IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 125
5620445

	BETWEEN	ALASTAIR COWLES Applicant
	A N D	BALLANCE AGRI-NUTRIENTS LIMITED Respondent
Member of Authority:	Helen Doyle	
Representatives:	Mary-Jane Thomas (Counsel) and Alice Anderson, (Advocate) for Applicant Gillian Service, Counsel for Respondent	
Investigation Meeting:	11 April 2017 at Invercargill	
Submissions Received:	11 and 26 April 2017 and memorandum of counsel 11 May 2017, from the Applicant 11 April, 3 and 24 May 2017, from the Respondent	
Date of Determination:	14 July 2017	

DETERMINATION OF THE AUTHORITY

A. **Alastair Cowles was unjustifiably dismissed from his employment with Ballance Agri-Nutrients Limited.**

B **Ballance Agri-Nutrients Limited is ordered to pay Mr Cowles taking contribution into account:**

(i) **$22,890.75 gross being reimbursement of lost wages under s123(1)(b) of the Employment Relations Act 2000.**

(ii) **$11,250 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.**

C **I have reserved the issue of costs and failing agreement set a timetable for an exchange of submissions.**

Employment relationship problem

Mr Cowles claim

[1] Alastair Cowles was employed by Ballance Agri-Nutrients Limited (Ballance) at its Awarua plant in Invercargill from July 2002 until he was summarily dismissed from his employment on 1 February 2016. The Invercargill plant manufactures and supplies fertiliser for customers in the South Island. The main product manufactured at the Awarua plant is superphosphate but 36 different products are sold or mixed at the plant.

[2] At the time of his dismissal, Mr Cowles was working as an operator in Acid Services which involves operations such as wastewater control monitoring, operation of the acid tank farm and safety monitoring of acid loads coming and leaving site. At the material time, his role was also responsible for the manufacture and dispatch of liquid aluminium sulphate (alum). This aspect of manufacturing and dispatch ceased in mid-2016 as the requirements for alum meant it was not feasible to upgrade the plant and storage facilities without a significant increase in price.

[3] Mr Cowles was a union member when he worked at the plant and his work as an operator was covered by a collective agreement between Ballance and the New Zealand Meat Workers & Related Trades Union Incorporated and the New Zealand Amalgamated, Engineering, Printing & Manufacturing Union Incorporated (the collective agreement). The collective agreement came into force on 1 July 2014 and continued until 30 June 2016.

[4] The events that led to Mr Cowles' dismissal commenced when he was injured at work on 12 January 2016. Mr Cowles was walking on a walkway next to the alum tanks and his right leg went into a gap on the walkway. The result of this was that he fell and his left knee was hurt on an angle iron.

[5] Mr Cowles did not advise anyone of his injury on 12 January 2016. His statement during the disciplinary process was that he rested for fifteen to twenty minutes after what he described as extreme pain following the injury. The pain then eased and he carried on working until the end of the day.

[6] Mr Cowles said the following day on 13 January 2016 he was in considerable pain and telephoned another employee, Jarrid Halder to let him know he would not be at work that day. Mr Cowles said that he told Mr Halder he had injured himself at work. Mr Halder did not accept he was advised the knee injury happened at work and presumed it was a home injury. Ballance says it only came to know of the work accident when it received ACC documentation on 20 July 2016. Mr Cowles was dismissed because he did not report the accident to his supervisor and he did not report the hazard which breached his employment agreement and Ballance's health and safety policy.

[7] Mr Cowles says that his dismissal was unjustified procedurally and substantively and not in all the circumstances an outcome a fair and reasonable employer could have reached.

[8] Mr Cowles seeks lost wages from the date of dismissal on 1 February 2016 until the investigation meeting on 11 April 2017. Mr Cowles also seeks compensation for hurt, humiliation and loss of dignity. There was an application for leave to amend the claim for compensation under this head to $20,000 in further submissions.

Ballance reply

[9] Ballance says that it justifiably dismissed Mr Cowles for not reporting both a work accident and the hazard that caused the accident. It says that its process was fair. If the Authority gets to the point of remedies Ballance says that the application to amend the claim for compensation should be denied and that reimbursement of any lost wages should be limited to three months lost remuneration.

Alternative claim not pursued

[10] Ms Thomas advised at the investigation meeting that an alternative claim on behalf of Mr Cowles, that there was an ulterior motive for Ballance to dismiss because of an anticipated redundancy situation, was not pursued.

New issue

[11] During the investigation meeting a new issue arose as to whether the operations manager at Ballance's Awarua plant in Invercargill, Neil Harrison, was the

decision maker. Further submissions addressing this matter were provided following the investigation meeting.

The test of justification

[12] The Authority is asked to consider whether Mr Cowles was justifiably dismissed and is required to apply the justification test which is set out in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Balance, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[13] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether the allegations against Mr Cowles were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such explanations were considered genuinely by Ballance before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[14] Ballance could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

The Issues

[15] The issues for determination by the Authority

(a) What was the reason for the dismissal?

