IN THE EMPLOYMENT COURT
AUCKLAND

AC 17/07
ARC 73/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANTHONY HOUSHAM Plaintiff
AND	JUKEN NEW ZEALAND LIMITED Defendant

Hearing: 22 and 23 March 2007
(Heard at Kaikohe)

Appearances: David Fleming, Counsel for Plaintiff
Miss PA Swarbrick, Counsel for Defendant

Judgment: 5 April 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue for decision in this challenge by hearing de novo from a determination of the Employment Relations Authority dated 6 September 2006 is whether Juken New Zealand Limited dismissed justifiably Anthony Housham.

[2] Mr Housham's dismissal followed a physical altercation with another employee at Juken's Kaitaia timber mill site in April 2006. The Authority concluded that a fair and reasonable employer would have dismissed Mr Housham in all of the relevant circumstances at the time of those events.

[3] Mr Housham was summarily dismissed on 26 April 2006 for reasons that are encapsulated in the company's letter to him of that date and are materially as follows:

> *This letter is to confirm that on 26 April 2006 I informed you that your employment with this Company would cease on the above date as a result of dismissal following a Disciplinary Meeting on 26 April.*
>
> *On Saturday 22 April 2006 while working at the Northland Mill Site you engaged in a situation of physical violence by pushing/striking another person on Company premises. The matter was thoroughly investigated on 24 April.*
>
> *The results of this investigation were outlined at the Disciplinary Meeting at which the conclusion was reached, after taking into account your explanation, that your actions amounted to serious misconduct under the Company's Code of Conduct. In particular you were considered to have breached that part of the Code which states that the following is prohibited:*
>
> *Arranging for or engaging in acts of physical violence against any person on the company's premises or at company arranged or sponsored events (**Note:** Includes fighting even if provoked).*

[4] Mr Housham had worked at Juken's Kaitaia mill since early 2000 and was, for reasons set out later, a pallet maker at the time of dismissal. The terms and conditions of his employment were set out in the relevant collective employment agreement. On Saturday 22 April 2006 Mr Housham and a labour hire contract worker, Anaru Nathan, were both at work. The physical altercation between them was not observed by anyone else although the consequences of it were.

[5] Mr Housham was operating a mechanical fork hoist emptying a rubbish box into a bin. While clean wood waste is normally put into a receptacle called "*the hogger*", Mr Housham's load was mixed with ferrous rubbish so that he did not empty it into the hogger. Mr Nathan, an employee of a contractor engaged on the site, remonstrated with Mr Housham for not emptying the waste into the hogger. Mr Nathan shouted rude abuse at Mr Housham, calling him "*a lazy cunt*". Mr Nathan then threw a large leather glove or gloves at Mr Housham who was still driving the fork hoist. Mr Nathan claimed in a statement made to the employer's representatives about the incident that he threw the gloves at Mr Housham because he almost collided with Mr Nathan. Mr Housham was unaware of the reason for the throwing of the glove(s) that struck him on the back of the head while he was driving the fork hoist.

[6] The two men began yelling at each other, Mr Nathan was about to mount the fork hoist and a physical altercation then ensued. Mr Housham claimed in his initial statement taken by the employer that Mr Nathan struck him in the face, breaking and

dislodging his glasses, before walking away. Mr Nathan claimed that Mr Housham threw a punch at him before he responded against Mr Housham in kind and that in the course of a *"tuffling"* around the hoist, Mr Housham ripped his thumb with *"the snips"*.

[7] Mr Housham in evidence claimed that when Mr Nathan was about to mount the moving fork hoist he feared an assault from Mr Nathan and so attempted to push him away with a hand to the chest. His case was that Mr Nathan punched him in the face, breaking his glasses, and that this occurred almost simultaneously with the push to Mr Nathan's chest.

