

**IN THE EMPLOYMENT COURT
AUCKLAND**

AC 26/07

ARC 7/06

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

BETWEEN EASTERN EQUITIES CORPORATION
 LIMITED T/A FARMERS TRANSPORT
 LIMITED
 Plaintiff

AND LEONARD EDWARD BRIGHT
 Defendant

Hearing: 19-21 March 2007
 (Heard at Gisborne)

Appearances: T M Petherick, counsel for plaintiff
 D J Erickson, counsel for defendant

Judgment: 16 May 2007

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This is a challenge and cross-challenge against a determination of the Employment Relations Authority at Auckland dated 21 December 2005. The determination followed an investigation at Gisborne on 26 July 2005.

[2] The defendant was employed by the plaintiff between October 2002 and October 2004 as manager of its Gisborne branch. There was a history between the parties. The defendant and before him his father, had been proprietors of a predecessor road transport business purchased by the plaintiff. Subsequently the defendant was employed as a driver and operations supervisor before leaving in 2000 to pursue other opportunities. The plaintiff persuaded him to return and take up employment in the role of branch manager, Gisborne.

[3] The relationship between the parties deteriorated. The plaintiff considered Mr Bright had not developed in the role as hoped. Attempts to assist him using another senior manager were ignored and eventually periodic performance appraisals were conducted leading to termination of employment for alleged performance deficiencies.

[4] This is a dismissal occurring prior to the coming into force of s103A of the Employment Relations Act 2000. The case is therefore to be determined on the state of the law prior to that amendment.

The determination

[5] The Authority found that the employer had genuine concerns with Mr Bright's performance. However, it was also found that the plaintiff never properly put those concerns to Mr Bright nor did it give him adequate time in which to improve his performance. Accordingly, the dismissal was found to be procedurally flawed. Mr Bright was granted the following remedies:

- (a) \$5,000 as compensation for hurt and humiliation;
- (b) \$2,000 gross for lost remuneration;
- (c) costs were reserved. I was not informed of the final outcome as to costs.

[6] It was found that there had been conscientious attention by Mr Bright to mitigation. He obtained alternative employment quite quickly although with less remuneration and status. The Authority found the lost remuneration should be calculated on the basis of the difference between his salary as branch manager and the salary offered by the plaintiff in a lower status position had he remained in employment. That in my view is a flawed basis of calculation. The starting point for calculating lost remuneration is the difference between his salary and allowances as branch manager for the plaintiff and the salary he received in the alternative employment actually acquired.

[7] Mr Bright also claimed for loss of use of the company's motor vehicle. The Authority Member mentions this in her decision, but the reasoning on this point is

obscure. It appears to have been dealt with as part of reimbursement for other money lost rather than as compensation for loss of a benefit.

The facts

[8] Mr Bright recommenced employment with Eastern Equities in October 2002. His employment was the subject of a written employment agreement dated 26 September 2002. He spoke in his evidence about working for Farmers Transport. Farmers Transport Ltd is a separate company from Eastern Equities Ltd. It appears the trading of the transport business may be under the name of “*Farmers Transport*”. However, it was agreed at the outset that the employer throughout was Eastern Equities Ltd.

[9] Mr Bright received two periodic pay increases along with other branch managers after he commenced the employment. In late 2003 problems with management of the Gisborne branch were noted by the general manager and the board of the group of companies, which include Eastern Equities Ltd and Farmers Transport Ltd. Mr Bright had been employed for approximately 12 months by this time. His performance was then watched more closely and by March 2004 the general manager decided to conduct the first of what became a series of performance reviews.

[10] It became plain during the hearing that the perception as to the purpose of these meetings differed as between Mr Bright and Mr Brian Kelsey the general manager of Farmers Transport Ltd. Mr Bright regarded them as “*management*” meetings to discuss wider issues relating to the performance of the branch. “*No meetings were called specifically to discuss my performance*”.

[11] Mr Kelsey on the other hand was quite clear in his evidence that, while general branch matters were discussed, Mr Bright’s performance was clearly in focus and was discussed. Mr Kelsey took handwritten notes of all but one of these meetings and they were produced in the bundle of exhibits.