(b) What are the material provisions of the collective agreement and policy?

(c) Did a full and fair investigation require Mr Cowles' partner be interviewed about what she overheard Mr Cowles say on 13 January 2016 to Mr Halder?

(d) Was Mr Harrison the decision maker and, if he was not the decision maker, was that more than a minor procedural defect?

(e) Could a fair and reasonable employer have concluded serious misconduct on the part of Mr Cowles?

(f) Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss?

(g) If Mr Cowles was unjustifiably dismissed then what remedies is he entitled to, should the Authority consider an award of lost wages in excess of three months and grant or decline the application for leave to increase the compensatory award claimed. Are there issues of mitigation and contribution?

(h) Should the Authority grant leave to amend the statement of problem to include a penalty for a breach of good faith?

The background against which these issues are to be assessed

12 January 2016

[16] Mr Cowles was walking on a walkway next to the alum tanks and his leg went into a gap on the walkway. Mr Cowles said that after resting he was then able to walk around and he carried on working for the rest of the day. Mr Cowles did not tell anyone about the incident that day.

13 January 2016

[17] The next morning, 13 January 2016, Mr Cowles awoke in pain and was unable to walk properly. He telephoned Mr Halder. I accept Mr Halder's evidence that in all likelihood that telephone call was made at 5.50am. Mr Halder is a despatch operator in the control room but he is also the fill in operator when Mr Cowles is away. He started his shift that day at 5.00am.

Failure to contact supervisor directly on that day

[18] The fact Mr Cowles did not contact his supervisor as well as or instead of Mr Halder was an issue raised during the disciplinary process. Mr Cowles direct supervisor, Despatch Team Leader, Anthony Padget (Smiley) was on leave at the time

of the incident and did not return to Ballance until 20 January 2016. In his absence Mr Cowles' supervisor was Production Manager, Graydon Gillingham.

[19] Mr Halder said that Mr Cowles advised him that he had fallen over and injured his knee and would not be coming into work. He presumed that Mr Cowles had done this at home. Mr Halder said that it was not his responsibility to tell anyone when Mr Cowles telephoned in that he was not coming into work. He did however mention to Mr Gillingham, when he visited the department later in the day that Mr Cowles had called in sick and had hurt his knee. Mr Halder covered Mr Cowles work that day which he had done on other occasions when Mr Cowles was unwell. In his written statement of evidence Mr Halder said that it was not unusual for Mr Cowles to let him know when he would not be into work as Mr Halder covered his work for him on such days.

14 January 2016

[20] On 14 January 2016, Mr Cowles again made contact with Mr Halder to advise him that he was going to see his doctor that day. Mr Cowles told Mr Halder that he may come into work after seeing his doctor. When Mr Cowles had his consultation with his doctor, he was advised to rest and for his knee to be reviewed on 19 January 2016. Mr Cowles advised Mr Halder of the updated situation and that he would be off work until 20 January 2016. Mr Halder again relayed that advice to Mr Gillingham.

20 January 2016

Mr Cowles returns to work and investigations into the accident by Ballance commence when they find out about it by way of the ACC claim

[21] Mr Cowles returned to work at Ballance on 20 January 2016. The return to work date coincided with the receipt of his ACC claim by Ballance. The advice about Mr Cowles ACC claim went to Mr Padget. The evidence supports that Mr Cowles did not initiate discussion about his absence on his return, but rather was approached by Mr Gillingham and maintenance manager Shane Reid about the ACC claim. On request, he provided his medical certificate.

[22] In accordance with Ballance's standard processes an initial investigation into the accident was undertaken by Mr Gillingham and maintenance manager, Shane Reid. Mr Cowles was interviewed. Following this discussion Mr Cowles was asked

to complete an accident/incident report with Mr Padget. That report was provided after the Authority investigation meeting.

[23] Mr Cowles was also advised that there would be a formal accident investigation into the incident on 12 January 2016 to get the details and facts, and a disciplinary meeting as there had been a lost time injury accident that had gone unreported.

[24] There was then a formal incident investigation undertaken by the Works Chemist, Matthew Ultee and Mr Reid. It was completed on 25 January 2016. Mr Cowles and Mr Halder were interviewed at that time by the individuals who undertook that investigation. The formal investigation found that the trip hazard at the alum reactor tank platform had never been identified as a specific hazard and that there had been a failure to report the incident. Steps were taken to eliminate the hazard by filling in the gap alongside the walkway and there was an article in the site newsletter reinforcing injury reporting requirements.

The disciplinary process

The letter advising of concerns and a formal disciplinary meeting

[25] On 27 January 2016, Mr Gillingham wrote to Mr Cowles to invite him to a formal disciplinary meeting on 29 January to answer two allegations. The two allegations set out were that Mr Cowles had allegedly failed to report the incident and he had allegedly failed to report the trip hazard observed by him as a result of the accident on 12 January 2016. It was stated in the letter of 27 January 2016 that the issues were seen as serious misconduct within Mr Cowles terms of employment, by failing to report any accident or observe safety rules and acts of negligence which seriously affected quality and safety.

