

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 9/08
CRC 54/07**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN JOHN COFFEY
Plaintiff

AND THE CHRISTCHURCH PRESS, A
DIVISION OF FAIRFAX NEW
ZEALAND LIMITED
Defendant

Hearing: 12 June 2008
(Heard at Christchurch)

Appearances: J A Wilton, Counsel for Plaintiff
Raewyn Gibson, Advocate for Defendant

Judgment: 24 July 2008

JUDGMENT OF JUDGE B S TRAVIS

[1] Mr Coffey was dismissed from his position as a sports journalist with the Christchurch Press newspaper (“The Press”) after swearing at the sports editor in a heated moment. He had been on a final written warning for similar conduct.

[2] The Employment Relations Authority found that the Christchurch Press had carried out a full and fair investigation into the allegation that Mr Coffey had used offensive and disrespectful language to his supervisor, Coen Lammers, on 9 March 2007. In the light of previous warnings about the unacceptability of such conduct and its consequences, it held that the decision to dismiss Mr Coffey on notice was justifiable because it was what a fair and reasonable employer would have done in all

the circumstances at the time of the dismissal. Mr Coffey challenged that determination and sought a full hearing of the entire matter, a hearing de novo.

Factual background

[3] The parties were able to agree on a series of facts and a chronology. The parties also led evidence at the hearing and I will include my factual findings based on that evidence in the following summary.

[4] Mr Coffey commenced employment at The Press in 1963 as a 16-year-old cadet journalist. He had been employed for some 44 years prior to his dismissal on notice on 22 March 2007. He is a nationally known sports journalist, specialising in the coverage of rugby league, cricket, boxing and yachting. He has written four books about rugby league.

[5] In August 2003 Mr Lammers was appointed sports editor at The Press. On 25 November 2003, Mr Lammers provided Paul Thompson, the editor of The Press, with a record of a conversation between himself and Mr Coffey which Mr Lammers considered to be unacceptable. The issue related to an editorial decision to remove the quotation from a cricket story that Mr Coffey had written.

[6] On 27 November 2003, Mr Thompson issued Mr Coffey with a written warning. This recorded Mr Lammers's concerns that Mr Coffey had been dismissive, abusive and aggressive towards him, that they had discussed this in a meeting with Mr Coffey who had apologised for his response to Mr Lammers when the latter rang him at home. Mr Thompson is recorded as having stated that Mr Coffey had the right to express any legitimate concerns but it was not acceptable for him to be verbally abusive to his supervisor. The letter recorded Mr Coffey's acceptance of Mr Thompson's decision to issue a written warning because Mr Coffey's outburst to his supervisor was inappropriate and concluded:

The effect of the warning is that if you are verbally abusive to your supervisor, or indeed any staff member, in the next 12 months you will face further disciplinary action, and your employment may be in jeopardy.

[7] On 2 August 2006, Mr Thompson met with Mr Coffey and subsequently wrote to him outlining the issues which they had discussed that day concerning Mr Coffey's performance and behaviour. The letter referred to the 2003 written warning and records that Mr Thompson talked about two main issues. The first was a complaint about Mr Coffey's conduct in the newsroom over the handling of a story. It records Mr Coffey's own account that he said "*...if you knew who had changed the first story I'd ring their fucking neck*".

[8] The second concerned Mr Coffey's performance and his attitude, which could often be seen to be negative and unhelpful. Mr Thompson proposed that they meet the following week to discuss these issues further. He expressed the preliminary view that these were disciplinary matters which might, if found to have substance, result in a written warning or termination of his employment.

[9] On 7 August 2006, Mr Thompson wrote to Mr Coffey enclosing a report from Mr Lammers alleging a number of problems Mr Lammers was experiencing with Mr Coffey's attitude and performance. On 9 August a meeting was held to discuss these matters, during which Mr Coffey provided a written response to the allegations. Mr Coffey's written response acknowledged that he had said to Lyn Riley, a sub-editor "*...if I knew who had changed the first story I'd ring their fucking neck.*"

