

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2015] NZEmpC 104
EMPC 285/2014**

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

BETWEEN KANA SHANMUGANATHAN
 Plaintiff

AND POWERNET LIMITED
 Defendant

Hearing: 25 - 26 May 2015
 (heard at Invercargill)

Appearances: M J Thomas, counsel for the Plaintiff
 J Copeland and J Frame, counsel for the Defendant

Judgment: 2 July 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Kana Shanmuganathan is a well qualified electrical engineer. In March 2000 he was employed by PowerNet Limited (PowerNet) as a Senior System Controller, being promoted to System Control Manager in January 2001.

[2] Throughout his employment there have been a range of issues where he has acted without authority or contrary to his employer's instructions. These issues have been dealt with either informally, then formally as they increased in frequency.

[3] Eventually a particular incident occurred which resulted in a disciplinary process where it was concluded Mr Shanmuganathan's conduct amounted to serious misconduct warranting demotion for a period of 12 months. Thereafter consideration would be given to the possibility he would be reinstated to a

management role, subject to improvement during the period of demotion. In addition, his salary was reduced.

[4] Mr Shanmuganathan raised a personal grievance and this was considered by the Employment Relations Authority (the Authority) at an investigation meeting.¹ The Authority determined that the decision to demote was not the action of a fair and reasonable employer. However, the Authority also determined that reinstatement was not practicable and reasonable. It was held that the appropriate remedies were financial, in that PowerNet should pay Mr Shanmuganathan \$1,875 for lost wages and \$2,000 for compensation for humiliation, loss of dignity and injury to feelings, after allowance for contributory conduct. Mr Shanmuganathan now challenges the Authority's determination on a de novo basis, which means that all issues must be reconsidered.

Background

[5] I commence my consideration of the facts by referring to events which took place from early 2007.

[6] On 2 February 2007, the company issued a final written warning, which was to take effect for two years. This warning arose from Mr Shanmuganathan's misuse of PowerNet's 0800 faults line number. Additionally, Mr Shanmuganathan was required to repay to PowerNet reparation of \$7,500, and his was salary reduced by \$10,000. He was also required to tender an apology to members of the control room staff.

[7] On 14 November 2011, PowerNet dismissed Mr Shanmuganathan for serious misconduct. This was because Mr Shanmuganathan had breached his employment agreement and PowerNet's computer policy; he had used PowerNet email, Internet and computer systems for his own personal business affairs. He applied to the Authority for an order of interim reinstatement, having raised a personal grievance with regard to the decision to dismiss. That application was granted and the parties were urged to consider mediation before interim reinstatement took effect.²

¹ *Shanmuganathan v PowerNet Ltd* [2014] NZERA Christchurch 153.

² *Shanmuganathan v PowerNet Ltd* [2011] NZERA Christchurch 210 at [81]-[82].

[8] At mediation, the parties entered into a settlement agreement which resolved all issues. The agreement confirmed Mr Shanmuganathan's interim reinstatement on the basis that a final written warning would apply for two years with effect from 14 November 2011. It contained a number of provisions relevant to the issues which had given rise to the dismissal, but included the requirement that Mr Shanmuganathan would comply with all lawful and reasonable instructions of the PowerNet leadership team, and would remain familiar with, comply and adhere to all PowerNet policies and procedures. There were other elements of the settlement agreement reached between the parties, one of which was that Mr Shanmuganathan would continue to report to Mr Pritchard, despite his role in the decision to dismiss. However, the recently appointed Chief Executive of PowerNet, Mr Franklin, would convene oversight and review meetings which the two would attend.

[9] Regrettably, compliance difficulties continued. On 15 March 2012, Mr Shanmuganathan was reminded by Mr Pritchard of the need to follow lawful and reasonable instructions following issues over the completion of telephone logs.

[10] In March and April 2012, a disciplinary process was conducted regarding the scheduling of Otago Power Services (OPS) safety briefings. PowerNet concluded that Mr Shanmuganathan had acted contrary to a decision of Mr Pritchard which he was unhappy about. Although Mr Franklin decided the refusal to obey a lawful and reasonable instruction amounted to serious misconduct, he also decided to take no further steps. It was emphasised, however, that "mixed communications" had caused significant issues for PowerNet and OPS which was unacceptable; and that if at a future time there was a lack of clarity on directions and instructions provided by Mr Pritchard, as Mr Shanmuganathan had asserted, then the matter should be discussed with him before engaging with others.

[11] A further disciplinary issue arose in August 2012 when Mr Shanmuganathan attended a Southland Supply Initiative Meeting without approval from his manager. An investigation meeting was conducted, with both parties being assisted by lawyers. In a letter of 1 October 2012, Mr Franklin determined that serious misconduct had occurred; again this involved a refusal to obey a lawful and reasonable instruction. He said that the frequency and severity of non-compliance

suggested there may be some underlying medical issue or other barriers that were impacting on Mr Shanmuganathan's ability to follow lawful and reasonable instructions. Accordingly, it was proposed that Mr Shanmuganathan be assessed by an industrial psychologist to assess whether there were any clinical explanations for his behaviour. Then a decision as to the form of disciplinary action, if any, would be made.