[26] Mr Gillingham wrote that he wanted to meet with Mr Cowles to discuss the issues and get his responses as part of a formal disciplinary process and had asked Mr Harrison to accompany him at the meeting. The meeting was to take place in Mr Harrison's office on 29 January 2016 at 1.30pm. Mr Cowles was advised that he was entitled to bring a representative with him to the meeting if he wished and that the issues were viewed as serious and depending on the outcome disciplinary action including dismissal could result.

29 January 2016

[27] Mr Cowles attended the meeting on 29 January 2016 with his representative, Gary Davis, who is the secretary for the Otago Southland Branch of the Meat Workers and Related Trades Union. Mr Gillingham attended with Mr Harrison. Mr Cowles was advised at the outset that the allegations were very serious and depending on the outcome, could result in disciplinary action including dismissal.

[28] This meeting and the next meeting before dismissal on 1 February 2016 were recorded, and subsequently transcribed.

Explanation to the allegation of failing to report the incident on 12 January 2016

[29] By way of explanation to the first allegation Mr Cowles stated that he had reported the incident the next morning when he spoke to Mr Halder. He explained that after he had returned to work he had talked later on with Mr Halder and Mr Halder said that he could not remember if he had been told it happened at work. Mr Cowles said that he then spoke to his partner Marie Strathern that evening and told her that he could not remember if he told Mr Halder it happened at work. He explained Ms Strathern said that he had told Mr Halder [it happened at work] and she was standing beside him at the time. It was put to Mr Cowles that if he had in fact told Mr Halder that the accident happened at work he would have expected Mr Halder to ask him how, where and when. Mr Cowles responded that he would expect so, but he [Mr Halder] was in a "mood with trucks to load." Mr Harrison questioned that at the hour of 5.30am in the morning although I note the telephone call between Mr Cowles and Mr Halder actually took place at 5.50am. When asked why he did not telephone Mr Gillingham on subsequent phone calls after 12 January 2016, Mr Cowles explained that he did not have everyone else's numbers. Mr Harrison said he could have been put through to Mr Gillingham.

[30] There were some questions about why Mr Cowles did not tell anybody on the day of the incident and reference to the fairly extreme pain he said he suffered. Mr Cowles said "lots of things were running through his head, pain, getting alum pumped, and going down to DG3 to sort PH". That explanation was summarised and put to Mr Cowles for comment and he agreed "yes harden up and get on with it". He said it did not enter his mind to telephone his supervisor, Mr Gillingham, and it did

not enter his mind that it would be something seen as significant because it was a lost time injury.

[31] Mr Harrison stated that because Mr Cowles failed to report the accident there was no opportunity to arrange light duties for him and that there was no ability to organise drug and alcohol testing. There was some reference to discrepancy over making alum batches in the incident investigation report and Mr Cowles accepted that he had that wrong at that stage.

[32] Mr Harrison also questioned that, when asked initially to show Mr Reid and Mr Gillingham where and how the accident occurred at the interim accident investigation stage, he became evasive and avoided eye contact. There was a statement about this in the interim investigation report. Mr Cowles categorically denied that matter and said that he did not do that sort of thing and always faced problems.

Explanation to second allegation that there was negligence affecting safety by not reporting a hazard

[33] Mr Cowles explained that he had been at Ballance for years and he had always walked on the catwalk. He explained that the hose was in the wrong place and he was trying to step over it. He had put it there to put water in the hose to prime the pump and said that "happens often". Mr Cowles said in response to a question about what was different that day to make him fall into the hole he said that he did not know and suggested inattention. He explained that he had never considered the gap to be a hazard previously and when asked why, when it was such a painful accident, he had not told someone about the hazard, he responded *"*I am old school, get up, get on with it and harden up*"*.

[34] Mr Harrison explained that his problem was that Mr Cowles did not tell anyone about the hazard and therefore others were exposed to it for eight days before Ballance knew.

The meeting on 29 January 2016 concludes and a further meeting date and time is discussed and agreed

[35] Mr Harrison explained that there would be a need to consider the responses that Mr Cowles had provided to determine the appropriate action. Mr Harrison also

referred to the need to consider how similar incidents would be treated across the company so there could be fairness and consistency with an understanding that every incident is different. There was agreement for the meeting to reconvene at 10.30am on Monday, 1 February 2016.

Resumption of meeting on 1 February 2016

[36] The meeting duly resumed on Monday, 1 February 2016 at 10.30am. Mr Cowles attended with Mr Davis and Mr Gillingham with Mr Harrison.

[37] Mr Harrison opened by asking Mr Cowles if he had any further responses or anything to add since the weekend. Mr Cowles responded that he had had a difficult weekend and that he was "wild" about the statements he was evasive and avoided eye contact. Mr Harrison then stated that from Ballance's point of view it was clear that Mr Cowles had made no attempt to follow company incident reporting requirements by reporting the incident to his supervisor, even after his return to work. Mr Harrison stated that he had listened to Mr Cowles and Mr Davis' responses and that he could not see any mitigating reasons for the failures. He stated that there had also been consideration how similar cases had been dealt with previously. Likewise it was concluded that he had failed to report a significant workplace hazard. The view of Ballance was that the appropriate course of action was to dismiss without notice.