[8] Mr Housham's evidence was that he held Mr Nathan's head down on the fork hoist seat to try to stop further punching but that Mr Nathan continued to do so, hitting him several times on the body. Mr Housham was bleeding profusely from his face but remained seated on the fork hoist for the whole time.

[9] Almost immediately after the incident the shift leader, Kura Walters, asked each man to provide a written statement about the incident. Mr Housham was yet to have treatment for his injuries when he was asked to make a written statement. He was later taken to Kaitaia Hospital but there was no doctor available and he was subsequently treated at a medical centre for about three hours before returning to the mill to pick up his car. He was told that he would be contacted about returning to work.

[10] On Monday 24 April Mr Housham was contacted by Vincent Burgess, then the defendant's Assistant Mill Manager, and advised that the incident was being treated seriously by the company and he should make sure he had representation during its investigation. Mr Housham was accompanied to the company's meeting that day by another employee who was a union delegate. At the meeting he gave his account of what had happened.

[11] This meeting included what was described as a re-enactment of the altercation with Mr Housham seated on the stationary fork hoist in the area in which he had been operating on the Saturday and Mr Burgess playing the part of Mr Nathan who was not present. The employer's purpose of this re-enactment was to gauge the relative positions of the combatants and the probabilities of their accounts of what had happened. Mr Burgess concluded that although Mr Housham could

have reached Mr Nathan's head while seated on the fork hoist, he could not have made contact with his hand to Mr Nathan's chest. Mr Burgess did not tell Mr Housham of this conclusion.

[12] After the re-enactment, Mr Housham claimed that Mr Nathan had initiated the incident by throwing gloves at him and that he was entitled to defend himself by pushing him away with a hand to the chest to prevent apprehended assault.

[13] The company advised Mr Housham that there would be a further meeting two days later. The plaintiff then made a complaint of assault against Mr Nathan at the Kaitaia Police Station. His statement to a constable was consistent with his account of relevant events given to the company. Mr Housham did not hear from the Police about his complaint.

[14] At the next meeting on Wednesday 26 April Mr Burgess, for the company, summarised its account of events. Mr Housham did not agree with some aspects of this and there were further questions and answers about what had happened. Juken management representatives retired to consider the position.

[15] Mr Housham was then told of his dismissal and handed the letter quoted at the start of this judgment. He was required to hand back his gear and was escorted around the site to do so.

[16] At the time of his dismissal Mr Housham was the longstanding senior union delegate at the mill. His loss of employment meant a loss of this important and prestigious role that the plaintiff felt severely. Mr Housham was then 54 years of age. No alternative work was available to him immediately in Kaitaia and applying for an unemployment benefit not only meant a significant reduction in his income but was a difficult and stressful exercise.

[17] Despite his relatively long service, at the time of his dismissal Mr Housham was working as the lowest graded pallet maker at the mill. He had been demoted to this position from his previously highest graded role as lathe runner because of industrial action taken by himself and another unionist at the mill. He challenged his demotion and the final warnings issued for this and, in September 2006, the Employment Relations Authority determined that these disadvantages in employment were unjustified. Because, however, Mr Housham had by then been dismissed, the Authority did not order his reinstatement to the lathe runner position

but only modest compensation for injured feelings. That determination of the Authority has not been challenged. In these circumstances Mr Housham says that remedies for unjustified dismissal should be based on the lathe runner role that he would have held had he not been unjustifiably disadvantaged and then dismissed.

[18] There are similarities in the circumstances of the two personal grievances. As the Authority's determination in the disadvantage grievance confirms, Juken applied the literal words of its *"Code of Conduct"* to what Mr Housham had done without considering or at least acknowledging the particular circumstances in which what might otherwise have been culpable misconduct, was in fact lawful industrial action. The company's letter of sanction to Mr Housham of 15 November 2005, following his participation in strike action, noted at its conclusion:

> *Failure to abide by the above requirements and any further breaches of "Code of Conduct", your Employment Agreement or Company rules and procedures could lead to further disciplinary action which may include a review of your ongoing employment.*

[19] In the circumstances of these two cases and the events leading to them, I have scrutinised carefully the justification for Juken's dismissal of Mr Housham who was, at the time of the events that led to, and of, his dismissal, challenging the justification in law of an earlier disciplinary finding against him and sanction for it.