[12] Mr Shanmuganathan cooperated in the assessment process, which was conducted by a registered Clinical Psychologist, Mr Geoffrey Shirley. He reviewed documents describing some of the above incidents, met with Mr Franklin, and then interviewed Mr Shanmuganathan when he also administered psychometric tests. He recorded that Mr Shanmuganathan seemed genuinely perplexed as to why he was being taken to task over what he saw as relatively minor issues, compared with the greater contribution he thought he made to the organisation. He concluded that Mr Shanmuganathan had a very positive view of himself, his achievements and his contribution to PowerNet. However, limited insight and a poor ability to empathise made it difficult for him to allow for the expectations of others; he would be more likely to focus on the task at hand as he saw it. He then gave a formal diagnosis.

[13] Mr Shirley specifically recorded that in respect of the safety at work, the issues which he had identified would not compromise the quality of Mr Shanmuganathan's technical work. However, Mr Shanmuganathan would need to genuinely understand and accept the rationale behind the rules in question. He emphasised that care in explaining rather than micro-managing rule compliance might increase empathy with the organisation's requirements. Then Mr Shirley said:³

Compliance may be improved by using a coaching model, helping Mr Shanmuganathan empathise with the organisation's need to have him follow the rules. His relationship with his manager has a problematic history, thus he is not the best choice for coach.

...

³ At the hearing of the challenge I made an order prohibiting publication of those parts of the psychologist's report which are not referred to in this decision; and that the Court's file should not be searched without leave of a Judge.

To provide a positive context for such discussions, Mr Shanmuganathan's contributions to the organisation should be acknowledged and affirmed.

I suggested to him that just as PowerNet is trying to understand him, he should try and develop empathy with the organisation's requirements of him, rather than just feeling bullied and degraded.

[14] At about the same time, Mr Shanmuganathan brought a complaint alleging bullying by Mr Pritchard; essentially he complained that he was being unreasonably micro-managed. PowerNet referred the complaint to a local lawyer who gave instructions for her report to be sent to PowerNet after she had prepared it in December 2012. However, this did not occur. The oversight was discovered in June 2013, and it was at that stage that her report was forwarded to PowerNet. Her opinion stated that what occurred was firm management rather than workplace bullying. She speculated that there was a personality clash between Mr Shanmuganathan and Mr Pritchard. That, however, was insufficient to constitute bullying. It later became evident that no interviews had been conducted prior to the preparation of the report as should have occurred; the lawyer's opinion was based solely on the documents with which she had been provided.

[15] PowerNet's lawyer wrote to Mr Shanmuganathan's lawyer on 8 July 2013 forwarding the psychologist's report of 16 November 2012, and the report as to bullying which had been provided to the company on 27 June 2013. Given the substantial delays in providing the psychologist's report, it was stated that the disciplinary matter commenced in September 2012 would not be the subject of further action. The letter also recorded PowerNet's conclusion that there was no substance to the bullying claim and that no further steps would be taken in respect of that issue. The letter stated, however, that Mr Shanmuganathan remained subject to a final written warning. It was noted that in recent days yet further concerns had emerged, which might need to be investigated.

[16] A short time later, on 17 July 2013, Mr Franklin wrote to Mr Shanmuganathan. He stated that a report had been received from Mr Pritchard which raised issues as to the personal use of a company car and cell phone; a further concern was that Mr Shanmuganathan had been unwilling to provide responses on these concerns. An investigation was to be commenced. A meeting was held and the

issues were discussed, during which Mr Shanmuganathan asked Mr Franklin not to escalate the concerns to a disciplinary meeting. He said he would follow instructions in future. Mr Franklin said that he made it clear to Mr Shanmuganathan that his actions were unacceptable, but that he accepted the assurance that Mr Pritchard's instructions would be followed in future. He said that in light of the psychologist's report he took care to explain to Mr Shanmuganathan why he needed to follow the company's procedures and why they were required. However the report was not discussed as such with Mr Shanmuganathan – either then or at any other time.

[17] On 26 November 2013, Mr Pritchard wrote to employees, including Mr Shanmuganathan, advising that mid-year performance reviews would be conducted. In two emails, staff were told to complete the self-assessment parts of a performance review form, prior to meeting their relevant manager. Staff were advised that if there were any issues they should be discussed with either Mr Pritchard, or the particular manager involved.

[18] Prior to the events which are about to be described, Mr Shanmuganathan did not raise any concerns with his Manager, Mr Pritchard. For instance, Mr Pritchard and Mr Burns met Mr Shanmuganathan at 9.00 am on 27 November 2013 to discuss the handover of accountability from Mr Pritchard to Mr Burns as part of an upcoming amalgamation process. That meeting was described as friendly and relaxed. Mr Shanmuganathan raised no issues as to the review which was scheduled for later that day.

[19] For the purposes of the performance review meeting at 2.00 pm on 27 November 2013, Mr Shanmuganathan did not complete the self-assessment questions in advance as had been directed. He said this was because he did not believe he would obtain a fair performance review from Mr Pritchard. He said there had been several incidents in previous months which supported this conclusion. In March 2013, he believed Mr Pritchard had issued an impracticable directive regarding the manner in which a circuit would be isolated and de-energised for safety purposes, when it was necessary to work on that circuit. In August 2013 he had been excluded from performance reviews and remuneration offers in respect of members of his team of system controllers. Also in August 2013, he believed he had

been excluded from an Incident Investigation Training course whilst a member of his team had been included, despite the fact that he was a Safety Officer Advisor holding certain responsibilities in relation to incidents or accidents that meant he would be involved in any field incident.