[38] Mr Davis made a statement that he disagreed with the proposed decision and said amongst other matters that Mr Cowles was a long serving employee whose supervisor was away and he had thought he had done the right thing by telephoning Mr Halder. He stated that Mr Cowles partner would confirm that she heard him say to Mr Halder that "it happened at work." Mr Cowles did not say anything further.

[39] There was then an adjournment for 10 minutes before the meeting reconvened.

Reconvening of meeting

[40] When the meeting reconvened Mr Harrison said that he and Mr Gillingham had had an opportunity to consider and reflect on thoughts and submissions. It was not felt that anything new had been added that had not been discussed on Friday so on that basis Mr Harrison confirmed the decision is to dismiss without notice. There was advice a letter was to follow.

What was the reason for the dismissal?

[41] I find that the reasons for the dismissal are contained in the letter sent to Mr Cowles on 4 February 2016 from Mr Harrison. The first was that Mr Cowles failed to follow company policy and report the accident immediately to supervision. As a result Ballance was unaware of the circumstances for eight days and the letter provided this exposed Mr Cowles and others to risk for a significant period of time. The second reason, which overlaps to a degree the first, is that there was a failure to report the hazard similarly stated to have exposed Mr Cowles and others to risk for eight days. The letter provided that Mr Harrison had lost the trust and confidence in Mr Cowles as an employee to be able to ensure that an acceptably safe work environment is maintained for himself and others.

What are the material provisions of the collective agreement and the hazards and incidents management policy?

[42] Schedule 3 to the collective agreement contains the company code of conduct. It provides a warning procedure in clause 1 and in clause 2 a non-exhaustive list of breaches of rules that constitute misconduct and serious misconduct.

[43] The two breaches of the following rules that are set out as constituting serious misconduct and were relied on are:

(i) Failing to report any accident, or observe safety rules and

(ii) Acts of negligence which seriously affect quality or safety.

[44] There is no reference in the collective agreement to a process for disciplinary matters.

[45] There is, in the group policies manual, a hazards and incidents management policy. The policy defines accident and hazards and those definitions apply to what happened to Mr Cowles on 12 January 2016. The policy requires hazards to be reported immediately to the supervisor or work manager and an immediate report of unsafe actions to the supervisor. Further that an employee assist in the recording, investigation and prevention of accidents/incidents.

[46] An overriding objective of the policy is to assist Ballance in eliminating all injuries to achieve the goal of zero harm. Ballance works with chemicals and

appropriately it places a great deal of importance on health and safety. Its goal of zero harm is commendable.

[47] I accept, as submitted by Ms Service, that there can be breaches of health and safety rules that are serious and of a nature to destroy the trust and confidence essential in an employment relationship and amount to serious misconduct. I shall proceed to determine whether that is so in this matter.

Procedural fairness

[48] Mr Cowles claims two matters are procedurally unfair. The first is the failure to investigate the explanation by Mr Cowles that his partner Mrs Strathern overheard him advise Mr Halder the injury to his knee occurred at work. The second that Mr Cowles did not have a fair hearing because he had a right to but was not heard by the decision maker. As Ms Service stated in her submission the requirements of s 103A(3) to (5) allow for an assessment of "substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing…" [1]

Ms Strathern

[49] Mr Harrison was asked at the Authority investigation meeting whether he felt that he should have spoken to Ms Strathern. Mr Harrison said that Mr Halder had no vested interest and he was more likely to prefer his statement therefore that he had not been told by Mr Cowles on the morning of 13 January the injury happened at work. Mr Gillingham also understood on 13 January 2016 Mr Cowles had hurt his knee and it was a home injury. Mr Davis responded at the disciplinary meeting that it was simply a "misunderstanding all round." It was put to Mr Harrison at the Authority investigation meeting why Mr Cowles "would not purposely report the accident." Mr Harrison responded that he did not know [Mr Cowles] was "not purposely not reporting." It was further put to Mr Harrison whether he agreed that there was no deliberate decision not to report. Mr Harrison responded that "Mr Cowles did not explain – felt closer to the deliberate end and that he should have reported [the accident] to supervision."

[50] A fair and reasonable employer could be expected to regard the call to Mr Halder with some importance to be weighed when making a decision about the

[1] *Angus v Ports of Auckland* [2011] NZEmpC 160 at [26]

seriousness of the conduct and a disciplinary outcome. Mr Cowles had made a telephone call the day after the incident although Mr Harrison concluded to the wrong person.

[51] Given Mr Cowles advised Mr Halder he had fallen and hurt his knee and that he did not say he was injured at home the issue for Mr Harrison was whether the words "at work" were said. Mr Cowles medical consultation notes and medical certificate were consistent with his injury occurring at work on 12 January 2016. A fair and reasonable employer could have been expected to take into account that it was not a situation where Mr Cowles said nothing at all about his injury.