[10] On 10 August 2006, Messrs Coffey, Thompson and Lammers and Ms Rosalind Webby, H R Manager, met and Mr Thompson advised Mr Coffey that a decision had been reached to issue him with a written warning. On 14 August Mr Thompson wrote to Mr Coffey issuing him with a formal written warning said to be as a result of Mr Coffey being "*unacceptably disrespectful to the news editor*" and because of his threat which was highly offensive and bullying in its nature. Mr Thompson noted Mr Coffey's willingness throughout the discussion to apologise to Mr Riley and his unprompted shaking of Mr Lammers's hand at the conclusion of the meeting and expressed the hope that Mr Coffey would continue to make significant improvements to his relationships. The letter listed the defendant's expectations which included Mr Coffey showing courtesy and respect to his colleagues. He was directed to meet weekly with Mr Lammers to review the past week's work. There would be a more formal monthly review of his work carried out

by Mr Thompson taking into account the reports he had received from Mr Lammers. Mr Coffey was offered confidential counselling and the opportunity to approach either Mr Lammers or Mr Thompson for assistance. The letter concluded, “*I am seeking consistent change or improvement in both your performance and attitude. If this does not occur in spite of the measures we are putting in place, then I will have no option to progress those matters as a disciplinary issue which, ultimately, may lead to the termination of employment.*”

[11] There were weekly review meetings between Mr Lammers and Mr Coffey and correspondence from Mr Thompson to Mr Coffey about these meetings. In his evidence to the Court Mr Coffey said that he was concerned about a lack of communication from Mr Lammers and had some disagreements with him, particularly about rugby league coverage. He did not challenge the August 2006 written warning because he had already apologised to the news editor and claimed that such flare-ups were not uncommon at The Press in his experience. He was also concerned over some aspects of the review process with Mr Lammers because meetings were changed, postponed, and, on some occasions, cancelled. He felt he was being put unfairly under the microscope. He had initiated a meeting with Mr Thompson on 8 December 2006 to make him aware of his concerns. The meeting was attended by Messrs Coffey, O’Connell (Mr Coffey’s representative), and Thompson and Ms Webby. The notes recorded Mr Thompson saying that Mr Coffey had to show Mr Lammers respect.

[12] Following that meeting Mr Thompson wrote to Mr Coffey on 13 December 2006 requesting his attendance at a disciplinary meeting to discuss a number of concerns about Mr Coffey’s alleged poor performance, attitude and behaviour over the past 2 months. It cited a particular incident on 1 November 2006 in which, during a conversation with Mr Lammers, it was said that Mr Coffey had become heated and argumentative to the point where he called Mr Lammers “*a fucking idiot*” in a loud and hostile tone. Mr Thompson stated he overheard Mr Coffey making that comment. Mr Coffey was advised that if that allegation was substantiated following their discussion it might result in a final written warning. The letter also addressed allegations of poor performance.

[13] The meeting actually took place on 20 December 2006 and Messrs Coffey, O'Connell, Andrew Marsh (Mr Coffey's solicitor), Thompson and Lammers and Ms Webby attended. The meeting discussed a response Mr Coffey had provided and on his behalf Mr O'Connell expressed regrets about a heated debate Mr Coffey had had with Mr Lammers and stated that Mr Coffey was prepared to apologise. Mr Coffey stated he had been frustrated by having to respond several times to the same question from Mr Lammers and that it was not unusual for the "f" word to be used. On his behalf Mr Marsh stated that Mr Coffey accepted that it was inappropriate and there was no suggestion that it would be repeated. There was a discussion about the traumatic health incident that Mr Coffey had recently experienced.

[14] The parties met again on 22 December, during which Mr Coffey was advised that a decision had been reached to issue him with a final written warning. That warning was recorded in a letter given on 23 December, which is incorrectly dated 21 December 2006. The letter states that calling Mr Lammers "*a fucking idiot*" was unacceptable, offensive and unprofessional. Mr Coffey's explanation that the comment was a reference to the stand Mr Lammers was taking and not to Mr Lammers as a person or as a supervisor was rejected. It referred to the written warning in August 2006 which made it clear that it was unacceptable to direct threats, contempt, disrespectful, or offensive language towards any of Mr Coffey's colleagues. The letter stated that the appropriate outcome in the circumstances was to issue him with a final written warning for his conduct on 1 November.

[15] Mr Coffey was directed to refrain from directing offensive, contemptuous or threatening language at the sports editor or any of his colleagues. He was again offered the defendant's confidential employee assistance programme through the health and safety advisor and was told not to undermine the sports editor's leadership. A review meeting in mid February was arranged and fortnightly review meetings were to take place with Mr Lammers.