Employment agreement and Code of Conduct

[20] Mr Housham's terms and conditions of employment were set substantially by the Juken New Zealand Limited and National Distribution Union Inc Northland Mill Collective Employment Agreement (19/05/2005 – 19/11/2006). Materially this provided:

> ***PART ONE – "COMMONS"***
>
> …
>
> …
>
> ***6.1 Conduct***
>
> *The parties agree to the need to undertake their duties and responsibilities with a commitment to reasonable conduct and good relationships with other employees and persons, companies and organisations with whom the Company has business relationships or potential relationships.*
>
> *The Company undertakes to treat employees fairly and properly consistent with the terms of this Agreement.*

PART TWO – "SITE SPECIFICS"

…

…

4.4 Policies and Rules

> *The Company shall be entitled to institute policies and rules in relation to its activities and the conduct expected of its employees from time to time and such policies and rules shall be observed in good faith by the Company and the employees. Any policy or rule as developed must be reasonable and the Company must ensure that the employees are aware of such policies and rules and any amendments. Where policies and rules deal with matters of conduct of employees (e.g. discipline, safety and health, leave taking, etc.) the Company shall consult with the Site Committee or Workplace Consultation Committee as the case may be (comprising representatives of management and work area delegates chosen by employees) prior to change or implementation.*

[21] The Code of Conduct (a set of policies or rules in terms of clause 4.4 of the collective agreement set out above) included the following relevant provisions. One example of "*serious misconduct"* was:

> - *Arranging for or engaging in acts of physical violence against any person on the Company's premises or at Company arranged or sponsored events (**Note:** Includes fighting, even if provoked).*

[22] Under "*Discipline Process"* the Code provided:

> *Any employee who is the subject of formal disciplinary action will have the allegation(s) put to him/her by a manager or supervisor in the presence of their representative and will be given an opportunity to provide an explanation before a decision is made.*

"Fighting" cases

[23] There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such a confrontation under any circumstances.

[24] An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee

is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.

[25] While a "*zero tolerance*" policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation. While an employer is entitled to have a *"zero tolerance"* policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called "*zero tolerance*" approach that will see offenders dismissed.

[26] One example from the earlier cases may suffice to illustrate the distinction between culpable and non-culpable involvement in a physical altercation. In *Pilkington (New Zealand) Ltd v Sangha* [1999] 2 ERNZ 263 Mr Sangha was the victim of an unprovoked assault by another employee on the employer's premises. Mr Sangha attempted to protect himself from fist blows but when passive resistance was insufficient, he attempted to dissuade his aggressor from continuing his attack by swinging blows at the aggressor that, nevertheless, did not connect. The employer, engaged in glass manufacture, had a strict policy against "*fighting*" and dismissed Mr Sangha in reliance upon it, saying that both employees had engaged in a fight. Both the Employment Tribunal and this Court upheld Mr Sangha's claim to unjustified dismissal on the basis that he had been the victim of an unprovoked assault by the other employee and his actions were reasonable in self-defence in all the circumstances. Mr Sangha's conduct did not constitute "*fighting*", physical combat engaged in willingly by both parties.

Procedural justification for dismissal

[27] In many respects Juken cannot be criticised reasonably for the manner in which it investigated what was by any account a serious incident between Mr Nathan and Mr Housham. However, ideally it should have ensured that Mr Housham had been assessed, if not treated, for his injuries before involving him in its investigation, including a crucial interview of him. While valuable information can be collected by interviews immediately after an event, where this has resulted in injury that requires medical attention a short postponement of an interview may be more appropriate. It follows that I should be wary of any reliance by Juken upon Mr Housham's account of events given when he first required, and should have been provided with, medical attention.

