

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 8B/07
ARC 22/06**

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

BETWEEN JULIAN BLAKER
Plaintiff

AND B & D DOORS (NZ) LIMITED
Defendant

Hearing: 23-26 July 2007
(Heard at Auckland)

Appearances: Brett Cunningham, counsel for plaintiff
Geoff Bevan, counsel for defendant

Judgment: 21 September 2007

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff has challenged a determination of the Employment Relations Authority which found that he had been justifiably dismissed for taking aluminium offcuts without permission and lying during the disciplinary investigation. The Authority found the plaintiff had committed serious misconduct and it was reasonable for the plaintiff to have decided that the appropriate sanction was dismissal. The plaintiff has elected to have the whole matter reheard by the Court.

[2] The plaintiff was employed in August 2004 to supervise installers of doors manufactured by the defendant. Those installers were frequently independent contractors. The plaintiff went to client sites with the installers from time to time and became aware that when clients were having doors replaced, and had no wish to

keep the old doors, the installers would remove them and take them to scrap dealers. Occasionally such doors found their way back to the defendant's premises.

Test of justification

[3] There is no issue in this case that the plaintiff was dismissed. The issue is whether that dismissal was justified, the onus being on the defendant. Section 103A of the Employment Relations Act 2000 contains the following:

103A Test of justification

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

[4] The section was examined in detail in *Air New Zealand Ltd v Hudson* [2006] 1 ERNZ 415. The section requires the employer's actions to be examined objectively to determine what a fair and reasonable employer would have done in all the circumstances of the case. In *Hudson* the Court determined that this restores to the Authority and the Court what Williamson J, in *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59; [1983] ACJ 653 (the "Hepi" case), called the duty of inquiry and a right of judgment. As was said by Judge Shaw in *Hudson* at para [120]:

...the s 103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

[5] The procedures adopted and actions taken by the employer are also to be objectively judged although, as the common law authorities make it clear, the circumstances and resources of the employer's business may influence the nature and extent of the investigations undertaken (para [138] *Hudson*).

[6] In the *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418, Chief Judge Colgan, in dealing with an issue as to whether a substantively justified dismissal could be unjustified because of a failure to investigate allegations fairly and reasonably, stated:

[56] Do Unitec's failures to investigate these allegations fairly and reasonably, cause what might be otherwise categorised as a substantively justified dismissal to be unjustified? Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand Parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly. As has been accepted in judgments of this Court³, the new s103A test does not mean that the Court will substitute its own decisions for those of the employer. So it is not a question of how any individual Judge would have dealt with the case as employer. Rather, the Court must apply the standards of a notional fair and reasonable employer, in the particular circumstances of the parties, on an objective basis and at the time of the relevant events.

[7] When considering all the circumstances, as s103A requires, it is helpful to look at the list contained in *Hepi* where the Court observed:

³ *Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155; *Fuiava v Air New Zealand Ltd* (2006) 4 NZELR 103.

... In a list not meant to be exhaustive we note that, where appropriate, the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated, and implied); the terms of any other relevant agreements; and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community. ... ((1983) ERNZ Sel Cas, 70; [1983] ACJ, 666)

[8] Bearing the obligations imposed on the Court by s103A in mind, it is helpful to first approach the matter from the defendant's point of view, to analyse whether its investigation, the way it acted and the conclusion it reached, were what a fair and reasonable employer would have done in all the circumstances, at the time of the dismissal. In doing so I accept Mr Bevan's formulation of the issues the Court will have to resolve in determining whether the defendant has discharged the burden of justifying the dismissal, namely:

- (i) was the defendant justified in concluding that the plaintiff could not reasonably have believed he was authorised to remove the offcuts?
- (ii) was the defendant justified in concluding that the plaintiff had lied during the disciplinary investigation?
- (iii) did the defendant follow a fair process?
- (iv) was the decision to dismiss the plaintiff one which a fair and reasonable employer would have made in all the circumstances?

The actions and conclusions of the defendant

[9] Steve Dean, the national operations manager of the defendant who oversaw all aspects of the production area of the defendant, was in Auckland on 7 December 2005. Henry Henry was employed in the production side of the business in Auckland. The plaintiff was employed in the sales area of the business under Kerry Heard's supervision. Although the plaintiff and Mr Henry did not work in the same

area it was common ground that the plaintiff, being a supervisor, was in a superior position to Mr Henry in the staff hierarchy.

[10] At about 1.30pm Mr Dean was approached by two supervisors, Hugh Wrigley and Les Svenson. The following is an extract from Mr Dean's "SUMMARY OF FACTS" which he had typed on 9 December from diary notes he made immediately after the events in question:

Wednesday 7 December approx 1:30pm

I was approached by Hugh Wrigley and Les Svenson who asked me if I knew of any reason Henry Henry was removing aluminium from our recycle bin and placing it in the company trailer. I confirmed I did not know why anyone should be moving the material and went with them to view the material. ...

Wednesday 7 December approx 2:30pm

I asked Hugh Wrigley to accompany me to view the trailer for a second time to see if we could clarify the situation. When we arrived I noticed the trailer had been moved and was empty. Noticing the department supervisor, Julian Blaker I asked him if he had seen anyone move the trailer. He said that at the request of another employee he had taken the material to the scrap dealer and then showed me the cash that he had received. Julian would not tell me who the other employee was until I said we know Henry Henry put the material in the trailer. Julian then confirmed it was Henry who requested Julian to take the material and also his intention was to give Henry the cash. I asked Julian if we could discuss this with Henry at 11:30 on Thursday morning which was acceptable he replied.

Wednesday 7 December approx 2:45pm

I approached Henry Henry to ask if he was available at 11:30 Wednesday [sic] to discuss the material movements. Henry replied he would be available but it was Julian who had asked him to collect the material and put it in the trailer. I said I prefer to discuss the events with Julian present and left the area.

Thursday 8 December approx 9:00am

Julian approached me to say he would not be attending any meeting without his lawyer present. I reminded him that we were only trying to gather information at this stage but he insisted he would not meet me without a lawyer present. Julian then said there was a third party involved but declined to name them.

...