[20] Mr Pritchard did not consider that these concerns were justified. He did not agree with Mr Shanmuganathan's handling of the issue as to the isolating of circuits on which contractors were to work. He considered there were emails which showed Mr Shanmuganathan had been involved in performance reviews of his direct reports. As to the assertion concerning attendance at a safety workshop he said that in fact Mr Shanmuganathan was given approval to attend, and did so. It was in the context of these events that the performance review took place in November 2013.

[21] At the performance review meeting, Mr Shanmuganathan tabled an email which read as follows:

Hi Gary

I am disappointed and disgusted with the review I had with you in the last Performance Review.

My work, energy and performance were not recognised and will continue in that manner under you.

Also over a number of years you made it a point I received no annual increments under your leadership.

You have tried [everything] in your capacity to humiliate me including giving substantial increment to my assistant [whose] salary is now more than mine.

Now I can say with great pleasure you have failed miserably as a leader to me and to my team in System Control in every sense. On the other hand I am standing proud where I am on my own strength.

Roy was picked up by me from where he was, trained and polished by me. He will not be where he is without my leadership and guidance – please remember that. And I am very proud of that too.

With the new restructure in progress and changes to senior management, I am looking forward to work and continue to provide my very best.

My team in System Control and I are looking forward to better and **happier** days under Keith Burns who will be our new Manager.

As such I don't think there is any value in me completing the latest Performance Review as requested.

Sorry to say the above but that's the truth.

Kana

[22] Mr Pritchard sent an email to Mr Shanmuganathan shortly after the meeting which summarised what had occurred, the accuracy of which I accept. It is in these terms:

Dear Kana

Thank you for attending the 6 monthly performance review. My request to you this week was to complete the self-assessment sections of the performance review documents so that we could then go through the review and discuss your assessment along with my assessment of your performance.

You arrived at the meeting at 2pm.

The self-assessment sections of the document were not complete.

You handed me a printed copy of an email you had prepared. The email is scanned and attached to this email. It is addressed to me and cc'd to Trish Hazlett and Keith Burns.

I read through the email while you were in the room and was extremely upset by the tone and the content finding it unacceptable.

I explained that the email and its content would be addressed separately and that there was a need to complete the performance review.

I had given you a very clear and reasonable instruction to complete the self-assessment parts of the performance review documentation. You decided without any discussion not to follow this reasonable instruction.

At the meeting I asked you to take the documentation away and complete the self-assessment section. This was a reasonable instruction.

You responded saying 'no' you would not.

I asked a second time and again you stated you would not.

I asked a third time explaining that my instruction was reasonable.

You insisted that you would not complete the self-assessment section of the performance review documentation.

At that point I stated that the performance review would take place without the self-assessment section of the performance documentation being complete.

You then said that you would take the document away and consider whether you would complete the self-assessment section of the performance documentation.

I made it clear that my reasonable instruction was that you completed the self-assessment section of the performance documentation and that you do as quickly as possible and that I would schedule another time to complete the review.

...

[23] After meeting with Mr Pritchard, Mr Shanmuganathan spoke to the Human Resources (HR) Manager, Ms Hazlett; he wanted to confirm whether he had to complete the self-assessment document, and he showed her the unsent email. She told him the instruction to complete the self-assessment document was reasonable, and that it would be inappropriate for him to send the email.

[24] Notwithstanding this advice, Mr Shanmuganathan dispatched the email electronically to Mr Pritchard, and to Ms Hazlett as well as Mr Burns who was to be his incoming Manager. The next day he completed the self-assessment form and gave it to Mr Pritchard.

[25] On 6 December 2013, Mr Franklin wrote to Mr Shanmuganathan regarding his actions. A disciplinary meeting was proposed, the issues being his failure to comply with a reasonable instruction to complete the self-assessment documentation before the review meeting was held, and the tabling and then sending of an offensive email which he copied to other senior managers. Mr Shanmuganathan was advised that this conduct could be regarded as serious misconduct. It was offensive to the receiver, and was not acceptable from an employee at any level. Mr Franklin wrote that there were appropriate ways to raise issues, and this was not one of them. Whilst the issue would be considered on its own following Mr Shanmuganathan's explanation, his past issues would also be taken into account when consideration was given as to whether disciplinary action should be taken and at what level. The letter went on to make detailed reference to the previous final warning and other issues that had arisen as described earlier in this judgment. Mr Shanmuganathan was told he could attend the meeting with a support person.

[26] A disciplinary meeting was held on 10 December 2013. Mr Shanmuganathan attended without a support person. He met with Mr Franklin, Mr Pritchard and Ms Hazlett. The employer's concerns were discussed. Mr Shanmuganathan said he had wanted to discuss the matters referred to in his email, before completing the performance review. After talking to the HR Manager, he had thought that it was appropriate that she and his new Manager should be aware of his concerns, which he described. In the course of the meeting, Mr Franklin confirmed that the issue was the way in which he raised his concerns, and that there was not an issue concerning his control room performance.

[27] In a subsequent letter dated 13 December 2013, Mr Franklin summarised the matters which were discussed at the investigation meeting, as well as the unsatisfactory history at some length. He said that Mr Shanmuganathan's explanation was not acceptable, and that his behaviour amounted to serious misconduct under the disciplinary procedures; he had demonstrated offensive behaviour at work. That behaviour could not be tolerated from a manager.