[28] Juken arranged for union representation of Mr Housham. It held a series of meetings and considered the position before making its decision. In the circumstances, suspension on pay was an appropriate response by Juken to the circumstances as they appeared immediately after the incident.

[29] The reconstruction of the event was not unreasonable in itself although it was not ideal that a managerial representative "played" Mr Nathan in the reconstruction with Mr Housham in the absence of much, if any, knowledge by the employer of where Mr Housham may have been at critical times.

[30] Juken relied upon Mr Burgess's calculations of what he considered Mr Housham could and could not have done to Mr Nathan while seated on the fork hoist. These included measurements taken by Mr Burgess after the re-enactment but not ever referred to Mr Housham or his representative about heights and distances on and around the fork hoist. Mr Burgess said these calculations confirmed for him that Mr Housham could not have pushed Mr Nathan in the chest while remaining seated on the fork hoist. It was wrong and unfair of Mr Burgess not to have made this information available to Mr Housham before considering his explanation or, alternatively, it was wrong for Mr Burgess to have taken this information into account as he did, having omitted to tell Mr Housham of it and allowing him to comment on it.

[31] As emerged in evidence for the first time, because Mr Housham had not previously been made aware of Mr Burgess's measurements and his reliance upon

them, these measurements and calculations were incomplete. Mr Burgess assumed that if Mr Housham had remained seated on the fork hoist, he could not have connected his hand to Mr Nathan's chest, but could have to his head. However, Mr Burgess conceded that by leaning towards Mr Nathan but still remaining seated on the fork hoist, Mr Housham could probably have made hand contact with Mr Nathan's chest. Mr Housham's explanation was not excluded by the measurements and calculations. The failure to disclose crucial information upon which Juken relied in dismissing Mr Housham illustrates that its assumptions were not as unequivocal as it concluded.

[32] Finally, in my assessment of the fairness and reasonableness of the employer's process, I have concluded that its compliance with the requirements of the Code of Conduct set out in paragraph [21] above, were met later than they should have been.

[33] Although it was fair and reasonable for Juken to have categorised its first inquiries and investigations into the incident as not having been directed to Mr Housham's personal culpability, by the end of the meeting on Monday 24 April at the latest, they had reached the point that a fair and reasonable employer would have told Mr Housham that he was not there as a witness but, in effect, as a suspect. Although it is clear that Juken met its obligations to tell Mr Housham that suspicion of misconduct was falling upon him, that he should be so advised in the presence of a representative, and that he would then have an opportunity to provide an explanation, this occurred only during the course of the final meeting on Wednesday 26 April, and relatively soon before he was dismissed. A fair and reasonable employer would have so advised Mr Housham at the end of the meeting on Monday 24 April at the latest.

[34] My assessment of the position is reinforced by an otherwise innocuous remark made by one of Juken's witnesses. It was that management was surprised that Mr Housham used a fellow mill worker, George Popata, as his representative at all stages during the inquiry. Management was surprised that Mr Housham did not obtain the assistance of the more experienced full-time Northland official of his union, Trevor Noel.

[35] This is consistent with Mr Housham's evidence that it was not until very late in the piece that he appreciated that he was regarded not as an innocent victim of an

assault and a witness to the employer's inquiry into this but, rather, as he came to appreciate on 26 April, that he was himself accused of serious misconduct with the consequence of dismissal.

[36] Although, as I have already noted, Juken conducted an investigation that was fair and reasonable in many respects, in other important ones it failed to meet the applicable standards of procedural fairness and reasonableness set out in s103A of the Act.

Substantive justification for dismissal

[37] In addition to my assessment of justification for the employer's procedure, I have concluded, to use the words of s103A, that *"… the employer's actions …"* were not *"… what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal …"*. That is for the following reasons.