[52] The conclusion reached however was that Mr Cowles made no attempt at following company incident reporting requirements by reporting the incident immediately to his supervisor even after his return to work on 20 January 2016. The disciplinary meeting notes on 1 February record Mr Harrison as stating that "we….cannot see any mitigating reason for your failures." Any procedural unfairness has to be considered in light of the conclusion there was a degree of deliberateness.

[53] I find that a fair and reasonable employer approaching the matter with an open mind would have wanted to hear from Ms Strathern to balance and weigh what she had to say with Mr Halder's account and any conclusion as to a deliberate omission. There was a suggestion that Mr Cowles could have provided the information from Ms Strathern in a written form or asked her to attend the investigation meeting. I find it is enough that Mr Cowles put forward what Ms Strathern had said to him and the failure, given the conclusions reached, to investigate that matter further in any way by Ballance was procedurally unfair.

Was Mr Cowles heard by the decision maker?

[54] There was no indication of an issue about whether Mr Cowles was heard by the decision maker until a question from the Authority to Mr Harrison. Mr Harrison when asked to clarify who made the decision to dismiss said that it was recommended by him and approved by the General Manager of Ballance, John Maxwell. The Authority did not hear from Mr Maxwell who is based at the head office of Ballance in the North Island. Mr Harrison confirmed in his evidence that the decision to dismiss is at Mr Maxwell's level but then that he had delegated authority to dismiss

from Mr Maxwell. He then, when asked a further question to clarify the matter as to whether he had the authority, said that he had authority to recommend.

[55] Ms Service submits that Mr Harrison had delegated authority to dismiss Mr Cowles. She accepted that his answers moved and became increasingly clouded when he was asked the same question but in different ways. Ms Service submits notwithstanding Mr Harrison's oral evidence did not move that he had delegated authority after the disciplinary process on 1 February 2016 or over the weekend. Ms Service submitted that Mr Harrison's recommendation to Mr Maxwell regarding the decision to dismiss Mr Cowles did not negate his delegated authority or mean that he was not the ultimate decision maker. Ms Service submits that the recommendation to Mr Maxwell was to ensure any decision reached about Mr Cowles was fair and consistent with similar issues across the company.

[56] I am not satisfied from the evidence that Mr Maxwell's input was limited to an issue about consistency with other health and safety disciplinary matters at Ballance. The evidence supported that after the disciplinary meeting on 29 January Mr Harrison went to Mr Maxwell with a recommendation to dismiss Mr Cowles. The evidence supported that Mr Harrison expected Mr Maxwell to endorse the recommendation although he said it was up to Mr Maxwell whether he did or not. It is unclear exactly what information Mr Maxwell had at that time. Mr Harrison said Mr Maxwell revised the transcripts and there was a discussion by telephone.

[57] Ms Service submits that the fact that Mr Maxwell was not contacted by Mr Harrison during the 10 minute deliberation after the initial meeting on 1 February is persuasive that Mr Harrison was the decision maker. That lack of contact can equally be explained by the fact as stated in the transcript of the meeting of 1 February that Mr Harrison did not consider anything new had been said that day. Mr Harrison when asked about Mr Maxwell's response to the recommendation after the disciplinary meeting on 29 January said that he was "okay with his view and carry on" and in particular "if nothing else comes up, then you can go ahead." It is more likely than not that if Mr Harrison considered new information had been provided on 1 February on behalf of Mr Cowles then he would have been required to contact Mr Maxwell. I place less weight on the letter of dismissal in the circumstances to the extent that it suggests Mr Harrison was the decision maker.

[58] There are cases where a decision-maker makes a decision on disciplinary action relying on some aspects of an investigation undertaken by others. That does not necessarily make the process unfair. Having heard the evidence in this matter I find that it was more likely than not Mr Maxwell, on receiving the recommendation from Mr Harrison assessing relevant information and discussing the matter, made the decision to dismiss. Mr Maxwell then in all likelihood limited any delegation in the event nothing new came forth at the meeting on 1 February for Mr Harrison to proceed to execute the dismissal. Had something new come forth on 1 February 2016 then I find it is very likely Mr Harrison would have had to go back to Mr Maxwell and advise him to see if the new information impacted on the decision. I am satisfied on the balance of probabilities that Mr Maxwell and not Mr Harrison was the ultimate decision maker.

[59] I do accept that Mr Harrison in all likelihood genuinely thought he had delegated authority to make a decision but properly assessed that was limited in the way I have set out to execution of the decision. That finding means that Mr Cowles was not heard by the decision maker. I shall turn to what that may mean for the fairness of the process.

[60] As a general rule it is the law that the right to be heard by the decision maker is one of the basic principles of natural justice on which procedural fairness is based. Support for this is found in several Employment Court judgments including *Irvines Freightlines Limited v Cross*[2] where it was found that Mr Cross was significantly disadvantaged by not actually being heard by the decision maker and this failure was the significant factor in a finding that the dismissal was unjustified.