[28] Mr Franklin said that despite a final warning which it was acknowledged had expired, Mr Shanmuganathan's behaviour had not changed and he continued to act in a manner that was not acceptable for a person in a management role. Lack of judgement in a leadership role needed to be addressed. It was his preliminary decision to require Mr Shanmuganathan to stand down from his System Control management role, and to operate as System Controller for at least 12 months. During that time, an assessment would be made as to his ability to follow the instructions of a new manager, and work would be undertaken on appropriate leadership skills. If at the end of 12 months the required skills were demonstrated and management was satisfied that he could show appropriate leadership, the potential for him to "possibly return to a management role" would be reassessed. The proposed demotion would result in a reduction of salary from \$100,000 to \$85,000. He would be expected to participate fully in the duties of System Controller. An opportunity to comment on this possibility was provided.

[29] Mr Shanmuganathan took that option, writing to Mr Franklin on 17 December 2013. He said that he had only ever wanted to discuss issues openly

and in a transparent manner, and had good intentions when he attended the review meeting. He did not believe his behaviour was offensive in the circumstances. A copy of the email had been sent to Ms Hazlett since she already knew his history and there was nothing to hide; and to Mr Burns who would be his new manager and who would learn about his history from his personnel file. The email was supposed to provide the basis for a discussion of issues with Mr Pritchard.

[30] In his letter, Mr Shanmuganathan said he had now apologised to Mr Pritchard and taken on board that there were other and better ways of achieving his objectives. The email was a “temporary lapse of judgement” and he sincerely apologised for any offence. He also said there would be no further issues of not following instructions, a point he said he had reiterated to Mr Burns when they had a “heart-to-heart talk”. He felt that for the first time after many years he had held a discussion with a manager without fear of facing disciplinary action. He said he was looking forward to moving on, leaving the past behind.

[31] By letter of 18 December 2013, Mr Franklin responded stating that such commitments had been made previously and there had been no corresponding change in behaviour. The actions which had occurred in this instance were unacceptable and a severe sanction was warranted. The preliminary decision was confirmed so that from 7 January 2014 Mr Shanmuganathan would work dayshifts as a System Controller in a training role, until he was deemed by the Acting System Control Manager to be able to operate on the control desk. He was to report to Mr Burns until an Acting System Control Manager was appointed. The next day Mr Franklin advised that Mr Duffin would assume temporary responsibility for the management and leadership of the system control team, in place of Mr Shanmuganathan.

[32] On 20 December 2013, Mr Shanmuganathan’s lawyer raised a personal grievance.

[33] Members of senior management of PowerNet believed that Mr Shanmuganathan was thereafter tardy in taking the steps which necessarily followed the demotion, which meant he was still not complying adequately with

instructions. This included the untimely way he vacated the manager's office he had occupied for some years, and his delay in making arrangements to start work as a System Controller at the control desk, along with the relevant training he was required to undertake.

[34] Mr Shanmuganathan based himself at a "storm gallery", not the control room desk where it had been intended he would work. This raised issues as to whether appropriate instructions from Mr Burns, to whom he now reported, were being complied with. He used the storm gallery for some 10 months. However, there is evidence, particularly from system controllers that as well as working in the storm gallery on particular tasks which were assigned to him, he observed system controllers at work on the desk. It was not until November 2014, however, that formal training in that regard commenced.

[35] It is clear that Mr Shanmuganathan considered the decision to demote him was unfair; on several occasions he told Mr Franklin and Mr Burns it should be reversed. However, he attended a four-quadrant leadership course in July 2014; he participated in a two-day "shared vision" workshop as part of a team-building exercise in October 2014, and participated in a learner self-assessment process, all as required. The last was a 360 degree Feedback on Leadership and Competency which involved the provision of information not only by Mr Shanmuganathan, but also by other respondents.

[36] For the purposes of considering whether Mr Shanmuganathan could be restored to a managerial role following the 12-month period of demotion, Mr Burns prepared a detailed report dated 29 April 2015 which concluded that minimal progress had been shown in Mr Shanmuganathan's commitment to the following of instructions. He stated that he did not have any confidence that Mr Shanmuganathan would follow his future instructions, unless they were in respect of tasks which he himself wished to undertake. Finally, he stated that he would not recommend Mr Shanmuganathan for a leadership or managerial role in PowerNet, but that further work would need to be undertaken to develop a training and development programme that would assist in Mr Shanmuganathan's understanding of leadership requirements.

[37] In a letter of 15 May 2015, Mr Franklin summarised the contents of the various reports he had received regarding Mr Shanmuganathan's training as a System Controller (Mr Duffin had said that within the next three to six months Mr Shanmuganathan would have achieved the required competency), leadership training programmes, (verbal reports from facilitators stated that participation during the training was appropriate, and Mr Shanmuganathan himself had stated that it had been beneficial); the 360 degree Feedback on Leadership and Competency, (the ratings on various competencies were varied); and the information contained in Mr Burns' report. He concluded his letter by stating that until Mr Shanmuganathan could demonstrate through his actions that he would follow the instructions of a senior manager, he could not regain the trust and confidence needed to return him to a management role. He emphasised that competencies relating to self-leadership required improvement, particularly those relating to integrity, trust and listening.

[38] Accordingly, he concluded that Mr Shanmuganathan could not yet be considered for a management role. However, he wished to work with Mr Shanmuganathan and HR staff on developing a personal development plan that would assist in developing the required competencies further. Once that had been developed and implemented, further reports would be obtained in 12 months time, so as to assess progress in following instructions and in the development of the self-leadership competency listed as areas for development. Mr Franklin concluded his letter by stating that the issue of changing his behaviour was entirely in Mr Shanmuganathan's hands.

