed employees who intend taking personal grievances must keep good and complete records of their attempts to mitigate their losses or otherwise of such losses that they may wish to claim from the employer. I do not intend to include Mr Allen's counsel in this criticism of his case because he has only become involved relatively recently. However, dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[79] Such details were noticeably absent from Mr Allen's case and he was very vague and sometimes inaccurate when trying to recall what he had done. The onus in these circumstances is on the former employee and if not fulfilled, will leave a former employer submitting, as the defendant did in this case, that either a lesser or even no award should be made as a result of failure to prove loss.

[80] Mr Allen lost income as a direct result of his dismissal and I accept that although he tried to find other work, he was unable to do so except for short periods of temporary work. How long he was unemployed is problematic for the reasons set out above. But I am satisfied that it was, in aggregate, considerably more than 3 months. Before reduction for contributory conduct, the plaintiff would have been entitled to compensation for lost remuneration beyond the 3 month minimum period specified in s128(2). The required reduction of remedies under s124 can be achieved by disqualifying Mr Allen from recovering more than 3 months' wages to which he would otherwise have been entitled.

[81] There was some confusion about the precise amount of Mr Allen's earnings in the year before his dismissal. As well as this can be gauged, I find that these amounted to approximately $68,000 so that the 3 months' award for lost remuneration that I make is for the sum of $17,000.

[82] Unlike the paucity of evidence about his loss of income as a result of the dismissal, I am satisfied that Mr Allen did suffer significant non-economic loss as a result of his unjustified dismissal for which he is entitled to be compensated. His inability to meet debt payments that was one of the direct consequences of his unjustified dismissal, embarrassed and humiliated him significantly. The effects of his dismissal on him even went so far as suicide planning and preparation.

[83] Mr Allen lost interest in his life. He became uncharacteristically angry more easily and felt deeply the loss of a job that he had held for a long time and which he considered he had performed well. Mr Allen eventually consulted his general practitioner, was diagnosed with depression, and given medication that he continues to take. That and other medication for a sleeping disorder, probably attributable to the unjustified dismissal, have begun to improve his state of health. Despite this, Mr Allen still exhibits the stammer he developed after his dismissal. His planned marriage in early 2007 went ahead although the honeymoon was cancelled because of the consequences of his dismissal. Mr Allen has had to borrow money from his family to attempt to keep up with paying the bills but has not been successful in that exercise. While able to meet child support arrears when he was employed, he fell further behind with these payments after his dismissal and now faces the prospect of

court proceedings to enforce them. Mr Allen's self-esteem has been knocked and he has gone through periods of antagonism towards those close to him. As his own words in evidence describe it:

> *Before 2007, I was someone who was strong, happy and healthy. I would even say that I was awesome at my job. Today I feel worthless. I've lost faith in other companies too. I feel that there is no one I can trust.*
>
> ...
>
> *There is nothing worse than losing everything that I have worked hard for.*

[84] Although it is always difficult to equate such consequences of unjustified dismissal with a precise figure for monetary compensation, I assess that to the extent that these consequences can be so compensated for, a fair award in Mr Allen's favour is $20,000 and I so direct.

[85] I reserve costs. Mr Allen is entitled to an award in both the Authority and this Court. If the parties are unable to settle this question within one month, Mr Allen may apply by memorandum, with the defendant having the period of 3 weeks following receipt to respond likewise.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Monday 4 May 2009