[11] Mr Dean showed his summary of facts to Mr Wrigley, who was present during the discussion with the plaintiff, and asked him whether it accorded with his recollection. Mr Dean claimed Mr Wrigley confirmed that the summary was correct. On 20 December 2005 Mr Wrigley confirmed in an email to Messrs Dean and Heard that he had read the summary of facts and that he had agreed it was correct as he heard it. Mr Dean incorporated his summary of the facts in a letter he wrote to the plaintiff on 9 December 2005. Mr Dean sought an explanation by 12 December to the information he had received which suggested to him:

- *Sometime during the afternoon on 7 December you apparently removed company property (aluminium) from our premises without authority.*
- *When asked if you knew where the aluminium had gone you replied to Steve Dean and Hugh Wrigley that you had received money in exchange for this company property.*
- *You expressed that your intention was to pass any money you received to Henry.*
- *The current whereabouts of the money is unknown.*
- *You confirmed that Henry Henry moved the aluminium from the recycle bin to the trailer.*
- *Our company vehicle was used to transport the aluminium without proper authorization.*
- *You allege a third person who was apparently involved in the movement of the property.*

[12] Mr Pa'u, the plaintiff's counsel, replied on 9 December seeking further documents to enable him to formulate a response.

[13] Mr Dean wrote a similar letter to Mr Henry with a copy to his union organiser, Damon Thomas. Mr Thomas replied, on Mr Henry's behalf, in an email sent on 9 December, the relevant part of which stated:

- 1) *Henry did not (Nor was involved) in removal of company property*
- 2) *Henry had no [sic] did not receive, nor had any arrangement, nor any expectation to receive profits from any sale*
- 3) *Henry is not in possession of any money, nor a party to possession*
- 4) *Did not use a company vehicle*
- 5) *As you shall come to see, Henry is not a 'Second Person' and therefore knows not of a 'Third Person'*
- 6) *Henry does, and always has admitted to loading some scrap materials from the workshop onto the trailer. This work he undertook as a request by a person working in a supervisory capacity in the same building, and was reasonable, lawful (he believed) and conducted in an open manner during the normal course of his working duties.*

Julian does from time to time ask Henry or others working nearby for assistance loading and unloading trailers/trucks/containers and this request would not have been considered unusual.

We thoroughly dispute the suggestion that Henry's involvement was part of a group or organised plan in any way.

[14] A copy of that email, together with Mr Dean's summary of facts, was sent to Mr Pa'u by Paul White, the defendant's solicitor. Mr Pa'u responded substantively to Mr Dean's 9 December letter to the plaintiff, by letter dated 13 December, in which he gave the following explanation on behalf of the plaintiff. When Mr Dean had first raised the matter the plaintiff had provided an immediate explanation and even presented Mr Dean with the money, which Mr Dean took and then immediately handed back to the plaintiff. The plaintiff regarded the aluminium offcuts as rubbish as they were in the company rubbish bin. This view was shared generally by other employees, including those of long standing. Such employees in the past had removed rubbish and on some occasions sold it for money. Aluminium doors returned from clients had been sold by employees and installers for money. This had never been raised as an issue. Mr Pa'u enclosed a copy of a memorandum from installers confirming the way in which client aluminium doors were disposed of. The plaintiff had never received an instruction, either verbally or in writing, to the effect that aluminium offcuts were to be regarded as company property and could not

be removed. The company had never claimed that the material in the bins was company property and its removal would be regarded as theft. The plaintiff admitted he removed the aluminium offcuts and sold them. He had thought he was doing the defendant a favour by removing rubbish and there was no misuse of the company vehicle.

[15] The letter does not deny Mr Dean's account that the plaintiff told Messrs Dean and Wrigley that his intention was to pass any money he received to Mr Henry, who had moved the aluminium from the recycle bin to the trailer, and that he had alleged a third person was involved in the movement of the property.

[16] The first meeting with the plaintiff and Mr Pa'u took place on 14 December 2005. Mr Dean was unable to attend. The defendant was represented by Mr White, Mr Heard and Edwin Richards, a sales manager to whom the plaintiff reported. Mr Heard told the meeting that he was happy with the explanation the plaintiff had provided about the use of the company vehicle but that he still had three concerns – the apparent removal of company property without authorisation, the whereabouts of the cash and the identity of the others involved. He made the following statements. The defendant did not consider the aluminium offcuts were rubbish. The bins were separated and there were two 44 gallon drums in the factory which took the offcuts and which were not placed outside at any time. He accepted what the installers had said, that discarded client doors were available for the installers to do with what they wished, but the factory offcut extrusions were treated differently and the defendant received money for recycling them. The plaintiff claimed not to be aware of the difference between doors and extrusions. A copy of a memorandum issued by the defendant in 2001 was shown to the plaintiff. It stated no property could be removed from the site without permission and unauthorised removal of company property would lead to dismissal. It was accepted by the defendant that the plaintiff was not with the company when that memorandum was issued.

[17] According to Mr White's notes of the 14 December meeting, he asked the plaintiff what his understanding was of what happened to the offcut extrusions. The plaintiff replied that a person came in a big truck and took them away. The plaintiff

also accepted that on an earlier occasion he had sought permission from Mr Richards to take door panels off the defendant's site.

[18] There was a discussion about the money the plaintiff had received from the scrap metal dealer. As the defendant later found, there was no material difference between the accounts given by the plaintiff and Mr Dean as to what happened to the money, namely that it was left with the plaintiff. Because this issue did not influence the defendant in the decision it made, I will not refer to it again in this judgment.

[19] There was then an exchange about when Mr Henry's name was first brought up. The plaintiff claimed, through Mr Pa'u, that the only time that Mr Henry's name came up was when Mr Heard came down to see the plaintiff on the Thursday and no names had been mentioned on the Wednesday. When the plaintiff had said to Mr Dean he was getting the money for others, he meant he was accumulating it for the social fund. He did not agree with Mr Dean's summary of facts.

[20] The plaintiff accepted he had asked Mr Henry to put the material into the trailer and claimed he had asked if this was rubbish and was told it was by Mr Henry and if he wanted some he could take it from inside the factory. He disagreed with some of the statements contained in Mr Thomas's email on Mr Henry's behalf. The plaintiff claimed what he had taken was rubbish. He refused to provide names of anyone else who had taken offcuts.

[21] The plaintiff said the money he had accumulated was for end of year drinks. He mentioned that the unofficial installer's social fund had gone missing. It was common ground that he had reported that to Mr Richards at the time, a matter which assumed considerable importance at the trial and to which I will refer later.

[22] The meeting, which was a lengthy one, concluded with Mr Heard saying they had taken on board the plaintiff's comments and they needed to do more investigative work to find out what people's thoughts were on what was company property.