Individual employment agreement

[39] Mr Shanmuganathan's individual employment agreement (IEA) provided a disciplinary procedure. It included examples of serious misconduct which were stated not to be exhaustive, including refusal to carry out reasonable work instructions and using offensive language or behaviour at the place of work. Clause 14 of the IEA provided that where an act of serious misconduct did not result in summary dismissal, or there were cases of less serious misconduct, the employee would be dealt with in accordance with a warning system and/or other disciplinary steps. The warning system would first entail the imposition of a written warning,

then a final written warning which would state that any future breach or failure to perform to the required standards may result in dismissal. Other disciplinary steps would include redeployment to an alternative position, demotion from a current position, and a requirement that the employee stand down from his role for a specified period. Finally, the agreement provided for the possibility of suspension.

Relevant principles

[40] In this challenge, the Court is required to consider whether PowerNet was justified in concluding that there was serious misconduct warranting demotion. The test is whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances, an assessment which must be undertaken on an objective basis. In applying that test the Court must consider whether the investigation was sufficient; whether concerns that the employer had were raised before the action was undertaken; whether there was a reasonable opportunity to respond to the concerns before the action was taken; and whether there was a genuine consideration of any explanation given.

[41] The Court may consider any other factors it thinks appropriate, and must not reach a conclusion that the action has been unjustifiable solely because of defects in process unless those defects were minor and did not result in the employee being treated unfairly.

The parties' respective positions

[42] The statement of claim succinctly describes the issues raised for Mr Shanmuganathan, which were developed in evidence and in submissions. They are:

- a) The finding that the initial refusal to complete the self-assessment amounted to serious misconduct was not substantively justified, since that assessment was completed by Mr Shanmuganathan the next day.
- b) The finding that the email amounted to serious misconduct was not justified having regard to:

- The fact that the email was not in all the circumstances sufficiently offensive to justify a finding of serious misconduct.
 - PowerNet knew about the ongoing relationship concerns between Mr Shanmuganathan and Mr Pritchard but did not consider these issues when reaching its determination despite the reports from the psychologist and bullying complaint.
 - The decision to demote Mr Shanmuganathan was unjustified having regard to the fact that Mr Shanmuganathan's actions did not warrant a finding of serious misconduct.
 - The final warning issued on 14 November 2011 had expired and the historic disciplinary issues relied on did not support the disciplinary sanction of demotion.
- c) Mr Shanmuganathan had been disadvantaged by the demotion and that his salary decreased by \$15,000 per annum, and he had been humiliated and diminished in the eyes of his peers.

[43] For its part, PowerNet's statement of defence, evidence and submissions described its position, which is:

- a) Each of the allegations about which PowerNet was concerned constituted serious misconduct so that its decision to that effect was well open to it.
- b) Demotion was an outcome available to a fair and reasonable employer.
- c) Having found that Mr Shanmuganathan's actions constituted serious misconduct when considering "penalty", PowerNet was entitled to take into account all of the circumstances including Mr Shanmuganathan's previous disciplinary history.

Personal grievance?

[44] The first of the three grounds relied on for the finding of serious misconduct related to the refusal to complete the performance appraisal self-assessment documentation prior to Mr Shanmuganathan's meeting with Mr Pritchard, having been told to do so twice before the review meeting.

[45] When Mr Shanmuganathan attended the meeting on 27 November 2013, he wished to discuss performance issues, and had prepared his email for that reason; he had not completed the self-assessment question of the performance review document.

[46] I find that he intended to engage in the performance review process, as he had been directed to do. Shortly I shall consider the terms of the email, which he proposed to use as a basis for discussion.

[47] At the meeting, Mr Pritchard requested Mr Shanmuganathan to complete the self-assessment documentation on three occasions; Mr Shanmuganathan said he would not. However, he did so subsequently and provided the review documentation to Mr Pritchard. In any event, the allegation was that he had not complied with the instruction to complete the self-assessment form before the review meeting.

[48] This allegation has to be assessed in context. There was by this time obviously a difficult relationship between Mr Shanmuganathan and Mr Pritchard – to the extent that the author of the bullying report, on the basis of the documents she considered, could see that there was perhaps a personality clash.

[49] Whilst the way in which the events unfolded at the performance review meeting was not ideal, I consider that a fair and reasonable employer could not have concluded that the refusal to complete the documentation prior to the meeting amounted to serious misconduct, or even misconduct.

[50] The second ground relied on was the preparation and tabling of an email to Mr Pritchard that was rude, offensive, disrespectful and demeaning. The email was all of those things, but again it had to be considered in context. As I have already

mentioned, there was a difficult history between Mr Shanmuganathan and Mr Pritchard. Mr Shanmuganathan had felt sufficiently aggrieved as to raise a bullying complaint. The complaint was not properly investigated but there was obviously an unresolved relationship issue. Mr Shanmuganathan could not be criticised for wanting to discuss that issue, which had led him to prepare the email. A further relevant circumstance was the content of the psychologist's report. Despite the company taking the constructive step of obtaining advice as to the way in which Mr Shanmuganathan responded to the issue of following rules, the recommendations had not been implemented. Mr Shirley advised that Mr Pritchard would not be the best choice for a coaching role, given the "problematic history". There had been no process for dealing with the report, such as discussing its terms and implications with Mr Shanmuganathan. Nor was a copy of the psychologist's report provided to Mr Pritchard, which could have enhanced his understanding of the issues.