[12] This discrepancy between the witnesses came clearly into focus during the hearing when Mr Bright was giving his evidence. I am quite sure that during the meetings Mr Bright was informed of his shortcomings in performance but he did not

listen to what was being said to him and failed to have regard to it. During his cross-examination by Mr Petherick, counsel for the plaintiff, I noticed the same trait in Mr Bright. Particularly, I noted his lack of comprehension of what was being put to him. Matters were flatly denied by Mr Bright, which were simply irrefutable on the basis of contemporary documents. On occasion he made statements, which were plainly contradictory of what he had stated or conceded earlier or elsewhere in his evidence. My impression at the conclusion of his evidence was that as events unfolded in the concluding months of his employment he simply did not listen to what was being said and had his head in the sand. A quite perceptive piece of evidence is contained in the brief of evidence of Mr Kelsey where he refers to the comments of Mr Des Moss, a training provider. Unfortunately the original report of Mr Moss had been lost. He did not give evidence and the evidence I did hear was necessarily hearsay and suffers in weight accordingly. Nevertheless, there was no objection to its inclusion in the Kelsey brief. The company had employed the external training provider to conduct a training course, which included Mr Bright. Mr Moss made the following assessment of Mr Bright's performance during the course:

Struggled to keep up, talks in the past, not quick to opportunities, remained aloof all day. May be technophobic: Selective listening, found it hard to concentrate. Didn't like any form of mental assessment.

I was particularly alerted by the statement as to “*Selective listening*” as, from my observation of Mr Bright during his evidence, it was an accurate assessment of an aspect of his personality.

[13] In March 2004 when matters had not improved Mr Kelsey met with Mr Bright in Gisborne. Performance issues discussed were:

- (a) His unduly confrontational and aggressive approach to operation supervisors and some of the drivers;
- (b) Inappropriate discussions of personal employment issues with employees in front of co-workers and revealing personal information of employees to co-workers;
- (c) Inadequate attention to marketing of the business;

- (d) Confrontational approach with customers;
- (e) Complaints from employees and customers that Mr Bright's wife had been speaking to others in a derogatory way about the company;
- (f) Inability to inform staff of business matters leading to loss of productivity and ill feeling;
- (g) Failure to work with the operations support manager, Alaister Gray, when there were clear instructions to do so;
- (h) Oversight in not inviting Mr Gray to a farewell function for a senior employee when both had worked together for many years in the company. I suppose that while this matter might seem trivial, it appeared to be raised as example of Mr Bright's lack of insight and people skills in overall management of the branch;
- (i) Complaints from four named customers and buyers over their relationship with Mr Bright;
- (j) Failure to keep staff informed of his whereabouts, drinking while on telephone duties in the evenings, drinking with favoured staff to the exclusion of others.

[14] As far as the allegations against Mrs Bright are concerned, she gave evidence. I must say I find her statements somewhat equivocal. I would have expected a vehement denial if the allegations were untrue. However, their relevance to Mr Bright's own performance is tenuous. It is not a major point relied upon by the employer and there is really no need to have regard to the allegations.

[15] Mr Bright, according to Mr Kelsey, agreed to modify his behaviour in some respects. In other respects he was reluctant to accept criticism. Where that was the case, Mr Kelsey gave him a clear direction as to the company's requirements of him. One issue, which is not recorded in the notes of the March meeting, but clearly causing concern, was Mr Bright's handling of an accident involving a company driver. This incident involved the rolling of a truck and trailer unit near Tutira just north of Napier.

[16] Following the meeting there appears to have been ongoing discussions. Mr Kelsey said he and Mr Gray endeavoured to counsel and encourage Mr Bright. By 6 May 2004 many of the concerns had not abated. Mr Kelsey arranged a further meeting with Mr Bright in Hastings. This time the meeting was attended by Mr Peter Roebuck, the executive chairman of the parent company, and another executive, Mr Dick Heasley. Mr Kelsey said he gave Mr Bright two days advance notice of the meeting and informed him that it was a performance review.

[17] The meeting on 6 May 2004 was not the subject of recorded minutes. Mr Kelsey said he did not record notes as those of the meeting in March were used as a discussion agenda. The company regarded Mr Bright as not having addressed the performance issues raised earlier. Feedback was still being received that he was behaving in the same manner towards customers and staff. While he did not dispute the problems he did not appear to view them as serious. By this stage two accidents, including the one at Tutira, had clearly not been addressed in accordance with the company's health and safety programme. This was of particular concern to Mr Roebuck as driver assessment and training had not been instigated. Mr Roebuck felt the company would be vulnerable if health and safety procedures were not adhered to. Mr Bright explained that the delay was occasioned by the driver's refusal to co-operate in the assessment. The period of delay being over six months by this point, however, would appear to make such an explanation untenable. In any event failure to grapple with the matter for this reason exposes serious flaws in management technique. Eventually when Mr Bright had completely failed to deal with the problem, Mr Kelsey took it in hand and carried out the process himself.