[38] There was no evidence of injury to Mr Nathan (or indeed to Mr Housham) that would have been consistent with any suggestion of Mr Housham punching Mr Nathan in the head before Mr Nathan assaulted Mr Housham. In Mr Nathan's first statement to the company immediately after the incident, he said: *"… I got right up in front of him …"*. That was consistent with Mr Housham's account of Mr Nathan mounting the fork hoist rather than the company's conclusion that he remained on the ground until after he had been assaulted by Mr Housham. That was also consistent with Mr Housham's statement to the company immediately after the incident that: *"… he was trying to climb on the fork, …"*.

[39] At the second interview/meeting on 24 April 2006, Mr Housham's account was:

- *… Anaru came up into my face and continued to abuse me.*
- *I pushed him away and he swung at me.*
- *There was a tussle during which time I was trying to defend myself.*

[40] Juken representatives, although inadvertently, reached a wrong crucial conclusion about the veracity of Mr Housham's account of the altercation. Although in the re-enactment Mr Burgess was careful to ensure that he asked Mr Housham where Mr Nathan was standing *"when the incident started"* and stood himself in the position indicated in the re-enactment, I am satisfied that Mr Burgess and Mr

Housham were communicating at cross-purposes about this important question and the answers to it..

[41] It was clear in Mr Housham's mind (and he had communicated this expressly to company representatives) that the start of the incident was, if not Mr Nathan's shouted abuse at him, then certainly and at the latest, the throwing of the glove that struck Mr Housham's head. Mr Housham regarded this as the first assault and technically he was correct.

[42] When Mr Nathan threw the glove or gloves at Mr Housham, the latter was driving the fork hoist that was in motion. Quite clearly, Mr Nathan was then standing on the ground in the vicinity of the fork hoist but was not either immediately adjacent to it or on it. It was only after Mr Housham halted the fork hoist that Mr Nathan attempted to mount it and was pushed by Mr Housham. Where Mr Housham indicated Mr Nathan was standing when the incident began was where Mr Housham recalled Mr Nathan standing when he was hit in the head by the glove. It was not, as Mr Burgess believed, where Mr Housham recalled Mr Nathan standing immediately before he pushed Mr Nathan.

[43] So it followed that Mr Burgess concluded that Mr Housham could only have struck Mr Nathan in the head and not in the chest because Mr Nathan was further from the machine than Mr Housham had indicated at the relevant time.

[44] So seen, Mr Housham's account of where Mr Nathan was at relevant times was entirely consistent with the plaintiff's explanation that he pushed Mr Nathan in the chest as the latter began to mount the fork hoist and Mr Housham feared reasonably the assault upon him that immediately eventuated. A fair and reasonable employer in all the circumstances would not have reached the conclusion that was adverse to Mr Housham that Mr Burgess did.

[45] Even if that might not have been so, however, Mr Housham would have been acting reasonably and lawfully in all the circumstances had he repelled Mr Nathan by applying force (of his open hand) to his head and not to his chest. So even if the employer's erroneous conclusion about the events immediately preceding the physical altercation was accepted, Mr Housham's response was reasonable and legitimate in all the circumstances then prevailing.

[46] Although company witnesses said in evidence that an employee fearing imminent assault by another would be entitled to take reasonable steps in self-defence without being guilty of serious misconduct, I am not satisfied that this was the approach that management representatives took at the time of the dismissal. The notes of those interviews include reliance by the company on its *"zero tolerance to violence policy"* and reiteration of the Code that stated that provocation was not an acceptable excuse. Towards the conclusion of the final interview on 26 April, Mr Burgess is recorded as discussing *"… alternate actions available to Anthony at the time as opposed to reaching out and pushing Anaru"*. That is more consistent with what I conclude was the company's view at the time that Mr Housham should not have touched Mr Nathan at all but, rather, should have either engaged him in discussion or removed himself physically from his presence.