[51] Mr Pritchard understandably said he was upset by the contents of the email. However, whether a fair and reasonable employer could decide there was serious misconduct requires an objective assessment having regard to all the circumstances.

[52] I conclude in light of the surrounding circumstances that a fair and reasonable employer could not have decided that tabling the email amounted to serious misconduct justifying dismissal as PowerNet did, although such an employer could have concluded that it constituted misconduct.

[53] The third ground relied on related to the sending of the email electronically to Ms Hazlett and Mr Burns, despite Ms Hazlett telling Mr Shanmuganathan that the email was inappropriate and should be withdrawn. I find that this was not an instruction, but it was good advice. Again, context is critical. That included the difficult relationship between Mr Shanmuganathan and Mr Pritchard, the recommendations of the psychologist which had not been implemented to the point which would have been fair and reasonable, and the fact that Mr Shanmuganathan had been invited to participate in a performance review ahead of a restructuring, which was the context in which the email was sent to Ms Hazlett and Mr Burns.

[54] I agree with Mr Franklin’s assessment that Mr Shanmuganathan raised his concerns in an inappropriate way. However, it was an error that had a particular context, so that a fair and reasonable employer could not have concluded that the sending of the email to Ms Hazlett and Mr Burns, despite being advised not to, constituted serious misconduct. However, such an employer could have concluded that it was misconduct.

[55] Considerable evidence was led regarding the issues which had persuaded Mr Shanmuganathan that he would not get a fair hearing by Mr Pritchard at his performance review as summarised earlier.⁴ It is unnecessary to make formal findings as to who precisely was correct on each of them. The short point is that Mr Shanmuganathan genuinely believed these concerns existed. He cannot be blamed for having a view on these matters, and I find they were not completely without foundation. His assessment of the issues was affected by the relationship difficulties. Constructive discussion of the concerns would have been desirable but this did not prove possible.

[56] I next turn to consider the decision to demote. The issues on this topic are procedural.

[57] It is first necessary to consider the relevance of previous conduct. On this issue, the submissions for the parties diverge. For Mr Shanmuganathan it is submitted that previous misconduct matters were clearly considered at the stage when PowerNet was determining whether the sending of the email amounted to serious misconduct. For the company it is submitted that these issues were considered, but only at the “penalty” stage. That distinction was made in the employer’s letters of 6 and 13 December 2013 when it was stated that past issues would be taken into account in determining whether disciplinary action should be taken. The factoring in of the previous conduct might explain why a conclusion of serious misconduct was reached but there is no acknowledgment that the past issues were considered at that stage. I therefore consider it appropriate to assess this issue on the basis advanced by PowerNet, which is that Mr Shanmuganathan’s history of difficulties were an aspect of the decision to demote.

⁴ At para [19].

[58] In *Butcher v OCS Limited*, Judge Travis was required to consider a submission that an employer had wrongly relied on an expired verbal warning to dismiss. He said:⁵

The recent decision of the English Court of Appeal in *Airbus UK Ltd v Webb* [2008] EWCA Civ 49; [2008] ICR 561 clarifies the position that if, but for the previous warning, the employer would not have had a reason for dismissing the employee, the expired warning cannot be relied on. An expired warning can be taken into account by an employer when deciding to dismiss an employee, and by a Tribunal in deciding whether the employer has acted reasonably or unreasonably. Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct. I therefore accept Mr McBride's submission that a recently expired warning for the same conduct cannot be completely disregarded as it is part of all the circumstances which have to be considered under s 103A. However, in the present case the defendant was not relying on an expired warning but on a direction contained in the same document which evidenced that warning that any repetition of the same conduct could result in dismissal.

[59] For the purposes of my analysis of justification under s 103A of the Employment Relations Act 2000 (the Act), I respectfully agree with this dicta. However, the "circumstances" which must be considered under s 103A of the Act in this case involved not only the continued difficulties which were experienced by management when dealing with Mr Shanmuganathan's non-compliance with rules and instructions, but other aspects of that same problem.

[60] PowerNet had decided to take advice as to whether there were psychological issues. It took advice from Mr Shirley in a process in which Mr Shanmuganathan cooperated. The company is entitled to credit for having elected to obtain that advice, but having done so it needed to take further steps as a consequence. As I have already found, it needed to discuss the issues specifically with Mr Shanmuganathan, and consider the implementation of the recommendation as to coaching by someone other than Mr Pritchard; and it needed to inform Mr Pritchard as to the advice it had received.

[61] The company also had advice regarding Mr Shanmuganathan from the bullying report that there may be a personality clash between Mr Shanmuganathan

⁵ *Butcher v OCS Ltd* [2008] ERNZ 367 at [55].

and Mr Pritchard. That was a further possibility which needed to be considered alongside Mr Shirley's conclusions.

[62] It was a significant procedural flaw that in reaching a decision as to demotion, the disciplinary history was considered but not the factors just discussed.

[63] The next issue relates to a factor which both Mr Franklin and Ms Hazlett stated was relevant to the decision to demote. In his evidence, Mr Franklin referred to the fact that the electricity industry is a highly safety sensitive one. He emphasised that the importance of following correct procedures was paramount. Ms Hazlett also referred to the fact that the system control function is extremely safety sensitive, and is an area of business where the rules and procedures have to be followed explicitly. I find that this factor was considered when considering the failure to complete the self-assessment document before the review meeting and the tabling and sending of the offensive email.

[64] This contrasts with what was said at the disciplinary meeting. Mr Franklin specifically said that it was not Mr Shanmuganathan's "control room performance" that was the issue, but the sending of an "inflammatory and accusatory email" in an unacceptable way.