[18] From both Mr Kelsey's and Mr Roebuck's evidence it is clear that strong direction was given to Mr Bright to improve his performance as manager at this meeting. Mr Roebuck said that Mr Bright was informed and would be in no doubt that his continued employment was in jeopardy. I have some doubt as to whether matters were indeed conveyed in that way. A day or two after the meeting, Mr Bright requested a further meeting with Mr Kelsey in Gisborne. This took place on 11 May 2004. Mr Kelsey recorded the meeting with handwritten notes. Operational matters were discussed but it is clear that the performance issues raised in the earlier meetings were reviewed. From comments, which Mr Bright made to him, Mr

Kelsey formed the view that Mr Bright was signalling his inability to cope with the manager's position. Mr Gray's services were offered but Mr Bright did not take the opportunity to gain assistance from him. When asked under cross-examination why he turned his mind against this opportunity, Mr Bright informed me he felt intimidated by Mr Gray.

[19] A further meeting took place on 4 August 2004. Mr Kelsey said he made it plain to Mr Bright that the meeting was to completely review his performance. The meeting took place at Gisborne. Brief notes record what was discussed although this meeting lasted four hours. The Tutira accident was among the matters raised. It was at this meeting that Mr Kelsey told Mr Bright that in the absence of any progress he was taking that matter over himself. Other matters discussed were the relationship problems and use of sub-contractors, which it was feared would lead to diminution of business with longstanding customers in Gisborne. Mr Kelsey formed the view that Mr Bright really failed to acknowledge the serious criticism of his performance as manager. This may not be surprising in view of Mr Bright stating in his evidence that no meetings were called specifically to discuss his performance and were really designed to discuss wider issues relating to the performance of the branch. Mr Bright's own brief of evidence records the following as his view of the meetings, which had taken place to that point.

5.1 *I agree that I met regularly with Farmers Transport's General Manager, Brian Kelsey, and other members of the company's Senior Management throughout 2004. This may have included meetings on the dates on which the company says we had performance management or similar meetings. These meetings were a regular part of my role as Branch Manager, and wider issues relating to the performance of the branch were discussed. No meetings were called specifically to discuss my performance.*

5.3 *The questions that I recall being asked during such meetings were:*

- a. *Was the Gisborne branch getting market share?*
- b. *Which other carriers were operating in the district?*
- c. *What was my relationship like with Stock Agents?*
- d. *What was my relationship like with office staff?*

5.4 *We discussed these issues and I was able to generally give favourable responses.*

5.5 *As Branch Manager, I accept that I had overall responsibility for the performance of the branch. On some occasions there was robust discussion as to how the Gisborne branch was operating. However, at no stage was my performance in the Branch Manager's role singled out for scrutiny. In particular, at no stage was I expressly told that Farmers Transport was dissatisfied with my performance as Branch Manager. As I have already noted, at no stage was any performance management programme of the type described in my employment agreement initiated. Nor was there any indication that my employment was at risk.*

[20] These passages confirm the gulf between the respective perceptions as to what transpired at the meetings. Mr Bright's view was the subject of considerable scrutiny by Mr Petherick in cross-examination. It is clear that by the conclusion of his evidence Mr Bright, albeit reluctantly, resiled from the position taken in his evidence-in-chief. It seemed to dawn on him then and he conceded, that performance issues were specifically raised. Indeed there was confirmation from him that most if not all of the issues noted by Mr Kelsey in his notes were in fact raised.

[21] From the perspective of the company, nothing improved following the series of meetings I have described. On 31 August 2004 Mr Kelsey telephoned Mr Bright to require his attendance the following day in Hastings. He informed Mr Bright that the meeting was to discuss ongoing performance issues and that he should bring a representative or support person as the matter was serious. Despite this, there was no indication that a possible outcome of the meeting was that Mr Bright's employment might be terminated. The company witnesses have indicated that that was not an intended outcome when the meeting was called.

[22] The meeting conducted on 1 September 2004 was attended by Mr Bright and his representative, Mr Blair Purcell. The company representatives were Mr Kelsey and Mr Roebuck. Mr Kelsey noted that the performance issues raised were staff management, the Tutira accident, marketing the business, relationship with clients and buyers, conduct over a Cedenco contract, disruptive comments to staff (e.g. intention to leave the company), general absence of leadership ability, wife's comments undermining the company, and facilitating the use of other carriers entering the Gisborne region. These were all issues, which had previously been discussed, apart perhaps from the Cedenco matter.

[23] The meeting lasted approximately 90 minutes. Mr Kelsey in his evidence elaborated upon each of the topics and obtained Mr Bright's response. There is a conflict in the evidence as to what transpired and what was said following a brief adjournment. Mr Kelsey and Mr Roebuck maintained that Mr Bright indicated on more than one occasion that he was not up to the job. Mr Bright and Mr Purcell maintained that this was not said by Mr Bright – that it was Mr Kelsey and Mr Roebuck who suggested this. It is a significant matter in the context of what followed and I would expect that it would have been noted in the handwritten notes of Mr Kelsey and recorded in subsequent correspondence. No such entry was made and I shall deal shortly with the correspondence, which emanated from the company after this meeting.