[47] In the circumstances that should have presented themselves to the employer at the time, and as have emerged in evidence, neither of those strategies could reasonably have been demanded by the Code or by a reasonable employer. Self-defence by attempting to push Mr Nathan away was a reasonable and legitimate reaction by Mr Housham to apprehended impending assault on him and as occurred. As Mr Housham told his employer in the last meeting on 26 April: *"At the time, the way he was coming towards me I thought that Anaru was not going to stop at anything."*

[48] Finally, Mr Burgess's comments made to Mr Housham when he was informed of his dismissal are pertinent and consistent with what I consider was an unreasonably narrow and strict view of what Mr Housham should have done in the circumstances. Mr Burgess is recorded to have said what is paraphrased below:

> *Difficult situation. Reviewed facts and believe that you (Anthony) engaged yourself in physical violence with Anaru Nathan. You have stated you both did not have a relationship that was working however you could have walked away from the situation. I believe you have breached the "Code of Conduct" and therefore I dismiss you for your involvement in an act of physical violence in the workplace. …*
>
> *Think this is terribly unfortunate situation we have had a good personal relationship over the years however I reiterate that we have zero tolerance to this type of behaviour.*

[49] Juken appears to have considered that even pushing Mr Nathan in the chest, as Mr Housham explained, was sufficient to constitute serious misconduct and justified

a dismissal. In the letter confirming dismissal on 26 April 2006 set out at the beginning of this judgment, Mr Burgess records: *"… you engaged in a situation of physical violence by pushing/striking another person on Company premises."*

[50] A fair and reasonable employer would not have concluded that Mr Housham's push to Mr Nathan's chest, or even his head, in the circumstances of an apprehended assault was serious misconduct warranting dismissal. A fair and reasonable employer would not have accepted Mr Nathan's claim that he was punched in the head by Mr Housham. Juken representatives wrongly concluded that any physical altercation in which Mr Housham participated, even to a lawful and reasonable extent, negated the significance of the particular circumstances in which that occurred. Juken's conclusions were neither fair nor reasonable.

[51] In the circumstances it is unnecessary to consider the claim that the treatment of Mr Housham was so disparate, when compared to the company's treatment of combatants in a fight at one of its adjacent mills shortly afterwards, that dismissal should be held to have been unjustified. I simply comment that the explanation made by company witnesses of the differences between these two events would have accounted satisfactorily for any apparently disparate treatment of the employees involved.

[52] For the foregoing reasons I have concluded that a fair and reasonable employer would not have decided, in all the circumstances at the time the dismissal occurred, that Mr Housham had been guilty of serious misconduct and had to be dismissed. It follows that his dismissal was unjustified and he is entitled to remedies for this.

Consequences of dismissal

[53] Mr Housham considered, justifiably in my view, that he was being dismissed in effect for being the victim of an assault at work. His summary dismissal was incomprehensible to him. He was so shocked and angry at the announcement of his dismissal that his initial reaction was to walk out of the office where the meeting was held, leaving his union representative, Mr Popata, to conclude the discussions with management representatives.

[54] Mr Housham had felt a strong connection to the company. He had been proud of the work that he had undertaken and was one of the longest serving employees on the site. He had been successful in organising a large number of staff to become

union members. The loss of his job meant that he was also unable to represent them as the senior union delegate on site as he had been for 5 years. It was the topic of conversation on the site that Mr Housham had been dismissed for fighting. He was not a violent person. He was a well-respected member of his community including being a Kaikarakia, a lay minister in the Maori Anglican church. Mr Housham was also an office holder in Te Runanga a Iwi o Ngati Kahu, a member of what was known as the 24/7 Kaitaia Hospital Committee and a member of the 28th Maori Battalion Association.

[55] After his dismissal and the reason for it became known to his family, many of them initially accepted that the company must have been in the right. Although his children were persuaded by him of his innocence, his youngest daughter was convinced for a long time that the company must have been right to have dismissed him and made this view known to him. People in his church congregation asked him why he had been fighting, having been told this by others who worked at the mill or their families. It was very embarrassing for Mr Housham to have to try to keep explaining what had happened. Similar questions were asked at Runanga meetings.