[16] Mr Coffey gave evidence that he was unhappy about the final written warning and felt it was unjustified. He decided not to challenge it, because he considered if he did so it would worsen the pressure he was under, both at work and in his personal life. He had been ill and both his wife and son had undergone

surgery. He took a fortnight's leave and had been attending a gym to increase his fitness and reduce stress. He claimed he worked hard and diligently in his work and in his contact with others and went out of his way to be civil and co-operative with Mr Lammers. This is borne out by notes of the review meetings that were held in January and February which showed that his behaviour had been very good and that he and Mr Lammers were working together well and communicating well. The notes of the 29 January 2007 meeting record he said that he had received legal advice that he had grounds to take a grievance against The Press, but he was sitting on it for now.

[17] The Canterbury cricket team was announced on Friday 9 March 2007 and Mr Coffey noted that the team included a schoolboy. He made enquiries and ascertained that the player was New Zealand's youngest first class player in 59 years. That day he wrote a story with that fact as the introduction. In the evening Mr Lammers changed the introduction of Mr Coffey's cricket story by adding the words to the story "*New Zealand's youngest in a decade*".

[18] This was a mistake. The opening words should have read "*New Zealand's youngest in over a half a century*". Mr Coffey saw the mistake when he returned to the office that evening. Although there is some issue between the parties how this came about, I find he was shown his article with the changes by Mr Lammers. Mr Lammers accepted that he had made a mistake when this was pointed out to him by Mr Coffey and corrected it before the story went to print.

[19] Mr Lammers wrote to Mr Thompson complaining of what he described as inappropriate behaviour by Mr Coffey which he felt breached the warning Mr Coffey had received about his behaviour and language. Mr Lammers accepted that he had incorrectly edited the story in the evening and was too quick and forgot to double check. He claimed that from previous experience he had learned to make sure that Mr Coffey had a look at his changes before they went to print, and:

Naturally, John picked up the mistake but his reaction was completely inappropriate. He used the F word several times in his tirade, telling me to leave his "f-ing copy alone", that I "always f.. it up" etc. He then added

that I shouldn't feel too bad because "they" – pointing at the editors office – "also fuck things up" – saying he was still waiting for his February review.

I am the first to admit I made a mistake with John's copy, but his response was totally uncalled for. I have not received any apology since.

John has been very civil in recent months, but Friday's brain explosion to me demonstrates that he is not changed at all when things get a bit touchy.

[20] Mr Thompson wrote to Mr Coffey on 14 March 2007 referring to the written warnings, including the final written warning, and the complaint from Mr Lammers and sought a formal response to the allegation that he had once again expressed contempt for, and directed offensive and disrespectful language towards, others. He was requested to attend a meeting together with a support person and was warned that his employment might be terminated should Mr Thompson consider misconduct had occurred and that termination was appropriate.

[21] As Mr Coffey did not receive this letter Mr Thompson wrote again on 16 March attaching a copy of it. The meeting date was adjourned until 22 March to accommodate Mr Coffey's request to enable his representative to attend. At that meeting, as at the previous ones, Ms Webby took handwritten notes. The parties acknowledged that her notes generally accurately reflect what occurred during the course of the meetings she attended.

[22] Mr Coffey was represented by Mr O'Connell, who made the following submissions: Mr Coffey was upset and used the f-word on a number of occasions; Mr Coffey had said "*you have fucked this up*" not "*you always fuck up*", the incident was prompted by a fairly significant error or inaccuracy and Mr Coffey's high standard of accuracy was well known. Mr O'Connell contended that Mr Coffey was not being abusive to Mr Lammers, but did use very strong words which might have led Mr Lammers to have felt humiliated. Mr Coffey was passionate about his accuracy and his outburst was because of those high standards and it was only good fortune that he had come in on the Friday night and was able to pick up the mistake. Mr Coffey had offered a "*sorry mate*" to Mr Lammers afterwards. Mr Coffey had

been diligently complying with the terms of the previous warning and was a bit frustrated that the reviews had not been regular. It was only a momentary lapse and Mr Coffey had made some personal life changes, joined a gym, organised his holidays and had made a real effort to be civil.