[24] It is clear that during the meeting Mr Bright raised the issue of the stress upon him but he does not appear to have indicated that he could not cope with the job. The entry in Mr Kelsey's minutes is as follows:

Len told we valued his contribution but we recognised the Branch Manager position was beyond his capabilities. It was not a vendetta – it was to ensure we had an ongoing business and that we addressed the stress issue which Len raised at least 7 times in the meeting.

[25] This entry follows the adjournment when Mr Bright and Mr Purcell returned and Mr Bright had asked what the alternative was for his employment. The company offered him a lower status job as operations supervisor with lower pay and type and quality of company vehicle. The meeting concluded with Mr Bright and Mr Purcell left to consider the proposal with Mr Bright's family and then respond. Mr Kelsey stated in his brief of evidence:

On at least six or seven occasions, Len Bright claimed that he was simply not coping with the job in general and that he couldn't do the job.

This is not how he records it in the minutes as I have indicated. Mr Roebuck indicated that Mr Bright said on numerous occasions that he couldn't cope with the job and was stressed by it. Mr Roebuck did not take notes, "... I had no need to. I had staff there doing that".

[26] Mr Purcell categorically denied under cross-examination that Mr Bright stated that he could not cope with the job. Of more significance however, is the

letter Mr Kelsey wrote to Mr Bright on 7 September confirming the outcome of the meeting. In that letter Mr Kelsey records the position as follows:

... I called the meeting on 1st of September to review your performance once again. Due to the critical nature of the position we cannot continue to operate the Gisborne branch in this way. At the meeting last Wednesday, Peter and I told you that we believed the manager role was beyond your capabilities.

As a consequence you were offered an alternative position as Operations Supervisor. We discussed that the change in position would result in a drop in salary and a move from a company car to a Ute. You undertook to consider our offer and respond. To date I have not heard from you.

[27] It is inconceivable that if Mr Bright had conceded he could not cope as alleged, the letter would have been worded in that way even if it had been incorrectly set out in the notes. I am of the view that it was Mr Kelsey and Mr Roebuck who alleged Mr Bright could not cope. This is consistent with contemporary documents and as recalled by Mr Bright and Mr Purcell. I prefer the evidence of Mr Bright and Mr Purcell on this point.

Meetings and correspondence after 1 September 2004

[28] Mr Bright did not return to work after the meeting on 1 September. As a result of the stress he was under he was medically certified as unfit to work. Correspondence then took place between Mr Bright's lawyers and Mr Kelsey. Mr Kelsey again stated that Mr Bright "*was told at the meeting of 1st September that we felt he was not coping with the demands of the position*". The tenor of the correspondence from Mr Bright's lawyer was that he did not accept the allegations made. Mr Bright made it clear in correspondence that he would not resign, nor would he accept the demotion offered. Mr Kelsey then terminated his employment orally. This was confirmed in writing the following day. In the letter of 16 September 2004 Mr Kelsey wrote following Mr Bright's refusal to resign or take demotion that:

I confirm that Farmers Transport has told you that the position of Branch Manager at Gisborne was beyond your capabilities and that as an alternative you were offered continuing employment as an Operations Supervisor at its Gisborne office.

As pointed out at the meeting held in Hastings on 1 September 2004 Farmers Transport can not [sic] continue to employ you as its Gisborne Branch

Manager. Because you have declined our offer of continuing employment per your fax of 14 September this left Farmers Transport with no option but to give you notice of termination of your employment which was verbally given to you on Wednesday 15 September.

[29] It is at this point that the plaintiff created for itself considerable difficulties in this matter. It is significant also that attention to detail by Mr Kelsey was not as precise as it should have been. The letter of termination is on Farmers Transport Ltd letterhead. Mr Kelsey refers to Farmers Transport throughout as if it was the employer. The employer was in fact a totally different entity. Nevertheless, it is plain that at this point termination was not and should not have been the only option.

[30] The sequence of meetings and correspondence leading to termination of employment is as follows. On 7 September 2004 Mr Kelsey had written to Mr Bright. Mr Bright was on sick leave at this point. Mr Kelsey confirmed his perception of the nature of the meeting and discussions on 1 September. He confirmed that performance issues had been raised. He outlined from his handwritten notes the matters discussed. He also confirmed the offer of a lower status position as operations supervisor. He set a deadline of 14 September for a decision. He confirmed that Mr Bright had valuable qualities and skills, which the company wished to retain.