[56] Mr Housham found it difficult and stressful to sign up to the dole which paid him $170 per week and was then further reduced to pay back a loan that he took out for a hearing aid.

[57] Mr Housham received some small monetary loans from others in the community but has pledged to repay these. He found having to ask for money, especially from his children, to be very difficult.

[58] Mr Housham experienced sleep difficulties for a long time after his dismissal and worried excessively about getting another job. He lost his appetite for food and separated from his domestic partner at the time because, as he describes it, his *"personal life fell apart"*.

[59] These consequences were confirmed in evidence by Mr Housham's sister, Yvonne Puriri. She described the effect on her brother on the day of his dismissal as being similar to when their sister had recently died: *"It knocked him right down"*.

[60] Ms Puriri said, however, that it was fortunate that over time Mr Housham got on top of the depression that he was suffering by taking long walks, meditation and involvement in his Christian faith. Nevertheless, his weight loss was noticeable and

he was more argumentative than previously. Ms Puriri described Mr Housham as losing his happy-go-lucky ways and ceasing to look always on the bright side of things. She estimated that it was about six months before he seemed to come right and for this period he retreated from all involvement with many people. This included with his church and marae because he was worried about what people would think of his having been sacked for fighting.

Reduction of remedies for contributory fault?

[61] Ms Swarbrick for the defendant submitted that if the Court were to find Mr Housham unjustifiably dismissed, the provisions of s124 of the Employment Relations Act 2000 should not only reduce the remedies to which he might otherwise be entitled but should indeed negate any remedy at all. Section 124 requires the Court, when deciding both the nature and extent of remedies for a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce accordingly the remedies that would otherwise have been awarded.

[62] Ms Swarbrick submitted that Mr Housham's conduct in declining to engage in rational conversation with Mr Nathan and to explain to him why he was not dumping material in the hogger, constituted such culpable contributory behaviour. That was said to have been exacerbated when Mr Housham failed again to discuss these matters rationally with Mr Nathan, having been hit in the head by a glove thrown by Mr Nathan. Although counsel asserted that Mr Nathan's reason for throwing the glove was to attract Mr Housham's attention, there is no evidence that the plaintiff knew why the missile had been thrown at him.

[63] I have not been persuaded from my initial reaction during the hearing to this submission that I expressed to counsel and which she did not press. Not only was Mr Housham's relevant conduct not contributory, in a culpable sense, to the situation that gave rise to his dismissal but it appeared to me to exemplify not only what he should have done in these circumstances but what the company's policy against physical confrontations promoted.

[64] Having been abused and sworn at rudely by Mr Nathan, Mr Housham did indeed respond by telling Mr Nathan that he should not criticise something about which he was not knowledgeable. Thereafter, as Mr Nathan became more abusive

and threatening, Mr Housham did not respond in kind but continued working. Even when further provoked by Mr Nathan striking him in the head with a thrown object, Mr Housham responded only by bringing the mobile fork hoist to a stop as was, in my assessment, a sensible and safe response. When Mr Nathan continued to act aggressively and appeared to be about to confront Mr Housham physically, the plaintiff remained seated on the fork hoist and attempted to repel Mr Nathan with a minimum of force. Even after suffering injuries at Mr Nathan's hands, Mr Housham did not insist, as well he might have, that he receive medical treatment before complying with his employer's requirements to make a statement about the events.

[65] In short, there was no culpable contributory conduct on Mr Housham's part that should mean any reduction in remedies, let alone the total negation of them for which the defendant argued.

Remedies for unjustified dismissal

[66] Only at the start of the hearing, counsel for Mr Housham advised the Court that the plaintiff had recently obtained work and no longer sought reinstatement. Although that remedy had been vehemently opposed by the defendant, it is now no longer in issue. The remedies sought by the plaintiff include loss of income from the date of his dismissal to 12 March 2007, compensation for non-economic harm resulting from the dismissal, and compensation for loss of employee benefits including superannuation subsidies. Costs are also claimed.