[23] Mr Coffey said that he had gone through 3 months without any problems and was looking forward to the last review in February which did not take place. He complained the meetings had been focused on the negative but each had ended on a good note. He said that he thought he had “*exploded at the time*”, was certain he had not abused Mr Lammers personally and had said “*you fucked this up*”, language others used and which was heard around the building.

[24] At the conclusion of the meeting Mr O’Connell claimed that Mr Coffey was contrite, the facts were reasonably clear and that Mr Coffey wanted to move forward. He also claimed that Mr Coffey’s relationship with Mr Lammers had improved.

[25] The meeting was adjourned until later that day, at which time Mr Thompson advised Mr Coffey that he had reached a decision to terminate Mr Coffey’s employment on notice. That same evening, Mr Thompson sent an e-mail to all editorial staff advising that Mr Coffey had left his employment at The Press.

[26] Mr O’Connell raised the personal grievance on behalf of Mr Coffey the following day. He also sought written reasons for the dismissal. The defendant wrote to Mr O’Connell on 3 April stating that Mr Coffey was dismissed on notice for directing offensive and disrespectful language towards another staff member after having received warnings for a similar offence on 14 August 2006 and a final warning for a similar offence on 22 December 2006. In each case it was said that Mr Coffey had directed his comments to a supervisor or another senior member of the department’s management team and that behaviour of this kind was considered by the defendant to amount to misconduct.

[27] It is accepted by the parties that although the warning letters included reference to Mr Coffey’s performance, he was not dismissed for any matters relating

to his competency but rather his conduct and attitude in the workplace. He was paid out 4 weeks' wages in lieu of notice.

[28] At the conclusion of the Employment Relations Authority investigation it was brought to the attention of the defendant that Mr Coffey, as a senior graded reporter, was entitled under the relevant collective agreement to 8 weeks' notice, and a further 4 weeks' pay was credited to his bank account.

[29] In his evidence to the Court Mr Coffey said he was appalled and outraged by Mr Lammers's mistake because it was something a rookie journalist would not have done and he became very angry. He claimed that if it had gone to print uncorrected, it would have made him look like an idiot and an incompetent. Normally he did not work on Friday evenings and he would not usually have been there to correct Mr Lammers's mistake. He claimed that he told Mr Lammers that he had "*fucked up my copy, and that he had no need to fuck about with my copy.*" He said that he was certainly annoyed by what Mr Lammers had done to his copy and if he had done something like this he would have expected to be bawled out for it, as would any other journalist. He claimed that the use of the word "*fuck*" in that kind of context was not uncommon at The Press, particularly at times of pressure and in his experience Mr Lammers was the most regular user of the word in the sports department.

[30] Mr Coffey spoke of an incident of a flare-up with another staff person some 20 years earlier. That had been between himself and a colleague. In relation to the August 2006 warning, he accepted that perhaps he had not apologised to Mr Riley at the time, but claimed that he had apologised to him by the time he received the warning. Also he, somewhat unwillingly, accepted that he had acknowledged during the disciplinary meeting that his behaviour was not acceptable and that he would modify it in the future.

[31] He continued to maintain that the final warning was unjustified although he accepted that he had called Mr Lammers a "*fucking idiot*" on 1 November 2006. He said he regretted having done so, was prepared to apologise and that he had acknowledged at the disciplinary inquiry into this incident that his conduct was

inappropriate and would not be repeated. He claimed that he had conceded this at the time because he was trying to smooth the waters.

[32] He claimed that the conduct for which he was given the final warning was not the same conduct as he had been given the first warning for. The first involved him going over to one person and making a point, the other warning related to an exchange in a private room which had got heated because Mr Lammers asked him the same question over and over again. Mr Coffey took issue with the allegation that he was loud, heated and abusive towards Mr Lammers in front of other staff. He claimed that no other staff heard anything to the extent that was alleged.

[33] Mr Thompson gave evidence confirming the steps he had taken and his view that it was not possible for Mr Coffey to be reinstated, because of his repeated conduct and the reallocation of his duties in the sports department. Mr Thompson had followed up Mr Coffey's claim that no one else had heard of the incident and Mr Thompson spoke to the other journalist in the area. That journalist had claimed he had not seen or heard anything. Mr Thompson still remained of the view that Mr Coffey had approached Mr Lammers and was loud, heated and abusive towards him.