[23] At the conclusion of the meeting Mr Pa'u and Mr White had a discussion about the nature of the defendant's ongoing investigations. Both gave evidence to the Court about this. In Mr Pa'u's brief of evidence he stated at no time was it agreed that, if the defendant only spoke to those persons who knew about the case, he would not raise any concerns about the process of the investigation. Mr White claimed he specifically sought an assurance from Mr Pa'u that the plaintiff would not raise any issue at a later date about the extent of the investigation. In the event, after cross-examination of Mr Pa'u and Mr White, it became clear that they both accepted it had been agreed that if the investigation into what staff thought about the removal of company property was limited to those who already knew about the investigation, this would not be raised by the plaintiff at any later stage, as a criticism of the extent of the defendant's investigation.

[24] After the meeting Messrs Heard and Richards discussed it with Mr Dean, who was in Christchurch. Mr Dean confirmed his summary of facts and what the plaintiff had said to him about Mr Henry. It was agreed Mr Dean would have Mr Wrigley verify his account and would also meet with Mr Henry, an employee of some 20 years standing who was the union representative on site. Both Mr Wrigley and Mr Henry were under Mr Dean's area of responsibility.

[25] On 16 December 2005, Mr Dean met with Messrs Thomas and Henry. Mr Henry is recorded, in Mr Dean's minute of the meeting, as having stated that he had never been instructed to move aluminium offcuts by anyone before and did not know of any other person who had moved aluminium offcuts out of the designated containers. He also acknowledged that the aluminium offcut bins were not left outside and were not a hazard in the workplace or available to scavengers and that he believed the staff understood the requirement to gain prior approval before removing items from the company's premises.

[26] On 19 December 2005 Mr Pa'u wrote to Mr White referring to the 14 December meeting, stating that during it they had made it abundantly clear that, at all material times, the plaintiff understood that the aluminium offcuts were in rubbish bins and regarded as rubbish. They were sold and the funds received were for the installers' social fund. After repeating other aspects of the explanations the plaintiff

had offered, Mr Pa'u stated, *"I am now concerned that at the conclusion at that meeting, your client advised that it wished to make further enquiries in relation to the general understanding of the employees"*. Mr Pa'u claimed the central issue was what the plaintiff had been told and the instructions he had received, and what policies or procedures had been brought to his notice. Mr Pa'u expressed concern that the managers disciplining the plaintiff, including Mr Dean, had only been with the plaintiff for some few months and were unaware of the processes. He then went on to state that, *"I am concerned that your client would commence an investigation process which is causing my client and his family undue distress and concern without himself becoming reasonably familiar with the practice and procedure of the company"*. He raised the possibility of the plaintiff pursuing a personal grievance for unjustified disadvantage in respect of the defendant continuing to subject the plaintiff to the investigation process, when the plaintiff had already provided a very credible and justified response.

[27] Mr White responded on 20 December and, after addressing the issues raised by Mr Pa'u, provided Mr Pa'u with the information the defendant had obtained from Mr Henry and one of the installers. This included a memorandum dated 16 December summarising Mr Dean's meeting with Messrs Henry and Thomas, a note written by Mr Richards about his conversation with one of the installers, and Mr Wrigley's written confirmation that the summary of facts prepared by Mr Dean was correct. The communication with the installer indicated that it had long been an understanding that installers were entitled to deal as they saw fit with old tilt doors they were permitted by owners to remove from sites. The installer contacted had no knowledge of what happened in the factory where the extrusion offcuts were kept.

[28] In his letter of 20 December Mr White also noted, as a further issue arising out of the investigation, that the plaintiff had denied saying to Mr Dean that he was going to give the money to Mr Henry and that he had claimed Mr Dean's summary of facts was wrong. Mr White stated:

7 *B&D Doors have now spoken to Hugh Wrigley who witnessed that episode. Mr Wrigley has confirmed that the summary made by Steve Dean is correct. A copy of his confirmation is **attached**.*

Further meeting

8 *In light of this confirmation from Mr Wrigley, B&D Doors would now like to speak to Julian about Julian's apparent lying to B&D Doors during this investigation. ...*

9 *...The more recent issue of Julian's lying also raises serious trust and confidence issues. Further investigation of this and any disciplinary action that might follow could also result in Julian's dismissal.*

[29] Mr White's next letter on 21 December, under a heading "***Lying during the investigation***", confirmed the defendant was now also considering the plaintiff's apparent lying during the investigation and was awaiting his response to this new allegation.

[30] After some difficulties in arranging a meeting with Mr Pa'u, the next meeting took place on 12 January 2006 between the plaintiff and Mr Pa'u and Messrs Heard, Richards and White. It was a tense meeting and Mr Pa'u accepted that he and Mr White did "*exchange some pointed comments*". There was a rather unfortunate start to the meeting because Mr Pa'u referred to an 11 page letter of 11 January 2006 that he had sent to Mr White, which at that stage Mr White had not received. Mr White checked with his office and found that the letter had been sent by fax and email by Mr Pa'u just before 11pm the night before. Mr Pa'u also raised an issue to the effect that he was unsure who the investigators were. The defendant's representatives clarified that the investigators were Messrs Richards, Heard and Dean, which were the names given to Mr Pa'u in Mr White's letter of 21 December. The defendant's representatives agreed with Mr Pa'u's concerns about Mr Dean's continued involvement, as he had been unable to attend the 14 December or 12 January meetings, and they advised Mr Pa'u that Mr Dean would not be a decision maker.

[31] The meeting then adjourned for some 15 or 20 minutes to allow the defendant's representatives to read Mr Pa'u's letter. The letter of 11 January canvassed in detail the correspondence and the attempts to arrange meetings. It alleged bad faith as a result of discussions between Mr Dean and Mr Thomas. It

complained about the role of Mr Woods, the General Manager, and the failure to investigate the complaints against Mr Henry. It claimed the investigation about the plaintiff had been unfair and biased and that the removal of the offcuts and extrusions was the removal of rubbish. If there was an inconsistency between the plaintiff and Mr Dean, it was not the plaintiff that was lying. The plaintiff maintained he did not say that he was going to give the money to Mr Henry, as recorded in Mr Dean's notes. If the defendant seriously believed that the plaintiff had told the company he was going to give the money to Mr Henry, then why had Mr Henry been told that the matter was resolved as far as he was concerned, and that there would be no further investigation against Mr Henry. This was said to be inconsistent with the course that was being adopted with the plaintiff. The plaintiff considered he had been unjustifiably disadvantaged in his employment and was now seeking remedies for hurt and humiliation of \$10,000, legal costs of \$3,500, an apology for the way he had been treated and an agreement to immediately cease the investigation and destroy all material relating to it.