[31] The response to this letter came from Mr Bright's solicitor, Mr D Sharp, and is dated 9 September 2004. That letter put Mr Bright's response to some of the issues that had been raised. It did not contain any acceptance by Mr Bright of the operations supervisor position. Clearly, Mr Sharp was putting the matter as instructed by Mr Bright. I say this because Mr Sharp wrote:

... We wish your confirmation that our client's performance is satisfactory or else detailed description of the areas of his performance that have been sub-standard.

Actual incidents should be referred to as our client was subjected to this meeting and these allegations without prior warning and without any indication that any aspect of his performance had been substandard.

[32] I have serious doubts that Mr Bright had fully informed Mr Sharp of what had transpired to that point. I read the letter as the beginnings of a claim to disadvantage as it is plain Mr Bright had no intention of relinquishing his position as branch manager. Mr Kelsey responded promptly to this letter. In a letter dated 13

September 2004 he set out the company's response to the matters raised by Mr Sharp and referred to the meetings held earlier between March and September and the matters discussed. It concluded with the statement that it was clear to the company Mr Bright could not continue as branch manager without significant damage to the branch. The operations role offer remained open.

[33] On 14 September Mr Bright sent a fax to Mr Kelsey advising that he declined the offer. The following day Mr Kelsey travelled to Gisborne to meet with Mr Bright. The latter asked to have a witness present but apparently Mr Sharp, who he wanted to be present, was engaged in court. It was agreed the meeting would proceed and be recorded. Mr Kelsey took notes. In view of Mr Bright's refusal to accept the operations position he was notified that his employment was terminated. Mr Kelsey recorded that there was discussion about notice, payment in lieu and how the staff would be notified. Mr Bright also took notes. He recorded there was some dispute on this last point. He indicated that he was not resigning, he was having his position terminated. Mr Bright then left to discuss matters with his wife. On his return it appears he requested notice of termination in writing. The meeting, which had taken place at the Gisborne Branch premises, ended at that point with Mr Bright leaving the premises and taking the remainder of the day off.

[34] On 16 September 2004 Mr Bright and Mr Kelsey corresponded with each other in writing. Mr Bright wrote initially confirming his refusal to agree to the demotion. He made it clear that he was not resigning and required proper notice of termination in writing. He confirmed the discussion concerning the timeframe for notice and that Mr Kelsey had suggested he resign in order to exit with grace. A discussion along these lines appears to have some corroboration in Mr Kelsey's notes of the meeting on 15 September. Mr Kelsey then responded with the letter of the same date to which I have already referred.

Submissions

[35] The company's Human Resource Policy & Procedures Manual contains quite elaborate directions to the manager who undertakes performance appraisals. It also sets out a process with vertical flow charts as to how poor performance leading to final dismissal is to be managed.

[36] In the case of Mr Bright, his own employment contract contained a provision relating to performance appraisals. Clause 14 of the contract reads as follows:

14. **PERFORMANCE APPRAISAL**

The Employer reserves the right to regularly conduct an appraisal of the Employee's work skills, attitudes and habits. This appraisal, although it will form the basis of a review of the Employee's remuneration, is also specifically intended to determine the Employee's ongoing ability to perform the duties requested of him or her. Where required, the Employer undertakes to initiate a programme of job training to assist the Employee to more effectively perform his/her duties.

[37] Mr Erickson referred in his closing to these provisions to submit that in this case the procedures had not been carried out in the appraisal and eventual dismissal of Mr Bright. In addition he referred me to the decision of *Trotter v Telecom Corporation NZ Ltd* [1993] 2 ERNZ 659. That case posed several questions upon which the employer's decision to appraise performance and if necessary dismiss may be measured. The following passage from *Trotter* sets out the relevant standards:

...It is, of course, not for the Court to be the arbiter of the standards set by the employer or of the employer's judgment of the question whether the employer's standards have been met. The Court can and does, however, exercise judgment on the question whether dismissal for unsatisfactory work performance is fair and that involves reaching a view on a number of questions. Some, perhaps most, of these can be said to be:

- (1) Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
- (3) Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*
- (4) Was a reasonable time allowed for the attainment of those standards?*
- (5) Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
 - (a) Using an objective assessment of measurable targets;*

- (b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
- (c) *Listening to the employee's explanation with an open mind;*
- (d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
- (e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?*

[38] Mr Erickson submitted that in the case of Mr Bright the employer had not carried out the formal requirements. That may be so in respect of the final steps taken, but I accept Mr Petherick's submission that the manual and the provision in the contract mean that the employer retains some flexibility in the way that the performance appraisals are carried out. With the exception of the flow charts, the manual provisions and the contractual clause are really aimed at methods by which performance is improved rather than proceeding down an intended path to dismissal.