[34] As to the 1 November incident, Mr Thompson gave evidence he had actually heard Mr Coffey calling Mr Lammers a fucking idiot because their offices were joined in those days. He accepted he had not reacted to it until Mr Lammers had complained a few days later. He agreed that there was a delay in dealing with it but claimed they had been very careful in the way they had dealt with the complaint because of the changes they were trying to effect in Mr Coffey's behaviour. It also appears Mr Thompson was frequently away from his office at the time which may have contributed to the delay.

[35] Mr Thompson in cross-examination did not accept the significance of the difference between the two versions of what had been said between Mr Lammers and Mr Coffey. He put the conduct in the context of a long and patient process to change Mr Coffey's pattern of behaviour. He said the crucial point of what had happened on the evening of 9 March was the insolence and disrespectful language used to Mr Lammers. This was after Mr Thompson had been very clear about the

way Mr Coffey needed to behave towards Mr Lammers in particular, and with other colleagues and superiors. Mr Thompson had found Mr Coffey's conduct on this last occasion was disrespectful, threatening and bullying but he accepted there was nothing in the notes from Mr Lammers that said that Mr Lammers had felt threatened or bullied. He said in his view, having talked with Mr Lammers and with Mr Coffey, he preferred Mr Lammers's account. He accepted up until that last incident the parties were getting on better and that Mr Coffey had been civil and courteous towards Mr Lammers.

[36] Mr Lammers gave evidence to the Court that after Mr Coffey had picked up the mistake on the Friday night, Mr Coffey "*went off*" at him. Although Mr Lammers had attempted to get Mr Coffey to calm down, Mr Coffey continued to direct offensive language towards Mr Lammers in an aggressive and extremely patronising manner. He said that he would never work with Mr Coffey again because he had never been treated in the manner which Mr Coffey had treated him. He did not regard himself as a thin-skinned type of person and had a wide experience working in various parts of the world, and had previously dealt with direct, confrontational and strong characters. He had worked at The Press until 1999 and then went to Australia and had come back after 5 years into the position of supervisor in the sports department. He accepted that having have left as a junior and returned as a supervisor created a difficult situation and there was some resentment from older staff which was a natural human reaction. He claimed that Mr Coffey was the most difficult journalist that he had ever had to manage.

[37] Mr Lammers accepted that after the mistake was fixed up life just went on and he got on with his normal work, as did Mr Coffey, who he gave permission to go home about half an hour later. He accepted Mr Coffey may have assumed matters were back to normal. They had worked together in quite close proximity between 9 March and the disciplinary meeting, and Mr Coffey was not suspended.

[38] Mr Lammers said he respected Mr Coffey as one of the best sports writers in the country, but it was very difficult to continue to like someone who continues to attack you. He was no longer the sports editor and would not have to work with Mr Coffey on a day to day basis if he was reinstated, but he was still supervising the

sports department as part of his new role as deputy editor. A new sports editor had been appointed.

[39] As to the 1 November incident, which Mr Lammers had reported to Mr Thompson the following day, he accepted Mr Coffey had not been supplied with a copy of his report and there had been a further meeting between the two on 12 November, during which he had made some hard hitting comments about Mr Coffey's professional conduct, but he did not consider it necessary at that point to point out to Mr Coffey that he was not happy about the way that Mr Coffey had been communicating with him.

Submissions

[40] Mr Wilton raised a preliminary issue about an argument the defendant had raised in the Authority that where a dismissal is on notice, the standard of justification required is lower than serious misconduct. Mr Wilton accepted that prior warnings could lower the threshold, as they were part of the circumstances required to be considered under s103A of the Employment Relations Act 2000, and were relevant to the employer's decision, but it was not accepted that payment in lieu of notice would have the same effect. He set out in an appendix his reasoning to this effect.

[41] In *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* [1983] ACJ 653, (1983) ERNZ Sel Cas 59 (the *Hepi* case), Judge Williamson stated at p666, when dealing with the issue of justification:

This broad test of justification is the same for dismissals upon notice and dismissals without notice.

[42] There are however, statements in other cases such as *Northern Distribution Union v Newmans Coach Lines Ltd* [1989] 2 NZILR 677, at 682 and *Northern Hotel IUOW v Johannink (No2)* [1992] 2 ERNZ 917 to the effect that summary dismissal should be reserved for the most serious kinds of misconduct which go to the root of the employment contract so as to destroy it all together or to render it impossible of

continuation. The Court of Appeal in *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at 487, when referring to conduct that deeply impairs or is destructive of the basic confidence or trust that is an essential of the employment relationship, were discussing the kind of conduct that would usually justify summary dismissal.