[32] During the adjournment the defendant's investigating team telephoned Mr Dean and discussed the bad faith allegation. The management team also considered the other aspects of Mr Pa'u's letter. The meeting was then resumed and Mr Pa'u expressed surprise and concern that the defendant did not need more time to consider his 11 page letter and to make further enquiries or have further discussions before reconvening the meeting. He sought to have the meeting adjourned to allow for mediation but this was declined.

[33] Mr Heard then addressed then the two remaining issues of concern to the defendant. These were the plaintiff's taking of the aluminium extrusions and selling them on 7 December, and the allegation that he had lied to the defendant during the investigation.

[34] Mr Pa'u responded on the plaintiff's behalf in a similar way to his submissions in his 11 January letter. He claimed if there was an inconsistency between what the plaintiff said and what Mr Dean allegedly recalled in his summary, it did not follow that the plaintiff was lying. In particular the plaintiff maintained he did not say he was going to give the money to Mr Henry, even though it was

recorded in Mr Dean's notes that he did say that. Mr Pa'u said Mr Wrigley could not assist with the lying allegation because he was not present in the room at the time. That was contrary to Mr Dean's statements that Mr Wrigley was present throughout.

[35] Mr Heard then invited a response relating to the removal of the offcuts. Mr Pa'u said his response had already been given and in addition the installer who had been spoken to was unaware of the policy. He also contended that if the plaintiff had asked, he would have been given permission to remove the offcuts. He claimed the plaintiff was being singled out because there was some hidden agenda against him. This allegation was refuted by Mr Heard. Mr Pa'u then addressed the plaintiff's circumstances, that he had a family to support and because he had been looking at the prospect of being dismissed, he had endured a horrible Christmas. Nothing further was added and Mr Heard indicated that he considered the investigation complete.

[36] Mr Pa'u requested that there be no consultation with Mr Dean or Mr Woods the general manager. Mr Heard responded that neither Mr Woods nor Mr Dean would make the decision although they would be consulted to ensure that the plaintiff was being treated fairly in the same manner as other employees had been treated in the past. The meeting was then adjourned and Messrs Heard and Richards, in the presence of Mr White, considered the information that had been supplied.

[37] When the meeting was resumed Mr Heard said the plaintiff had admitted taking company property without authorisation and that amounted to theft which warranted disciplinary action. As to the two lying allegations, the first relating to the way the money had been dealt with between Mr Dean and the plaintiff, that is who was the last to have it, was not important, but the second issue, relating to the role of Mr Henry as the intended recipient of the money, was clearly lying and this amounted to serious misconduct and raised trust and confidence issues.

[38] The plaintiff and Mr Pa'u were then given the opportunity to make a response. Mr Pa'u again addressed the process and the plaintiff's personal circumstances. He said, should there be a decision to terminate the plaintiff's employment, he would be immediately applying for interim reinstatement and would

be filing a personal grievance. There was a further adjournment for 20 minutes and Messrs Heard and Richards again considered the issue. The meeting was then resumed. Mr Heard said that they had considered the explanation that the plaintiff did not consider that he had done anything wrong but rejected that explanation. On the lying issue they thought that this, together with the unauthorised taking of the company's product, amounted to serious misconduct and, for both issues, the plaintiff's employment was being terminated, effective immediately.

[39] The dismissal and the reasons were confirmed in a letter sent from Mr White that day which prompted a substantial response from Mr Pa'u on 13 January, raising the unjustified dismissal grievance.

The defendant's evidence before the Court

[40] Mr Dean confirmed his summary of facts and his role in the subsequent investigation. Messrs Richards, Heard and White confirmed their role in the correspondence, investigation and decision to dismiss.

The plaintiff's evidence before the Court

[41] The plaintiff's evidence was supported by that of his wife and also by Mr Pa'u. In summary the plaintiff's account of what had taken place on 7 December was as follows.

[42] On Wednesday, 7 December 2005 the plaintiff had removed aluminium offcuts from drums located within the defendant's premises and sold these, together with some aluminium client doors, to a scrap metal dealer. He had done this before and was aware that other employees and installers had sold aluminium doors and also aluminium offcuts to scrap metal dealers. After the sale on 7 December he collected the funds for the social fund for which he was responsible. The social fund was for the benefit of employees and installers. Mr Richards was aware of how they had accumulated the funds for the social club from the sale of aluminium doors and offcuts.

[43] When he returned to work after having sold the doors and the offcuts he was approached by Mr Dean, whose role involved overseeing all aspects of the production area of the defendant's operations. Mr Dean asked the plaintiff what he had done with the offcuts on the back of the trailer. He told Mr Dean that the offcuts had been sold to a scrap metal dealer and he presented Mr Dean with the money he had received. Mr Dean initially took the money but then placed it on the plaintiff's desk in front of him. He also told Mr Dean that he had sold them and that the funds were for the benefit of the employees.

[44] Mr Dean returned to him later that day and asked the plaintiff to attend a meeting in the boardroom and mentioned that Mr Henry would be attending that meeting also. This was the first time Mr Henry's name was mentioned. The plaintiff had never mentioned Mr Henry's name in his previous discussion with Mr Dean and the plaintiff had never mentioned to Mr Dean that other employees were involved. He then sought legal advice from Mr Pa'u.

[45] That evidence varies from the explanation given by the plaintiff at the 14 December meeting where he is recorded as saying Mr Henry's name was not mentioned on the Wednesday and the first he heard it was when Mr Heard came down to see him the following day.

[46] It is also in sharp conflict with that given by Mr Dean to both the disciplinary enquiry and to the Court. The defendant resolved this conflict in favour of Mr Dean and it formed the basis of the defendant's conclusion that the plaintiff had lied during the investigation.

Issue raised at trial

[47] In the course of the hearing, both the plaintiff and Mr Pa'u claimed in evidence that during the investigation the plaintiff had told the defendant that Mr Richards was aware that the plaintiff was selling offcuts obtained from bins inside the defendant's factory. This matter was not referred to in the written briefs of the plaintiff and Mr Pa'u which were exchanged with the defendant prior to trial. The

issue first arose clearly in the course of Mr Bevan's cross-examination of Mr Pa'u, and clarified in questions from the Court.

[48] Mr Pa'u said that it was explained, either by him or by the plaintiff, that the sale of the offcuts had taken place at previous times and that this was known to Mr Richards and he knew that the social club was benefiting from this exercise. Mr Richards had become aware of this at the time the social funds went missing, which had given rise to an enquiry which had involved him. Mr Pa'u said he was reasonably sure that this would have come up at both meetings and either he or the plaintiff, or both in combination, had raised the issue. Mr Pa'u accepted that in substance this was a statement that the plaintiff's removal of aluminium offcuts was known to Mr Richards, that Mr Richards had not declined permission to remove the offcuts and that Mr Richards, knowing of the practice, had allowed it to continue. Mr Pa'u also accepted that this was a very important point, because it gave the plaintiff the licence to continue to do that which he was doing on 7 December 2005.