[61] Ms Thomas referred to the Employment Court judgment in *Ioane v Waitakere City Council*[3] and the statement from the then Chief Judge Goddard:

> "…that to be justifiable procedurally, or for that matter substantively, the fair inquiry that must precede every dismissal for cause must be carried out by the decision-maker. Preliminary portions of that investigation can, and in many cases must, be delegated to others. But in the end, the decision-maker must turn his mind not only to what those under him report and recommend, but also to what the employee has to say in reply…."

[2] *Irvines Freightlines limited v Cross* [1993] 1 ERNZ 424 at 7
[3] *Ioane v Waitakere City Council* [2003] 104 at [25]

Ioane was the subject of an appeal although not on the ground about the right to be heard by the decision maker.

[62] Ms Service referred to an Authority determination in *Oh v Bluebird Foods Limited*[4] as an example of a finding that a decision-maker's authority to dismiss is not defeated when they consult with or provide a recommendation to other managerial staff. It was found in *Oh* at [21] not to be a case of dismissal by a "remote decision-maker" where a manager who had inquired into the circumstances of the employee's conduct had made a recommendation to two other managers. It was unclear in *Oh* whether the manager had the authority to dismiss. That is not the case in this matter. Mr Harrison confirmed that he had the authority to recommend and the authority to dismiss was with Mr Maxwell. The extent of any subsequent delegation I have found in all likelihood was limited to the execution of the decision to dismiss. The circumstances in this matter are distinguishable from those in *Oh*.

[63] The obligations of good faith in s 4 of the Act I find were also breached because Mr Cowles was led to believe that Mr Harrison had authority to deliberate on what he had been told at the disciplinary meeting and make the decision to dismiss. Instead Mr Harrison only had authority to recommend and then delegated authority to execute the dismissal decision made ultimately by Mr Maxwell. In the absence of that information Mr Cowles and/or his representative could not request to be heard by Mr Maxwell the decision maker.

[64] Mr Cowles was deprived of an opportunity to persuade Mr Maxwell that he had attempted to report his accident at work the following day and that he should not be dismissed in light of his 14 years of unblemished service. It is unclear exactly what was said to Mr Maxwell by Mr Harrison. Ms Service submits that I should find the procedural failings minor and technical because in all other respects it was a fair and reasonable disciplinary process. I find that the procedural failing was serious and sufficient to make Mr Cowles dismissal unjustifiable. I will now turn to consider substantive justification.

Substantive justification

[65] There is no dispute that Mr Cowles failed to report his accident on the day it occurred to a supervisor and that was not in accordance with the health and safety

[4] *Oh v Bluebird Food Limited* AA 42/05 (Member Dumbleton)

procedures and reporting requirements at Ballance. Compliance with health and safety procedures in the event of an accident and reporting of an accident is important. Mr Cowles had received training on health and safety procedures at Ballance including reporting obligations; he had been a health and safety representative and had been involved in an incident in January 2012 where he had followed the reporting process. His most recent refresher training was on 6 May 2015.

[66] The collective agreement categorises a failure to report an accident as serious misconduct. Ms Thomas accepts that a single act of negligence can justify dismissal as long as the conduct is sufficiently serious to impair trust and confidence.[5] Some negligence cases in the employment area have as a feature of the factual background an extra element over and above a simple mistake. In *Click Clack International Ltd v James*[6] there was an action that could properly be considered as recklessness. In *Ballylaw Holdings v Ward*[7] there was a further action of falsification and in *Health Waikato v Tebbutt*[8] there was a continuing course of events.

[67] A failure likely to destroy or seriously undermine trust and confidence is less often one of inadvertence, carelessness or negligence and more often one that is wilful or deliberate. The procedural failing to make inquiry of Mr Cowles partner about what was said the following day to Mr Halder impacts on such a finding including whether the failure to report was ongoing or whether there was inadequate reporting. Had inquiry been made it could have altered the finding about the seriousness of the misconduct from failure to report the accident at all to inadequate reporting and not to the right person. The latter would not be of the same seriousness as the former.

[68] A fair and reasonable employer could also be expected to take into account that Mr Cowles advised Mr Halder that he had hurt his knee and that it was caused by a fall. That sits less easily with a finding of deliberateness or evasiveness and more so with carelessness or inadvertence in the nature of a failure to adequately report. Objectively assessed what is somewhat unusual is that Mr Halder asked no questions about the knee injury when Mr Cowles telephoned him. That could support that Mr Halder may have been busy at the time and perhaps less interested or less attentive to what Mr Cowles had to say as a result.

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[5] *W & H Newspapers v Oram* [2000] 2 ERNZ
[6] *Click Clack International Ltd v James* [1994] 1 ERNZ 15
[7] *Ballylaw Holdings v Ward* (Unrep, WC 45/01)
[8] Health Waikato v Tebbutt [2003] 2

[69] In terms of the failure to report the hazard it had been there for at least as long as Mr Cowles had worked at the plant which was 14 years. The collective agreement refers to an act of negligence which seriously affects quality or safety. I am not satisfied that the delay of eight days until Ballance became aware of the hazard in all the circumstances could be said to, or indeed did, seriously affect quality or safety.