[43] I accept Mr Wilton's submission that the issue is not settled and that in any event the statutory test for justification in s103A requires all the circumstances to be looked at. He correctly observed that in *Air New Zealand Ltd v Hudson* [2006] ERNZ 415, Judge Shaw concluded that the previous law in the *Hepi* case has been restored in the context of s103A. I observe that in *Hepi*, Judge Williamson expressed the view that the giving of notice could occasionally be relevant when considering the justification of the employer's actions.

[44] Mr Wilton submitted that the present case was intensely factual and that during the 44 years that Mr Coffey had worked for The Press with a number of editors, he would not have survived if he had been incompetent or unable to work with others. Mr Coffey had made efforts to put the past behind him and to work on his relationship with Mr Lammers, even though he had received a warning with which he did not agree. As to the final incident Mr Wilton claimed that Mr Lammers had made an astonishing error which could have made Mr Coffey the laughing stock of Canterbury cricket. Mr Wilton referred to Mr Thompson's indifference as to the dispute over what precisely had been said and his concentration on Mr Coffey's manner as being disrespectful, threatening and bullying. He noted that Mr Lammers had made no reference to feeling threatened or bullied and that a person of reasonable fortitude would readily have got over such an encounter. Mr Lammers had kept calm and life went on normally. Mr Wilton contended insufficient weight was given to Mr Coffey's long and illustrious record of service. A fair and reasonable employer would also have recognised the unusual nature of the incident.

[45] Turning to the 1 November incident, Mr Wilton observed Mr Thompson had actually heard Mr Coffey call Mr Lammers a fucking idiot but had done nothing about it and had then participated in the 8 December meeting at Mr Coffey's behest,

but had not mentioned it at that meeting. By 13 December it had been raised to the extent of a final written warning. Mr Wilson suggested Mr Thompson was not really concerned about the swearing and was more concerned about Mr Coffey's old-fashioned approach, as appears from the written warning he issued. He submitted that Mr Thompson's actions subsequent to the dismissal were illuminating because Mr Coffey was not replaced, which indicated there was overstaffing. Mr Wilton observed it would have been very expensive to have made Mr Coffey redundant.

[46] Miss Gibson submitted that the conduct that had given rise to the previous warnings was serious enough to have constituted serious misconduct but in light of the length of employment and the plaintiff's illness, the defendant had acted leniently by issuing warnings. The dismissal on notice had come shortly after a final warning for similar misconduct. She submitted the defendant, therefore, did not have to determine whether the plaintiff's conduct amounted to serious misconduct to substantively justify the dismissal. She submitted that there was precedent for finding that the provision of notice in some circumstances reduces the degree of seriousness but the defendant's position in the present matter was that this was a dismissal on notice after reliance on two previous warnings and therefore there did not have to be proof of serious misconduct. She relied on *Hepi* where Judge Williamson stated, at 671:

One instance of serious misconduct may be sufficient. One instance of simple misconduct is unlikely to be sufficient, whereas several instances of simple misconduct following warnings may be sufficient.

[47] Miss Gibson referred to decisions which emphasised the seriousness of conduct of the present nature where it is directed towards a supervisor, citing *Wellington Road Transport and Related Industries Motor and Horse Drivers IUOW v Shell Oil (NZ) Ltd* [1980] ACJ 217, *NZ Baking Trades Employees IUOW v The French Bakery Ltd* [1991] 1 ERNZ 409, *Macadam v Port Nelson Ltd (No1)* [1993] 1 ERNZ 279 and *Dodd v D E & L M Spence Ltd, (t/a Pak'n'Save)* [2002] 2 ERNZ 572. These cases noted an obvious difference between insolence and insubordination accompanied by liberal use of bad language to a superior and various degrees of abuse as between employees of equal rank. The latter will not usually amount to

repudiatory behaviour, the former may well be regarded as disruptive and repudiatory of the employment relationship. In the present case Miss Gibson submitted that on each occasion the use of foul language was accompanied by the plaintiff acting in an aggressive manner which was considered by the recipients to be abusive and offensive.