[39] This was after all a situation involving the general manager endeavouring to achieve improvements in the way that the manager of his Gisborne branch managed that branch. In dealing with a manager of Mr Bright's seniority, some flexibility and latitude in the process may be permitted. However, if an employer adopts a less formal approach to appraisal in this way and dismissal later comes to be considered, an employer will not be regarded as having acted justifiably unless the employer has first given the employee fair warning and an opportunity to improve and show whether he can do the job or not. The vertical flow chart to which I have referred, contemplates the different stages in the overall process and the response, which the employer must take, depending upon how matters progress.

[40] In the present case, Mr Bright alleges he was not afforded the opportunity of fair warnings and an opportunity to improve and show that he could in fact carry out the position. The employer on the other hand, stated that it did over a number of months, spell out in detail the areas where improvement was required. When, during that process, Mr Bright indicated his inability to perform the required duties it looked at alternatives for his remaining in employment. It stated that only when Mr

Bright refused to consider such alternatives did it make the decision to terminate his employment.

[41] One issue submitted by Mr Erickson was that Mr Bright was entitled to know not only the details of the complaint but also the identity of the complainants. I do not agree with that submission in a situation where purely performance issues were being appraised. That might be the case where misconduct issues leading to the possibility of summary dismissal are considered. In this case the identity of the customers making complaints about Mr Bright were noted and discussed. However, in a situation where allegations were being made by fellow employees of his confrontational and aggressive approach it would be unreasonable to require the employer to disclose their identity if Mr Bright was to remain in a management role over them.

[42] The issue of the identity of the people complaining against Mr Bright do not appear to have been raised by him until the meeting on 1 September when he attended with Mr Purcell. It was then mentioned in subsequent correspondence, emanating from Mr Bright's solicitors. Mr Erickson pursued that issue in his submissions. As I say I am not prepared to accept that the company's decision not to reveal the identity of the employees when purely performance appraisals were being conducted, amounts to a procedural deficiency.

Conclusion

[43] I am left in no doubt that there were serious deficiencies concerning Mr Bright's performance of his duties as branch manager. I am similarly in no doubt that these deficiencies were discussed with him and he was given opportunity to improve.

[44] As I have said earlier it is clear that the plaintiff became dissatisfied with Mr Bright's performance. On the evidence I have heard there were good grounds for it to form that view. The notes of Mr Kelsey make it plain that the level of dissatisfaction and specific reasons for such dissatisfaction were notified to Mr Bright. It would have been preferable for them to be specified in writing following each of the meetings rather than remaining merely in the form of minutes retained by Mr Kelsey. His objection to committing to writing, as that would reveal the matters

being discussed to other employees, is somewhat unconvincing. After all, this was one of a group of companies and it is certain that at chief executive level there would have been secretarial staff bound to maintain secrecy and confidence. Correspondence could have been sent to Mr Bright's home or some other postal address agreed. Nevertheless, such written evidence is not available in this case and I am left to assess whether Mr Bright was properly informed on the evidence before me. From the combined oral evidence and what were clearly contemporary documents in the form of minutes, I am satisfied that he was informed at each of the meetings.

[45] I find that objective criticism was given and objective statements of standards set. Quite apart from issues of procedural requirements there clearly remained an underlying problem with Mr Bright's management of the Gisborne branch. Just one issue alone: Mr Bright's obstinacy and obduracy in refusing to deal with the Tutira incident, placed the company at serious risk with health and safety considerations if a further accident had occurred and been investigated. Mr Roebuck stressed this as a factor on more than one occasion when giving his evidence. It is clear that there were also issues involving work given to out of town competitors and relationship problems with existing customers of such concern that the customers came to mention them to senior management. Insofar as training and counselling were concerned the company had Mr Gray, the very person employed to provide these. Mr Bright was offered this expertise but refused to accept it. Even as late as the 1 September meeting, the company acted on the basis that the goal was to improve Mr Bright's performance as Gisborne Branch Manager. I accept Mr Petherick's submission that that meeting was convened without any contemplation of an outcome of dismissal. However, it seems plain that at some stage during that meeting the company did come to the conclusion that if Mr Bright did not accept the lower status position he would be dismissed. By that stage the company had really only completed a series of performance appraisals. The standards required before a dismissal could take place had not even begun to be met. The procedure, which should have been put in place at that point, was to clearly establish the standards in formal written warnings and go down the process, which is set out in the vertical flow chart contained in the policy and procedure manual. That such warnings were

not then put in place and subsequent meetings held to assess performance following the warnings, results in a substantial procedural deficiency.