[65] I conclude that despite having told Mr Shanmuganathan that his performance as Manager of the system controllers was not the issue, in fact there was a concern that Mr Shanmuganathan might not follow the rules when managing the control room. Such a concern was not raised at the disciplinary meeting or in the letters sent by Mr Franklin – indeed Mr Shanmuganathan was told in effect there were no such concerns. A fair and reasonable employer could not have made a decision to demote if it held safety concerns without those being expressly identified and an opportunity for response given. That too was a significant procedural flaw.

[66] In summary, I find that there were both substantive and procedural flaws in the employer's decision-making, which meant that the finding of serious misconduct and the decision to demote Mr Shanmuganathan do not meet the test of justification under s 103A of the Act. His personal grievance is accordingly established.

Remedies

[67] The main remedy sought by Mr Shanmuganathan is reinstatement; he also seeks financial remedies. I begin with a consideration of the former.

[68] Section 125 of the Act provides for reinstatement and states that where there is a personal grievance and if reinstatement is sought, there is a discretion to order such if it is practicable and reasonable to do so. Section 126 of the Act states that if there is such a remedy, the employee must be reinstated immediately or on such a date as may be specified by the Court.

[69] Mr Shanmuganathan seeks reinstatement because:

- a) The period which has passed since demotion does not preclude reinstatement.
- b) The reason for the adverse conclusion made by PowerNet could not be considered as having related to Mr Shanmuganathan's performance as System Control Manager, or his ability to lead a team and operate in accordance with the health and safety policy.
- c) The position had not been permanently filled in the meantime, and Mr Shanmuganathan currently undertakes many of the roles he performed previously.
- d) Reliance was also placed on the supportive opinions expressed by four system controllers who were called to give evidence.

[70] PowerNet opposes reinstatement for these reasons:

- a) Reinstatement would be unreasonable – although it was accepted it would not be impracticable, because the System Control Manager role is currently filled on a temporary basis only.

- b) PowerNet continues to hold serious concerns about Mr Shanmuganathan's ability to follow instructions. There is a prospect that policies will continue to be breached, that there will be a failure to follow instructions, and that any attempt to manage these will result in further assertions of bullying.

- c) These factors are evident from the difficulties that arose following Mr Shanmuganathan's demotion, as summarised in Mr Burns' report of 29 April 2015 and Mr Franklin's letter of 15 May 2015; these concerns arose notwithstanding Mr Shanmuganathan's statement in his letter of 17 December 2013 that he would henceforth follow instructions. Mr Shanmuganathan continues to believe that he is justified in disregarding management instructions where he considers a contrary decision is preferable.

[71] The Court's analysis must focus on what is reasonable in the present circumstances, since it is accepted that reinstatement would not be impracticable.

[72] The term "reasonable" was added in 2011. Subsequently, in *Angus v Ports of Auckland Limited*, the full Court said:⁶

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad enquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

...

⁶ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.

[68] ... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[73] Considerable evidence has been adduced as to the events which followed the demotion; and as to the concerns which PowerNet managers continue to hold regarding Mr Shanmuganathan's ability to comply with instructions. Whilst those factors must be a concern, there must be some allowance for the fact that they arose in circumstances where Mr Shanmuganathan believed he should not have been demoted, and the Court has found that belief to be justified.

[74] Against the concerns about Mr Shanmuganathan's ability to comply with reasonable instructions must be balanced the positive evidence given by four system controllers, who referred to Mr Shanmuganathan's appropriate communications with them, including his willingness to share his undoubted technical expertise as an electrical engineer. His colleagues respect him and support his reinstatement as their Manager.

[75] A further factor requiring consideration is that the advice given by Mr Shirley has not been adequately implemented. The coaching model he recommended needs to be fully considered – perhaps with further input from Mr Shirley or a similar expert, since the advice has not been well understood. The aim should be to assist Mr Shanmuganathan in developing “empathy with the organisation's requirements ... rather than just feeling bullied and degraded”, as Mr Shirley put it. Reinstatement following resolution of his personal grievance would provide, in my view, an opportunity for those recommendations to be advanced constructively.

[76] The results of the 360 degree Feedback on Leadership Competency Assessment may not be as negative as has been supposed. The small group from whom feedback was obtained included peers, managers and customers who had worked with or were provided with a service by Mr Shanmuganathan over the period January 2014 to January 2015. It is apparent that views regarding Mr Shanmuganathan's performance in that period have been mixed, and that the opinions of managers may have been included. Some allowance must be made for

the fact that it occurred against a background of an unjustified demotion. Furthermore, Mr Shanmuganathan was not exercising a leadership role during the period under review. The company's wish to see improvement in Mr Shanmuganathan's leadership skills is entirely fair and reasonable, but the 360 degree Feedback assessment was not undertaken in ideal circumstances.

[77] The next issue relates to the prospect of a successful relationship being established between Mr Shanmuganathan as System Control Manager if he was to be reinstated, and Mr Burns as the senior Manager responsible for the system control function. In late 2013, Mr Shanmuganathan anticipated a positive relationship with Mr Burns, since he would no longer be reporting to Mr Pritchard with whom there were longstanding difficulties. Mr Burns was required to manage Mr Shanmuganathan during the period of demotion when there were some issues of non-compliance. It is in that context he has concluded that it would not be desirable for Mr Shanmuganathan to be reinstated. Notwithstanding that history, however, I consider that Mr Burns and other senior managers are well capable of assimilating the findings of this decision under Mr Franklin's leadership in a professional manner, so as to support Mr Shanmuganathan's reinstatement. For his part, Mr Shanmuganathan will be able to engage positively with Mr Burns now that his concerns have been considered and addressed.