[48] Miss Gibson maintained that the plaintiff's termination was not a summary dismissal, citing *Aotearoa International Ltd v Madsen* [1996] 1 ERNZ 511 (CA). She submitted the delay in following up the 1 November incident was not material because the complaint was dealt with thoroughly and there was no question of prejudice.

[49] Miss Gibson submitted there was no evidence that Mr Thompson was addressing redundancies because of the care that he took in issuing the warnings and the efforts he made which showed a desire to retain Mr Coffey's services. The warnings and the review process were not undertaken with the aim of dismissing him but were intended to turn his conduct around.

Determination of the Authority

[50] The Authority found that Mr Coffey's outburst was directed at Mr Lammers rather than being a statement about the error. It found the language used as part of the angry outburst was disrespectful to Mr Lammers and offensive and was not an appropriate expression of Mr Coffey's frustration after he had received clear warnings that such behaviour and language were not acceptable.

[51] Having found that Mr Coffey's behaviour constituted misconduct, the Authority considered whether the decision was justifiable in all the circumstances. It observed that Mr Thompson had said that he had agonised over the decision because Mr Coffey had made a very valuable contribution to The Press as a journalist over a 44-year period and that it was unlikely that he would ever work again in a similar position. The Authority was satisfied that Mr Thompson took Mr Coffey's length of service into account. The Authority found that a fair and reasonable employer would conclude that the warnings were particularly explicit as to what behaviour and

language was unacceptable and the consequences if there was similar conduct. Mr Thompson had also noted the improvement in Mr Coffey's performance since the final written warning. The Authority concluded that in the circumstances it was not such a long period without any unacceptable conduct as to enable a fair and reasonable employer to conclude with certainty that the conduct would not be repeated.

[52] The Authority also observed that a fair and reasonable employer would consider whether there was another solution to dismissal and saw that the notes taken at the 22 March 2007 meeting recorded Mr Thompson seeking other solutions. The notes also record Mr Thompson's expression of concern that the solutions to date were exhausted and that Mr Coffey's behaviour was not going to stop. The Authority noted that Mr Coffey had been offered EAP counselling when he had been warned on previous occasions and concluded that, if Mr Coffey had thought that he required some assistance in managing his anger, there was an opportunity for this to have been put forward on his behalf on 22 March. The Authority observed that Mr Lammers was shaken and upset by the outburst and the effect on him was a matter that Mr Thompson was entitled to take into account. The Authority concluded:

It was very sad that Mr Coffey's employment ended in the way that it did. I find that a fair and reasonable employer, where there was repeated conduct notwithstanding clear warnings that such conduct could result in termination, would have concluded that Mr Coffey should be dismissed on notice.

Conclusion

[53] This is a difficult case and, thanks in no small part to the advocacy skills of Mr Wilton, it is finely balanced. It was most unfortunate for such an illustrious career to end in this way but I am obliged by s103A to consider whether the actions of the defendant were those that a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[54] At that point in time Mr Coffey had received two very explicit warnings, the second of which was expressed to be a final warning. They made it clear that conduct of the type that occurred on 9 March 2007, particularly when addressed to a supervisor, would no longer be tolerated and could result in his dismissal. Although at some point Mr Coffey indicated his dissatisfaction with the warning following the 1 November 2006 incident, neither the factual circumstances giving rise to that warning, nor the warning itself, were challenged at any relevant time.

[55] I have some concerns about the way in which the final warning was issued. Mr Thompson overheard the words which were found to constitute misconduct and which founded the warning, and then shortly afterwards received a complaint from Mr Lammers. Notwithstanding this, two meetings were held with Mr Coffey, one with Mr Lammers and one with Mr Thompson and at neither of those meetings was the issue of his conduct on 1 November raised. This was in spite of the fact that very full notes of the first meeting were prepared by Mr Lammers and sent to Mr Coffey and these notes showed that Mr Lammers had very frankly dealt with issues of what were regarded as inadequate work performance on Mr Coffey's part.