[67] Mr Housham has excluded from his claim for lost remuneration, a period of 2 months during which he had and was recovering from eye surgery. This procedure had been planned from the time before he lost his job. Mr Housham says, and I agree, that if he had not been dismissed unjustifiably, he would have used leave for the purposes of this operation and recuperation. Consistently with the way in which his case was presented, I will treat that notional period of 2 months' leave as being unpaid.

[68] For the reasons just set out, Mr Housham's dismissal affected him particularly badly. The consequences would have made, and I accept did make, obtaining alternative employment difficult, at least in the short term. At the age of 54 years, Mr Housham would not have been easily employable in the area in which he lived. That is illustrated, for example, by the location of the position he eventually

obtained, supervising the cleaning and preparation for sinking as a diving attraction of the former frigate *Canterbury*. This work is undertaken at Opua. Mr Housham lives in Kaitaia.

[69] Despite criticism by the company of his efforts to obtain alternative employment, I am satisfied that, as and when he could do so reasonably, Mr Housham made efforts to find work with a variety of employers in the area in which he lived but was unsuccessful. He applied for and was granted an unemployment benefit. He would have had to be actively seeking work to have maintained receipt of this benefit. I conclude that Mr Housham mitigated sufficiently his loss of employment in all the circumstances of it and is entitled to recover an amount equivalent to his remuneration loss resulting from his dismissal until 12 March 2007 but less an allowance for 2 months (referred to above) and less the figure of $200 representing the approximate value of koha or other goods and services given to him in return for voluntary work performed.

[70] As invited by counsel, I propose to leave the precise calculation of remuneration loss to the parties to settle in the first instance. The calculation of remuneration loss must be at the rate that would have been payable to Mr Housham as a lathe runner, the position that he lost as a result of his earlier unjustified disadvantage in employment. This amount should be assessed as being, in the first instance, the difference between his remuneration as a lathe runner and as a pallet maker whilst employed and, for the period following dismissal, at the lathe runner rate.

[71] I am satisfied that, as a result of his unjustified dismissal, Mr Housham lost his employer's superannuation subsidy to which he would otherwise have been entitled and he should recover this as a loss that was consequent upon unjustified dismissal. Again I leave the calculation of the relevant amounts of this loss to the parties to attempt to settle in the first instance but reserve leave to apply if that is not agreed. Mr Housham is entitled to interest on these specific losses.

[72] Finally, I turn to the question of compensation for non-economic loss. The evidence adduced for Mr Housham in this regard was unusually detailed but not challenged.

[73] Acknowledging that awards for such consequences will usually fall in a range up to about $27,000[1], the consequences of his unjustified summary dismissal and the circumstances of it warrant a substantial but not excessive award. Taking account of the Court of Appeal's guidelines in this area and, to the extent that this is possible, comparing Mr Housham's suffering to that of other grievants, I assess that there should be an award of compensation under s123(1)(c)(i) of the Employment Relations Act 2000 of $20,000.

[74] Mr Housham is entitled to a contribution to his legal costs in both the Employment Relations Authority (the decision of which has been reversed on this appeal) and in this Court. Because questions of costs are sometimes affected by offers made without prejudice except as to costs, I will reserve the amount of the awards to which Mr Housham should be entitled, first, to allow the parties themselves to attempt to settle these but, if not, to make submissions which should be by memorandum filed on behalf of Mr Housham within 30 days of the date of this judgment with the company having the period of the following 21 days to respond by memorandum.

GL Colgan
Judge

Judgment signed at 4.30pm on Thursday 5 April 2007

[1] *NCR (NZ) Corporation Ltd v Blowes* [2005] 1 ERNZ 932; *Simpson Farms Ltd v Aberhart* [2006] 7 NZELC 98,450