[49] It appears that the unofficial installers' social funds went missing some time in October 2005, that the plaintiff reported the missing fund to the defendant's accountant and, as a result of that reporting Mr Richards came to see him. The issue of what was said between the plaintiff and Mr Richards on that occasion and, even more importantly, what was then said on behalf of the plaintiff to the defendant at either of the two meetings or in the course of correspondence, requires resolution.

[50] Mr Pa'u conceded, in supplementary questions from Mr Bevan, that he could not point out where, in any of the letters he wrote to Mr White, he had asserted on behalf of his client that Mr Richards knew the plaintiff was selling the offcuts and had taken no objection. He also accepted that the matter had not been referred to in any of the briefs filed on behalf of the defendant, especially that of Mr Richards, who was present in the meetings when Mr Pa'u alleged the issue of Mr Richards' prior knowledge and acquiesce had been raised.

[51] As a result of the allegation arising in this manner, I raised the issue with counsel as to whether or not the plaintiff should be recalled to deal with the claim that Mr Richards knew of, and acquiesced in, the removal of the offcuts. The

plaintiff had said nothing of this during his evidence. Mr Bevan, counsel for the defendant, objected to this course but Mr Cunningham, counsel for the plaintiff, submitted that it would be useful. I therefore directed the recall of the plaintiff, restricting his examination to what had occurred between him and Mr Richards on the earlier occasion and what was said about this during the defendant's investigation.

[52] The plaintiff was recalled and claimed he had told Mr Richards that the money was being accumulated from the sale of the aluminium doors and offcuts and was "*pretty sure*" he had brought it up at either or both of the meetings. He claimed that he would have said that Mr Richards knew the money was for the benefit of the social fund and it was from the sale of aluminium doors and extrusion offcuts. He was "*pretty sure*" that he must have raised it because it was a key point.

[53] The issue was then put to Mr Richards. In summary he said there had been a discussion with the plaintiff at the time he became aware of the missing installers' fund. He had understood, from what the plaintiff had told him, that the source of the social fund was contributions by installers from their sale of customers' old doors and offcuts from the customers' sites. There were few offcuts produced on customers' sites and their value would only be a few cents. He did not understand the offcuts were from the defendant's own recycling bins. He had never given the plaintiff, or anyone else, permission to remove offcuts from those bins as they were not under his jurisdiction. Neither he, nor the plaintiff, had any involvement with the factory where the recycling bins were kept. These bins were emptied regularly and no one would have assumed they could be removed by staff for sale. He could not recall this being raised by Mr Pa'u or the plaintiff at the two meetings and did not think it had been.

[54] When the matter was put to Mr Heard, he stated the explanation about Mr Richard's prior knowledge was never raised at the meetings. He knew about the missing fund but said it was not his concern because it was not company property. He understood that the source of the fund was the sale of the old doors. From the evidence produced by the defendant the offcuts being created by the installers on the customer's site could have amounted only to a very small amount of aluminium.

Aluminium seals were fitted in the factory and trimmed there and there would hardly be any reason for an installer to have produced offcuts on the customers' sites.

[55] Mr White was adamant that the matter had not been raised at either of the two meetings. He said it would have surprised him if it had been raised because it was quite significant. He would have advised the defendant that it could not proceed on a disciplinary track with an employee, when the immediate supervisor knew what he had been doing and had essentially condoned it.

[56] Having closely re-examined the evidence, I accept Mr Bevan's submission that the issue of Mr Richards's previous knowledge was not raised in either of the two meetings. Had it been, it was such an important issue that it must have caused the defendant's investigators to pause. Mr White made it clear that had the issue been raised he would have addressed it with the defendant and raised the obvious point that it would be unfair to continue in a disciplinary investigation if the plaintiff's immediate supervisor had authorised, or acquiesced in, the removal of offcuts from the defendant's site. This issue was so important that it would not have been omitted from Mr Pa'u's extensive letters containing his full submissions on a whole range of points on the plaintiff's behalf, because it fundamentally undermined the defendant's view that the plaintiff had knowingly removed company property without authorisation.

[57] I do not accept the plaintiff's evidence that his exchange with Mr Richards in October 2005 over the missing funds, would have led to a reasonable belief on the plaintiff's part that he was authorised to remove the offcuts from the recycling bins in the factory. I find that Mr Richards, whose evidence I accept, had understood that the offcuts the plaintiff had referred to in their discussion over the missing funds, were offcuts along with doors removed from client sites, and not offcuts in the recycling bins in the factory premises, with which Mr Richards had no involvement. Had the plaintiff believed the contrary it is highly likely he would have so advised Mr Pa'u, and the defendant, when the investigation started less than two months later.

Resolution of issues

Issue One: Authorised Removal

[58] Mr Cunningham accepted that client doors and offcuts were taken to the scrap dealer on 7 December 2005 by the plaintiff and sold for cash and there was no dispute about this. The defendant had not taken issue with the removal of the doors and their sale. The only issue was in relation to the offcuts. He submitted that the defendant had complicated the issue because it did not make the distinction between offcuts from the customers' sites brought back by installers to the workplace, offcuts from the large rubbish bin outside the factory and offcuts placed in bins inside the factory as part of the manufacturing process. The only issue the defendant had was with offcuts placed in bins inside the factory for recycling. There is no issue that everything else appears to have been regarded by the defendant as rubbish.

[59] Mr Cunningham submitted Mr Richards knew what was going on and attempted to draw inferences from his evidence. However, in view of my findings, I do not accept those submissions. Further I have found that Mr Richards thought the offcuts the plaintiff was referring to at the time the funds were missing were from client premises and not the defendant's factory. Without the complicating factor of the allegation of lying, which I shall deal with shortly, if the plaintiff or his counsel had raised the issue of Mr Richards's knowledge of offcuts during the investigation, as Mr Cunningham did in his final submissions, the outcome may have been different. The difficulty facing the plaintiff is that this was not the explanation he offered initially, or during the course of the investigation.

[60] Mr Cunningham raised another issue as to the source of the offcuts that were on the trailer on 7 December, but as this was not raised either in the investigation or by the plaintiff's evidence I will take it no further. However, it became clear from the enquiries carried out by Mr Dean that Mr Henry had placed these items in the trailer at the plaintiff's request, which the plaintiff did not deny, either in the investigation meetings or in the correspondence from Mr Pa'u.