[46] It is possible that having had it brought home to him, by proper written warnings, that his employment was in jeopardy if he didn't improve, Mr Bright may have attended to the difficulties being put to him and improved. While there were several meetings, the position was never put to him in this way. Mr Roebuck maintained that he asked that Mr Bright be warned that his employment was in jeopardy. This is not confirmed by Mr Kelsey. I do not share Mr Roebuck's confidence that such a warning was given. I am satisfied that Mr Bright (and also Mr Purcell in respect of the 1 September meeting) are correct on this point.

[47] It was clearly the hope of the company, prior to the September meeting, that if he was made to realise the matters had got to a serious stage, Mr Bright would improve his performance. If this was not the situation then Mr Petherick could not have made the submission he did that a dismissal was not contemplated as a possible outcome of the meeting at its outset.

[48] Finally, of course, the company did not conduct a final meeting at which Mr Bright was informed in advance that dismissal was a possible outcome, and at which he was given the opportunity of legal representation. The final meeting conducted was to confirm his dismissal, but that is an outcome, which Mr Kelsey had already predetermined prior to the meeting once he knew Mr Bright would not accept the other position offered. He did not undertake that meeting with an open mind. It is true that Mr Bright was given the opportunity of having his solicitor present at that meeting, but in view of the attitude the company had clearly adopted by that stage, it is difficult to see how such representation might have procured an alternative result. Mr Kelsey subsequently confirmed that this was so in the letter he wrote following that final meeting in Gisborne.

[49] While the performance appraisal process was conducted in a proper manner, in this case the employer has not followed strictly to the letter set out in its own manual the dismissal procedures, which followed. Nor has it complied with the procedures established in cases such as *Trotter*. Dismissal for performance deficiencies are notoriously difficult for an employer. Matters are not as clear cut as,

for example, in disciplining for misconduct. Where meetings commence for performance appraisal but later in the process dismissal is in prospect the employee must be notified. The purpose of adherence to such formal procedures has been well established in employment law over many years. In *New Zealand (with exceptions) Food Processing etc IOUW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582, 594 Chief Judge Goddard stated:

Procedural fairness and the rules of natural justice embrace similar if not identical concepts of fair and reasonable dealing. Those concepts are fundamental requirements and characteristics of the employment relationship which is sometimes said to depend on mutual trust and confidence.

[50] There is always the hope that matters will improve and that becomes enhanced if proper procedures are followed and the employee is given proper time for reflection and the taking of advice. The plaintiff in this case faced the added difficulty that in a situation where the employee was clearly being told the areas where he needed to improve, he simply was not listening. Faced with that difficulty matters were not reduced to writing as they should have been.

[51] Judged overall I do not consider that the meetings conducted between March and September could be regarded as objectionable. Mr Kelsey established an approach to performance appraisal he hoped would result in improvement. His relationship with Mr Bright was at the higher end of the employment scale in the company: general manager to branch manager. Mr Bright had had a long relationship with the company in one way or another. When it was clear, however, that Mr Bright was not going to improve in his performance and dismissal was an option then as a matter of fairness the company should have embarked on a more formal procedure of warning and assessment. Simply adopting the attitude that if Mr Bright was not to accept the demotion then the dismissal was the only alternative fell short of a fair and proper process.

[52] For these reasons I concur with the determination of the Member of the Employment Relations Authority. As a result of the procedural deficiencies in the latter stages of the entire process the dismissal was procedurally unfair and cannot be justified.

Disposition and Remedies

[53] Insofar as remedies are concerned, I have already indicated that the appropriate method of dealing with reimbursement and mitigation is to consider the difference between the remuneration Mr Bright was receiving in the branch manager position and the remuneration he received in alternative employment. There is no ground made out nor proper reason in this case for departing from the quantification on the basis of 3 months income. Had the procedural deficiencies not occurred and Mr Bright not improved his performance his continued employment would have been unlikely beyond a further period of 3 months. The gross lost remuneration calculated on what I regard as the proper basis amounts to \$3,000 and that sum is awarded.

[54] Insofar as compensation is concerned there is ample evidence of Mr Bright's distress and humiliation at his untimely termination of employment. However, as I have discussed in this decision, he was somewhat the author of his own misfortune. I do not believe that Mr Bright actually countenanced that he was incapable of performing the tasks of branch manager without further substantial counselling and training. Nor do I think he accepted that the company's assessment of him in that light was correct. Nevertheless, on the basis of legal principles applying in such matters Mr Bright is entitled to compensation. I would have placed the quantification of such compensation a little higher than the sum awarded by the Member of the Employment Relations Authority.