[56] However, in view of the way Mr Coffey had admittedly acted on 1 November towards Mr Lammers, it is perhaps not surprising that Mr Lammers did not raise that issue when he met with Mr Coffey. It is somewhat more difficult to understand why Mr Thompson did not raise the matter with Mr Coffey at the 8 December 2006 meeting that Mr Coffey had requested, but again this may be because Mr Thompson wanted to give Mr Coffey adequate notice of the seriousness with which his conduct on 1 November was being viewed. The delay in dealing with Mr Lammers's complaint is also explainable by Mr Thompson's absences from the office at this time. In the end the complaint was dealt with thoroughly and Mr Coffey was given a full opportunity to deal with Mr Thompson's concerns.

[57] The language used and the manner in which Mr Coffey admittedly addressed Mr Lammers on 1 November do show contempt for Mr Lammers's position as his supervisor. That was a serious matter which Mr Thompson was bound to investigate. On balance I conclude that a fair and reasonable employer was entitled

to conclude that in light of Mr Coffey's previous conduct, a final written warning was justified.

[58] In *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering IUOW* (1989) ERNZ Sel Cas 575; [1990] 1 NZLR 533, the Court of Appeal accepted that a final warning administered to a worker could give rise to an unjustified disadvantage personal grievance claim because the employment was affected to the worker's disadvantage by making his contract of employment less secure and making him more vulnerable to dismissal. The Court of Appeal found that an employee becomes significantly more vulnerable for dismissal because what would otherwise have been a warning category offence would now become a dismissible offence.

[59] A proper review process was then put into place. As a result of this and some personal actions taken by Mr Coffey, his relationship with Mr Lammers appeared to have improved during January and February 2007. However, the next time that an incident occurred which could have justifiably upset Mr Coffey, in this case because of the way in which his article was dealt with, his reaction was very similar to the way he had reacted to Mr Lammers on 1 November 2006 and to another colleague in August 2006 when he thought someone was interfering with his copy.

[60] I am satisfied from Mr Thompson's evidence that he was reluctant to take the ultimate step of dismissal but that he was concerned that should a further incident occur which caused Mr Coffey to again lose his temper, Mr Lammers or other staff could be subjected to the same disparaging and obscene language, which would be distressing to them. Mr Thompson was entitled to accept Mr Lammers's statement that he was upset by the way Mr Coffey had conducted himself on 9 March, even though the two men managed to work normally for another half hour that night and for the remaining week leading up to the disciplinary inquiry. However the return to normality only suggests that there were no stressful matters in that period which would have caused Mr Coffey to conduct himself in a manner that was inappropriate. Mr Thompson could justifiably have no confidence that Mr Coffey would conduct himself properly on any future stressful occasion. Such occasions apparently are not uncommon in the process of publishing a daily newspaper.

[61] Like the Authority, I consider it was proper of Mr Thompson to look for other solutions. One, which could have been offered by Mr Coffey in light of the suggestions made to him on at least two previous occasions, was that he might benefit from EAP counselling or some form of anger management. That was not suggested by Mr Coffey. In such circumstances Mr Thompson was entitled to conclude that he had no adequate reassurance that such conduct would not repeat itself.

[62] I observe that the final incident took place within 77 days of the issue of the final written warning on 23 December 2006. It also appears that Mr Coffey was on leave for part of that period.

[63] It is difficult to escape the conclusion that Mr Coffey was entirely the author of his own misfortune in speaking to Mr Lammers in the way that he did over a mistake that Mr Coffey was fully entitled to feel concerned about. How much worse would have been his reaction had the mistake not been noted by him in time and if his article had been published in the way Mr Lammers had altered it? The evidence was that such mistakes do happen and hopefully are rectified, but the way that Mr Coffey reacted was entirely inappropriate, especially in light of the warnings he had already received.

[64] I am fortified in the conclusion that I have reluctantly reached that the defendant has succeeded in discharging the burden of justifying the dismissal, by the reasoning and conclusions of the Authority with which I completely agree. I also conclude that as a result of a fairly conducted investigation, the presence of previous written warnings including the final written warning, with no reassurance that it would not happen again, a fair and reasonable employer was entitled to conclude that Mr Coffey's misconduct on 9 March 2007 was sufficiently serious to warrant his dismissal on notice.

[65] The challenge therefore fails.

[66] Costs are reserved. If they cannot be agreed they may be the subject of an exchange of memoranda, the first of which is to be filed and served within 60 days

of the date of this judgment. The memorandum in response may be filed and served within a further 30 days.

B S Travis
Judge

Judgment signed at 3.30pm on 24 July 2008