[61] I accept Mr Cunningham's submission that the removal of the offcuts was done during office hours and in the open and that Mr Henry was seen loading the

trailer. It is true that the plaintiff had keys and access to the workplace after hours and may have been able to remove the offcuts without the knowledge of anyone in those times. Mr Cunningham submitted that the plaintiff's actions were consistent with those of someone acting honestly and with a genuine belief he was entitled to do that which he did. It was also true that during the course of the enquiry it became clear that the plaintiff was well regarded.

[62] Mr Cunningham then submitted that there was a confusing message given by the defendant as to whether offcuts could be taken without permission. In relation to the discarded client doors that were occasionally brought back to the site, such permission was implicit, he submitted, from the discussion Mr Richards had had with the plaintiff at the time the funds went missing. Mr Cunningham submitted that it was reasonable for the plaintiff to have assumed that the offcuts in the bins in the factory were rubbish, in the same way that doors removed from a customer's site were so regarded. The plaintiff had told Mr Richards that he was selling offcuts at the time the funds went missing and Mr Cunningham submitted the reportage of the missing funds also indicated that the plaintiff was an honest employee. The plaintiff had maintained that at no time during his employment had he ever been advised in any policies, or any documentation, or in any other way, that the offcut extrusions in the 44 gallon drums in the factory were company property and not to be removed without permission. There were no signs on any of the drums. He submitted that therefore the defendant was not justified in concluding that the plaintiff knew he was removing company property without authorisation.

[63] Mr Bevan submitted that the defendant was justified in concluding that the plaintiff had no reasonable belief that he was authorised to remove the offcuts because the plaintiff had provided no valid basis to substantiate his stated belief that he was so permitted. Mr Bevan cited the *Hepi* case in support. He contended that the substantial evidence available to the defendant pointed against such a belief being present, and therefore it was justified in concluding that the plaintiff did not honestly believe he was entitled to remove the offcuts. He noted that the plaintiff had sought specific permission to remove old steel doors of limited value from Mr Richards and that authorisation was given. It was clear from their reporting of the

incident that Messrs Wrigley and Svenson did not believe that the practice asserted by the plaintiff was acceptable to supervisors.

[64] Mr Bevan accepted that the plaintiff was probably never specifically advised that he could not remove offcuts, but the defendant never had any reason to so advise him because it did not know that employees were removing them. The plaintiff's job had nothing to do with offcuts in the factory. It was reasonable for an employee to be aware that some activities may lead to dismissal and the proper use of an employer's property was part of the employees general duties of service and fidelity which are implied into every contract of employment. Again Mr Bevan cited the *Hepi* case and also *Kemen v Electricity Corporation of NZ* [1990] 2 NZILR 787 and *New Zealand Sugar Company Ltd v Ingham* unreported, Judge Colgan, 6 August 1998, AC 60/98. Mr Bevan did not accept that it could be suggested that the plaintiff and the defendant were at cross purposes and that the plaintiff ought to be given the benefit of the doubt on this aspect. He pointed out that the plaintiff was given the benefit of the doubt on the usage of the trailer and also on the issue of whether or not the money had been given to Mr Dean and returned.

[65] Mr Bevan submitted that the plaintiff's assertion throughout the investigation that the offcuts were rubbish was not supported by the evidence disclosed in the investigation. The plaintiff claimed that the offcuts were kept in rusty 40 gallon drums containing a mixture of rubbish and aluminium offcuts whereas by contrast the defendant's evidence was that the drums in question were painted blue, were 44 gallons, were specifically used for recycling and did not contain general rubbish. Mr Bevan submitted that the plaintiff was not entitled to assume that the offcuts were rubbish which he could remove without seeking permission, citing again from the *Hepi* case. There was no issue about the client discarded doors or offcuts, occasionally brought back by installers from customer sites. These had already been sold to the customer and were effectively now the responsibility of the installers and could be tossed into the rubbish bins. This did not happen very often and in most cases there was no need for any offcuts to be created at clients sites as part of the installer's work.

[66] In any event, Mr Bevan submitted, if the plaintiff had honestly been confused about the position in respect of offcuts he would not have stated he was selling them at the request of another employee and then have refused to name the employees involved.

[67] I prefer Mr Bevan's submissions. It was clear from the enquiries carried out by the defendant that such implicit permission did not apply to the aluminium extrusion offcuts that were produced during the manufacturing process and kept inside the factory premises in distinctive bins. It applied only to offcuts and doors removed from client sites. That was Mr Richard's understanding. Such items were clearly distinguished from what otherwise could have been regarded as rubbish, which included discarded client aluminium doors and a few offcuts that might have been cut at customers' sites and which installers had brought back to the defendant's yard. This was well known to all the employees, and the installers who gave evidence during the defendant's investigation.

[68] From all the material available to the defendant as a result of its investigation I am satisfied that the defendant was entitled to conclude that the plaintiff could not reasonably have believed he was authorised to remove the offcuts from the clearly marked aluminium offcut recycling bins in the factory. The plaintiff admitted in the first meeting that he knew these bins were regularly cleared by a driver in a big truck. Mr Henry denied he had authorised the removal and said he had been instructed by the plaintiff to load them on to the trailer. These offcuts were clearly different from any small offcuts returned to the site by installers. The first issue is therefore resolved in favour of the defendant.

Second Issue: Lying

[69] As to the allegation of lying during the investigations, Mr Cunningham urged me to prefer the evidence of the plaintiff to that of Mr Dean when the two were in conflict, contending that the plaintiff had been consistent throughout whereas there was contradiction in Mr Dean's evidence concerning how money was dealt with. Mr Cunningham suggested that Mr Dean, having had it reported to him by the supervisors that Mr Henry was seen loading the trailer, was possibly mistaken about

what he heard and simply made some assumptions which had been treated by the investigators as fact, because of Mr Dean's seniority. Mr Cunningham submitted that this allegation was being elevated to one of lying by the employer simply because one aspect of the plaintiff's version was different from that of Mr Dean, although he accepted that was in part because of Mr Wrigley having agreed with the summary of facts prepared by Mr Dean.

[70] This appeared to be the pivotal issue in the case. If Mr Dean's evidence was able to be accepted by the investigators, acting reasonably and fairly in all the circumstances, the plaintiff had resiled from the explanation he first gave Messrs Dean and Wrigley. I also find, although this is not relevant to the consideration of the defendant's investigation, that Mr Dean was a credible witness, unshaken by cross-examination.