[55] Mr Erickson also submitted on behalf of Mr Bright that should the challenge be decided in his favour that further compensation should be awarded for the loss of the motor vehicle and that that matter might be adjourned for calculation and further evidence. When Mr Bright left the employment with the plaintiff he almost immediately obtained alternative employment although with a lesser status. A vehicle attached to the position he obtained although not the same quality of vehicle. Having regard to the nature of the employment and the overall circumstances surrounding the unjustifiability of the termination being purely procedural, I am not persuaded that there should be any substantial compensation for loss of the benefit of the more expensive motor vehicle. What Mr Erickson is proposing is a full accounting for the difference in value to the employee between the two classes of vehicle. It is clear, from a brief consideration, that would give rise to a substantial

sum out of keeping with the remedies already granted. However, the loss of such benefit, for that is what it was, should not simply be subsumed in the compensation specifically awarded for the humiliation, loss of dignity and injury to feelings. It is appropriate that a further identifiable sum be awarded, which I assess at \$1,000.

[56] I am required to consider s124 of the Employment Relations Act 2000:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, -

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[57] Some insight into the way the section may be applied is gained from the approach taken in *Nelson v British Broadcasting Corporation (No 2)* [1980] ICR 110 and adopted in *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 albeit involving different although similar statutory provisions. In *Nelson* Brandon LJ stated (p120):

I agree with the conclusion there reached that, on a proper interpretation of paragraph 19(3), an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy. This conclusion can be arrived at in various ways. First, it can be said that the epithet 'culpable' or 'blameworthy' should be implied before the word 'action.' Or, secondly, it can be said, that the expression 'caused or contributed' impliedly incorporates the concept of culpability or blameworthiness. Or, thirdly, it can be said that, in any case, it could never be just or equitable to reduce a successful complainant's compensation unless the conduct on his part relied on as contributory was culpable or blameworthy. For my part, I prefer the third way of arriving at the conclusion to either the first or the second, and would approach the application of paragraph 19(3) on that basis.

It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.

[58] Travis J in *Paykel* held that the actions that require a reduction in remedies are actions which may be loosely categorised as being culpable and blameworthy. There must be a causal connection between such actions and the situation, which gave rise to the dismissal. He went on to say (p339):

The Tribunal or the Court may, after applying the steps contained in s 40(2) consider that the actions of the employee were so blameworthy that the remedies that would otherwise have been awarded are reduced to nil. The converse is also true, the Tribunal or the Court may conclude that the actions, although contributing to the situation which gave rise to the grievance, are insufficiently blameworthy to require the remedies to be reduced to any extent.

[59] In the present case I had already described some of Mr Bright's actions as obstinate and obdurate. In other respects he has refused, whether as a result of a quirk of his nature or deliberate stubbornness, to accept and improve the areas of criticism. This is similar to the colloquialism of bloody-mindedness referred to by Brandon LJ. It is plain, therefore, that there were actions of Mr Bright which contributed towards the situation that gave rise to the personal grievance. Having said that, however, except to the extent that I have varied them, the remedies awarded by the Authority Member could be described as tending towards the conservative. I would certainly have increased the level of compensation, which must be regarded in the context of other awards as very much at the lower end of the scale. I would have been more inclined to have awarded compensation in the sum of \$7,500 with a one-third reduction arriving at the same figure as that awarded by the Authority Member. It is possible of course that, while not specifically mentioning s124, that she has effectively made a similar calculation in arriving at her award.

[60] I have found that, except to correct error in approach, the level of lost remuneration is appropriate. In such circumstances, therefore, I do not propose to increase the level of compensation simply to then enable a reduction for contributory behaviour. Accordingly, in the circumstances of the case, the actions of Mr Bright do not require any further reduction from the level set by the Authority Member or the extra compensation I have allowed in respect of the motor vehicle.

[61] This then disposes of the challenge and cross-challenge except on the matter of costs. If the parties are unable to resolve that matter between themselves then

further written submissions will be required. Any application for costs should be filed by the end of May 2007. The plaintiff will then have a further seven days to reply. Insofar as costs in the Authority are concerned I note that costs were reserved. Similarly if those costs cannot be settled then an application should be made to the Authority Member to set costs.

[62] Finally, to ensure there is no misunderstanding arising from the way the plaintiff has been described in the intituling, this judgment in favour of the defendant is against Eastern Equities Corporation Limited. That company is to pay to Mr Bright reimbursement of remuneration of \$3,000 and compensation of \$6,000. Those orders are in substitution for the awards contained in the determination of the Authority, which is set aside.

M E Perkins
Judge

Judgment signed at 12.35 pm on Wednesday 16 May 2007