[70] A fair and reasonable employer could in some circumstances conclude a failure to report an accident/hazard was serious misconduct. I am not satisfied in all the circumstances of this case objectively considered a fair and reasonable employer could conclude that Mr Cowles conduct in failing to report his accident or the hazard that caused it was misconduct of a nature that deeply impaired or destroyed the trust and confidence that it could have in Mr Cowles.

Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss?

[71] I have found that the Mr Cowles was not heard by the ultimate decision maker. I have also concluded, and this overlaps in part with the adequacy of the investigation, that a fair and reasonable employer could not conclude that the failures in this matter amounted to misconduct that was so serious so as to deeply impair or destroy trust and confidence. This is particularly so when considered against a 14 year unblemished record of service.

[72] I do not find that the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances.

[73] Mr Cowles has a personal grievance that he was unjustifiably dismissed and he is entitled to consideration of remedies.

Remedies

Lost wages

[74] Mr Cowles seeks lost wages from the date of dismissal until the date of the investigation meeting on 11 April 2017. Ms Service submits that any award should be limited to a maximum of three months subject to contribution. Ms Service refers the Authority to the Court of Appeal in *Telecom New Zealand v Nutter*[9] and the statement

[9] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [78]

that there is no automatic entitlement to "full compensation" and that moderation is appropriate when setting awards for lost remuneration.[10]

[75] The Authority has found that Mr Cowles has a personal grievance of unjustified dismissal. In determining reimbursement under s 123 (1) (b) the Authority applies s 128 of the Act. The evidence supported that Mr Cowles lost remuneration as a result of the personal grievance. Subject to issues of contribution under s 128 (2) of the Act the Authority must order payment of the lesser of a sum equal to that lost remuneration or 3 months ordinary time remuneration.

[76] The Authority has been asked in this matter to consider exercising its discretion under s 128(3) of the Act to order Ballance pay to Mr Cowles by way of compensation for lost remuneration a sum greater than that in s 128 (2) of the Act from the date of dismissal to the date of the investigation meeting.

[77] I find that this is an appropriate case to exercise my discretion and order a sum for lost remuneration greater than 3 months. These are the reasons why. Mr Cowles is in his sixties. The Authority is satisfied from applications made from February 2016 that Mr Cowles has applied for other jobs in the Invercargill area without success. He feels that the fact he has not had success to date in securing other more permanent employment is due to his age. The work he has been able to obtain is of a casual and part-time nature and his income has dropped significantly as a result.

[78] I have also considered, as Ms Service correctly submits I must, the likelihood of Mr Cowles continuing with Ballance and whether there are contingencies to take into account. The evidence does not support performance or other issues that would impact on employment not continuing beyond three months. The evidence supported that redundancy was not a risk even with the alum production ceasing. Mr Halder is now undertaking the role that Mr Cowles used to perform with some modification.

[79] Subject to issues of contribution I intend to exercise my discretion under s 128 (3) and consider an award for reimbursement of lost wages from the date of dismissal 1 February 2016 until 31 March 2017. That is a period of 14 months. I do not as submitted by Ms Thomas make an award under s 128 (3) of the Act without taking into account earnings during that period as the Employment Court did in *Brake v*

[10] Above n 1 at [79]

Grace Team Accounting Limited[11] which approach was confirmed by the Court of Appeal.[12]

[80] *Brake* was in the context of a redundancy situation and not a dismissal for reason of misconduct. I agree with Ms Service that I had adopted the approach in *Brake* I would have been guided by the fact that the Employment Court in *Brake* awarded about half of what was initially claimed in that matter. In this case that would be seven months loss of income.

[81] I have been supplied with Mr Cowles earnings from the Inland Revenue Department. For the year ending 31 March 2015 Mr Cowles received $60,955 from Ballance. For the year ending 31 March 2016 he received $59,013. That takes into account no earnings for a month after dismissal and then $3,060 for the month of March 2016. For the year from 1 April 2016 to 31 March 2017 Mr Cowles received $32,466.

[82] I intend to calculate lost earnings on the basis of what Mr Cowles would have received had he not been dismissed. I have assessed that for present purposes at a rounded figure from end of year March 2015 at $61,000. For the year ending 31 March 2016 the loss is $1987 gross ($61,000 less $59,013). For the year ending 31 March 2017 the loss is $28,534 ($61,000 less $32,466). The total loss is $30,521 gross. I find such an assessment is fair to both parties in circumstances where it is unlikely Mr Cowles will ever find a permanent role at which he would receive remuneration at a level he received at Ballance. Against that he has made attempts to try to mitigate his loss.

[83] Subject to contribution the award for reimbursement of lost wages under s 123 (1) (b) is $30,521 gross.