[71] Mr Bevan submitted that the plaintiff's denial that he had ever intended to give the money to Mr Henry and the plaintiff's assertion that he had not mentioned Mr Henry in the initial discussion with Mr Dean, clearly conflicted with Mr Dean's summary of facts and concerned the investigators. Mr Dean, the second most senior employer of the defendant, had recorded in a contemporaneous statement what the plaintiff had said in the presence of Mr Wrigley. The plaintiff was now denying this. Mr Bevan pointed out that Mr Heard and Mr Richards had spoken to Mr Dean, who confirmed his version of events. Mr Wrigley then provided a second written confirmation that he agreed with Mr Dean's summary of facts.

[72] Mr Bevan also submitted it was significant that Mr Dean's record of what the plaintiff had said was provided to Mr Pa'u on 12 December 2005, after the matter had been clearly set out in Mr Dean's letter of 9 December. In spite of this, the plaintiff's first written response through Mr Pa'u on 13 December, did not challenge Mr Dean's summary of the facts on this point. As Mr Bevan submitted, if the plaintiff had not said that Mr Henry was going to get the cash, surely the plaintiff would have challenged that point straight away. Instead it was not challenged until the meeting of 14 December when the plaintiff asserted he had never said the cash was for Mr Henry and that he had never said what Mr Dean had recorded him as

saying. The allegation of lying was clearly put in the letter from Mr White to Mr Pa'u and raised squarely at the second investigation meeting.

[73] I accept Mr Bevan's submissions. I find, objectively viewed, that the defendant was entitled to conclude that Mr Dean's version of events, supported as it was by Mr Wrigley, was correct and that the plaintiff had lied in the investigation. He had no hidden agenda against the plaintiff, whose involvement he came across only by accident. He had no reason to make a false accusation. His summary of facts, prepared from notes taken immediately after the interview, and his letter to the plaintiff had made it clear that the plaintiff had talked about Mr Henry's involvement during the discussion on Wednesday, 7 December. His letter of 9 December made it clear that the replies received from the plaintiff were given to both himself and to Mr Wrigley.

[74] It was open to a fair and reasonable employer, in the circumstances disclosed, to reject the plaintiff's denial that he had said that his intention was to pass the money he received on to Mr Henry and that there was a third person involved in the movement of the property. Nothing that occurred in Court affected Mr Dean's credibility so it cannot be said he was a witness whose evidence should not have been accepted by the defendant, and preferred to that of the plaintiff, during the defendant's investigation. Viewed objectively, the defendant was justified on the evidence before it, in concluding that the plaintiff had lied during the disciplinary investigation. The second issue is resolved in favour of the defendant.

Third Issue: Fair Process

[75] Mr Cunningham made a spirited attack on the fairness of the investigation. Most of the matters he raised had been canvassed by Mr Pa'u in his communications to the defendant. Mr Cunningham submitted that, by the time of the 14 December meeting or shortly afterwards, the defendant probably had reached the conclusion that the plaintiff's explanation regarding the offcuts was "*unbelievable*". He submitted that the investigations then automatically concluded that the plaintiff must be lying. He contended that this conclusion influenced, to a great extent, the course of the process and there was a failure to approach the situation with an open mind.

He claimed that the extent of the investigation into the common belief was only to speak to Mr Henry, no attempt being made to speak to the very senior supervisors, Messrs Svenson and Wrigley. He submitted the investigators had not made a serious and impartial assessment of Mr Wrigley's role and pointed out Mr Wrigley had not been called as a witness.

[76] Mr Cunningham also submitted that the rest of the investigation was sloppy and not done with any degree of care and skill. For example, he said even Mr Richards did not fully comprehend his role. Mr Cunningham submitted that Mr Richards's role at the two meetings was as second in command to Mr Heard. He also submitted that this was never put to the plaintiff.

[77] Mr Cunningham submitted it was highly prejudicial and inappropriate for the investigators to have been discussing the matter with Messrs Dean and Woods, and for views, such as the plaintiff's explanation being "*unbelievable*", to have been expressed between them. He submitted the investigators had concluded, from a very early point that, should theft be proven, then dismissal would follow. He submitted they had moved their process quickly to a disciplinary meeting and then made a decision on 12 January. They had refused to adjourn the matter for further investigations and mediation even though they had just received an 11 page submission from Mr Pa'u, along with lengthy oral submissions and a medical certificate addressing the plaintiff's health. Mr Pa'u's concerns about haste were rejected as were his other submissions.

[78] Mr Cunningham also submitted that it was inappropriate for Mr Heard to be having conversations with Messrs Dean and Woods during the final meeting, given their views on the matter. These telephone discussions were never mentioned to the plaintiff nor were they referred to in Mr White's notes of the meeting. Mr Cunningham submitted that the discussions were significant and invited the Court to infer that Mr Heard had been consulting Messrs Woods and Dean on what he should do. He suggested it was implausible, in the context of the process that had been adopted and the conversations they may have been having, that the conversations on 12 January 2006 would not have been about the plaintiff's explanations and what the result should be. He submitted that the decision was inevitable because of Mr

Woods's view that if theft was established then dismissal must follow in accordance with the company guidelines.

[79] He observed that Mr Dean, and even Mr White, had found the plaintiff's explanation unbelievable and this must have influenced Mr Heard. The view taken therefore was too rigid, did not take into account the plaintiff's personal circumstances, the low value of the product removed and the reasons the plaintiff advanced for the sale of the offcuts.

[80] Mr Bevan submitted that the defendant's enquiries had all been revealed to the plaintiff and his counsel prior to the 14 December meeting. He referred to the communications with Mr Henry and the response received from his union representative, Mr Thomas.

[81] In relation to the 14 December meeting, Mr Bevan submitted that it was made clear to the plaintiff and his counsel, that his explanation that the offcuts were rubbish, did not accord with the defendant's understanding or the way in which the offcuts were treated. The plaintiff's claim to justify his actions as part of a widespread company practice was inconsistent with the complaint received from Messrs Wrigley and Svenson who had reported the removal of the offcuts to Mr Dean. Mr Bevan observed that when the defendant suggested he wished to check whether such a belief as asserted by the plaintiff was present in the company Mr Pa'u had refused to allow the company to make those enquires but eventually agreed that the defendant would speak to those persons who were already involved in the investigation. He also submitted that it was clearly put to the plaintiff that his account at the meeting, and what he was recorded as saying to Mr Dean on 7 December, were at variance and the plaintiff's response was to say that Mr Dean's account was wrong and that the plaintiff had never said that Mr Henry was involved.