[78] A further relevant fact is that the company itself is moving towards a reinstatement of Mr Shanmuganathan to a managerial role, albeit not yet.

[79] Balancing the broad equities of the parties' respective positions, I am satisfied that an order of reinstatement should be made after I have heard from the parties. Mr Shanmuganathan's successful reinstatement will require careful and proscribed management. To that end I propose to impose conditions⁷ on an order of reinstatement. The parties should first have the opportunity of providing input about these. In my view formal conditions are necessary because of the issues which have arisen in the past and because of the highly safety sensitive nature of the system control functions Mr Shanmuganathan will be required to manage. Focused and

⁷ Such an approach is adopted by the Authority and Court from time to time as may be appropriate; see for example *Walker v Firth Industries* [2014] NZEmpC 60.

detailed consideration needs to be given to such factors as to the completion or undertaking of further leadership training, the establishing of a coach or mentoring arrangement for Mr Shanmuganathan and a personal improvement plan as contemplated by Mr Franklin, as well as the appropriate timing of reinstatement. There may be other practical steps which should be taken so as to ensure that both parties can meet their respective obligations to be active and constructive in establishing and maintaining a productive employment relationship in which each are, among other things, responsive and communicative.⁸ Because the parties have struggled to implement these arrangements it is appropriate for the Court to receive evidence if necessary and submissions as to the possibility of relevant conditions being formalised in the Court's order of reinstatement.

[80] Section 188(2)(c) of the Act provides that the Court must in the course of hearing and determining any matter, consider from time to time as it thinks fit whether to direct the parties to mediation.

[81] I consider it is appropriate to direct the parties to attend mediation as soon as possible so that they may have the opportunity of discussing constructing the conditions which should appropriately apply. I intend that Mr Shanmuganathan's reinstatement to the role of System Control Manager should occur in a carefully structured way within approximately six weeks time. The timing is subject to the timetable which I set out below being complied with. Mr Shanmuganathan's remuneration for that role will recommence on the date when he resumes his managerial responsibilities.

[82] Whether or not conditions of reinstatement are agreed at mediation, I wish to receive submissions from the parties on appropriate terms, either jointly or individually. Accordingly, I direct:

- a) The parties are to attend mediation by 24 July 2015; to assist that process, the Registrar is to forward a copy of this judgment to the Chief Mediator, so that arrangements for mediation can be made as soon as

⁸ Employment Relations Act 2000, s 4(1A)(b).

possible. Counsel are to advise the Court of the date of mediation as soon as it is fixed.

- b) Submissions as to appropriate conditions for Mr Shanmuganathan's reinstatement are to be filed jointly by 31 July 2015; if that does not prove possible, they are to be filed individually on the basis that PowerNet should file and serve its submissions and evidence by affidavit, if any, by 31 July 2015; and Mr Shanmuganathan should file and serve his submissions and evidence, if any, by affidavit by 7 August 2015. Counsel should also indicate whether a further hearing is sought, or whether the finalising of the order of reinstatement can be dealt with on the papers.

Other remedies

[83] Mr Shanmuganathan also seeks lost wages from 18 December 2013 until the date of hearing including interest, and a compensatory payment of \$20,000 for humiliation, loss of dignity and injury to feelings.

[84] In respect of lost wages, the amount which would potentially be payable under s 128(2) of the Act for 13 weeks is \$3,750 gross. I am not, in the circumstances, persuaded to exercise my discretion under s 128(3) of the Act in respect of the period over and above three months.

[85] I fix an award for hurt, humiliation and loss of dignity, on the basis of the evidence I received from Mr Shanmuganathan and his daughter, Dr Shanmuganathan, in the sum of \$5,000.

[86] However, s 124 of the Act provides:

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 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.

[87] I have found that the issues regarding the performance review including the tabling and the sending of the offensive email constitute misconduct, but not serious misconduct. The provision of the email was an error of judgement, and to some extent Mr Shanmuganathan is the author of his own misfortunes.

[88] Section 124 of the Act provides the Court with a discretion when considering the nature and extent of remedies, which in appropriate cases means the Court may prefer one type of remedy over another in order to meet the justice of the case.⁹ I have concluded that this is a case where it is appropriate to order reinstatement subject to conditions. However, the extent of Mr Shanmuganathan's conduct which gave rise to the personal grievance means it is not fair and reasonable to award any financial remedies in addition.

Conclusion

[89] The decision that serious misconduct had occurred warranting demotion was not justified; Mr Shanmuganathan's personal grievance is accordingly established.

[90] There will, following the process described earlier in this judgment¹⁰ be an order for reinstatement which will take effect on a date to be determined, following mediation, the filing of submissions and the Court's consideration of those; the order will be subject to conditions which will apply when Mr Shanmuganathan is reinstated to his former role.

[91] No order of financial remedies is appropriate.

⁹ *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110 at [85]; *X v Auckland District Health Board* [2007] ERNZ 66, at [189]-[190].

¹⁰ At paras [81] and [82].

[92] I shall return to the issue of costs when I settle the terms of the order of reinstatement.

B A Corkill

Judge

Judgment signed at 3.45 pm on 2 July 2015