[82] The result of the 16 December meeting with Mr Henry and Mr Thomas was provided to the plaintiff. It demonstrated that Mr Henry had never previously been instructed to move aluminium offcuts, that he did not know of any other person who had moved aluminium offcuts out of the designated containers which were not left outside and therefore were not a hazard in the workplace or available to scavengers

and that he understood the requirement to obtain prior approval before removing items from the defendant's premises.

[83] After Mr Pa'u's objection to Mr Dean and Mr Woods being involved in the decision-making process, Messrs Heard and Richards agreed that neither Mr Woods or Mr Dean would be the decision makers.

[84] Mr Bevan submitted there was no need to have adjourned the 12 January meeting to another time to consider Mr Pa'u's 11 page submission, as little new material was raised in it.

[85] Mr Bevan relied on the agreement between Mr White and Mr Pa'u, that Mr Pa'u would not later argue that the defendant should have talked to more persons to confirm whether or not there was a wide spread belief that employees were entitled to remove and sell offcuts. He submitted there was no pre-determination, that the issues raised at the meetings on behalf of the plaintiff, were listened to and considered. He contended that even if there were procedural deficiencies, which was denied, these were minor and did not affect the outcome.

[86] There is force in Mr Cunningham's submission that the role of Mr Dean became somewhat confused during the investigation. He was initially going to be one of the investigators and had sent the disciplinary letter to the plaintiff and Mr Henry. Because he was unable to attend the two investigation meetings Mr Pa'u took exception to his continued involvement as an investigator and decision maker and in the end Mr Heard with Mr Richards's assistance, became the decision maker. The evidence satisfies me that Messrs Heard and Richards did discuss with Mr Dean whether his summary of facts were correct after the plaintiff put them in issue at the first meeting. They were entitled to accept Mr Dean's assurance for the reasons I have given.

[87] It would have been desirable for Messrs Heard and Richards to have interviewed Mr Wrigley separately rather than leaving that to Mr Dean, but Mr Wrigley had confirmed the accuracy of the summary of facts in his written confirmation. In these circumstances, Messrs Heard and Richards were entitled to

prefer the statement from Mr Dean to that of the plaintiff. This was especially so as the plaintiff had not raised the issue in his initial response, through Mr Pa'u, to the letters from Mr Dean and Mr White, the latter enclosing Mr Dean's summary of facts.

[88] As to the understanding of the practice of acquiring permission before a removing company property from the site, that was clearly confirmed by Messrs Wrigley and Svenson raising the matter with Mr Dean on 7 December. If they had considered the actions they saw Mr Henry performing to be in accordance with company policy there would have been no reason for them to have brought it to the attention of Mr Dean. Further the agreement with Mr Pa'u about the confining of the investigation to those who already knew about it placed constraint on the defendant's investigation.

[89] A counsel of perfection may have led to the defendant acceding to Mr Pa'u's request on 12 January 2006 to adjourn the meeting to allow his submissions to be fully considered. However, I accept Mr Bevan's submission that there was nothing new raised in the 11 page submission that would have required a further adjournment other than an allegation of bad faith in the discussions between Mr Dean and Mr Thomas. This was clarified by a phone call to Mr Dean during the adjournment. This allegation of bad faith involving Mr Thomas was not pursued by the plaintiff before the Court.

[90] I am not persuaded that the investigation process was tainted by any communications the investigators had with Messrs Dean and Woods. In view of the seriousness of the allegations they were considering it was entirely appropriate that they would have checked with Mr Dean as to the accuracy of his summary of facts, and indeed a failure to have done so might well have impeached the process. Mr Woods was kept informed, as he was entitled to be, and his view that if theft was proved dismissal would normally follow, is hardly a surprising one for a general manager to express. It does accord with the memorandum the defendant had issued in 2001.

[91] I take into account the comments of the Chief Judge in the *Henderson* case, that issues of fairness of process may be less important under s103A, if the substantive conclusion reached is one that in all the circumstances a reasonable employer would have reached.

[92] The process in this case was marked by a total revelation of all of the material disclosed during the course of the investigation and full and frank discussions involving counsel on both sides. Objectively viewed, while the process was clearly not ideal, I find that it was reasonable and fair. The third issue is resolved in the defendant's favour.

Fourth Issue: Dismissal

[93] Finally I turn to consider whether the decision to dismiss was one which a fair and reasonable employer would have made in all the circumstances.

[94] Mr Cunningham submitted that the plaintiff had not committed serious misconduct. There was insufficient evidence for a fair and reasonable employer to have found that the plaintiff had committed theft and then lied to the defendant. In any event dismissal without notice was a harsh and disproportionate response to the events at hand. He submitted there was no contributory conduct on the plaintiff's part because he did not knowingly contribute to the circumstances giving rise to his dismissal as he did not know the removal of the offcuts was unacceptable.

[95] I have taken into account Mr Cunningham's submissions about the plaintiff and his previous unblemished record. It is clear that he was previously held in high regard. This view negates any suggestion that there was some form of conspiracy, or a hidden agenda, to dismiss him. I have observed from the cases cited by counsel, and other cases throughout the years, that many employees have been dismissed in similar circumstances and their dismissals have been held to be justified for serious misconduct.

[96] Had the matter been limited only to the allegation of unauthorised removal of company property, and had the issue of Mr Richards's previous involvement been clearly raised at the investigation, it may well have been in all the circumstances,

including the fact that the plaintiff had not received the memorandum clearly stating the company's position, that a fair and reasonable employer might not have dismissed but instead may have given a final warning.

[97] The fatal factor in the present case is that the defendant was entitled to take from Mr Dean's account of the plaintiff's first explanation, placing the blame on Mr Henry, and then denying that explanation was ever given, that the plaintiff had lied during the investigation. This, together with the circumstances in which the offcuts were taken from the blue recycling bins inside the factory premises, amounted to serious misconduct and fundamentally undermined the defendant's trust and confidence in the plaintiff.

[98] The defendant has discharged the onus of showing that the decision to dismiss the plaintiff was one which a fair and reasonable employer would have made in all the circumstances.

[99] I am fortified in my conclusion because it is the same as that conclusion reached by the Authority after a thorough investigation. The challenge is accordingly dismissed.

Costs

[100] At the request of counsel costs are reserved, and, if they cannot be agreed, a memorandum may be filed within 30 days from the date of this judgment. A memorandum in reply may be filed within a further 21 days.

B S Travis
Judge

Judgment signed at 4.15pm on Friday 21 September 2007