Compensation

[84] Ms Thomas seeks leave to amend the claim for compensation under s 123 (1) (c)(i) from $15,000 to $20,000. In doing so she relies on *Hall v Dionex Pty Limited*[13] and the statements about the levels of compensatory awards and that new evidence about the decision maker came to light. That application is opposed by Ms Service

[11] *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81
[12] *Grace Team Accounting v Brake* [2014] NZCA 129
[13] *Hall v Dionex Ptd Ltd* [2015] NZEmpC at [87]

who submits that no additional evidence of hurt and humiliation has been provided. Further that the comments of the Employment Court in *Hall*[14], of the need to be mindful not to keep compensatory payments artificially low, are balanced against the expressed need for moderation. She submits that is still able to be achieved under the existing claim for compensation.

[85] Ms Thomas submits that if leave is not granted to amend the compensatory award then leave should be granted for a penalty for a breach of good faith on the basis that there was a failure to disclose the decision maker was Mr Maxwell or any reference to him at all. I'll turn to that matter later if required.

[86] The Authority will be reluctant to grant leave to amend a claim for remedies after the investigation meeting unless failure to do so will lead to significant unfairness. It is not uncommon for new procedural issues to come to light during an investigation of an employment relationship problem but that does not automatically mean that impacts the basis or amount for a compensatory award. I am not satisfied that declining the application for leave would lead to unfairness in this case given the quantum of the existing claim. I decline leave for Ms Thomas to amend the claim to $20,000 for compensation and I will assess an award under this head on the claim of $15,000.

[87] Mr Cowles in his evidence said that people had seen a significant change in him. He felt insecure and did not want to leave the house after his dismissal and would stay at home and lock the door. He said that his mood had not improved at the time of the Authority investigation meeting. There are some medical consultation notes from his doctor that support anxiety and stress issues and I have placed some reliance on them because Mr Cowles was somewhat reluctant to talk about the impact his dismissal had on him resulting in stress and anxiety. I also heard from Ms Strathern about that matter. In October 2016 the doctor's notes reflect Mr Cowles had ongoing anxiety and that he did not want to leave his property. The medical notes state Mr Cowles had low mood levels and a flat attitude. Mr Cowles did not want to see a specialist as his doctor suggested because he said it was "not his style."

[88] Ms Strathern said that Mr Cowles self- confidence decreased. She said that he made children's toys in the garage but that has stopped as had his socialisation at the

[14] Above n 8 at [29]

pub. She said that he has not taken back up his hobbies including fishing and hunting. Ms Strathern said that she has been very worried about Mr Cowles and reluctant to leave him and go to work. To get him out of the house after the dismissal she said she hatched a plan with a relative saying that he needed help badly and then for the first time Mr Cowles left the property.

[89] The impact on Mr Cowles after his dismissal was serious and the evidence about hurt, humiliation and loss of dignity compelling. Subject to contribution a suitable award is the sum of $15,000.

Contribution

[90] The Authority is required to consider under s 124 of the Act where it has determined there is a personal grievance the extent to which the actions of Mr Cowles contributed toward the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.

[91] Mr Cowles should have reported his accident on the day it happened to his supervisor and he did not. Mr Cowles knew because of his training that health and safety was a matter of importance for Ballance. Ballance is wanting to change the culture from an old school attitude of harden up and get on with it to clear communication to identify, minimise or eliminate hazards. Ballance has obligations for its employees' health and safety.

[92] I find on the balance of probabilities that it is more likely that Mr Cowles intended to say that he had hurt himself at work to Mr Halder. For whatever reason what was said did not register with Mr Halder as a work accident. I am not satisfied however that Mr Cowles deliberately tried to hide the fact of his accident happening at work and find it was more a case of inadequate reporting.

[93] I find that there was blameworthy conduct on Mr Cowles part. Ms Service submits there should be an 80% deduction but I have not found that the conduct went to the heart of trust and confidence in the employment relationship. That level of contribution is simply too high. I find it fair and reasonable to assess contribution at 25%.

[94] The awards for lost wages and compensation are to be reduced by this amount.

Orders made for unjustified dismissal

[95] Taking contribution into account I order Ballance Agri-Nutrients Limited to pay to Alastair Cowles the following:

(a) Reimbursement of lost wages under s 123(1)(b) of the Act in the sum of $22,890.75 gross.

(b) Compensation in the sum of $11,250 without deduction under s 123(1)(c)(i) of the Act

Leave to amend the statement of problem to include a claim for a breach of good faith

[96] Ms Thomas seeks leave to amend the claim against Ballance to include a penalty under s 4 (1) of the Act for the breach of good faith. Ms Service opposes this and submits leave to amend should be denied.

[97] The Authority has jurisdiction to deal with all actions for the recovery of penalties under s 133 of the Act. This includes a breach of any provision of the Act for which a penalty in the Authority is provided. Section 4A provides a penalty for certain breaches of the duty of good faith.

[98] Under s 135(5) of the Act an action for the recovery of a penalty must be commenced within 12 months. It is the word "commenced" that I place importance on rather than the time limit because I accept Mr Cowles only became aware of the issue about the decision maker on 11 April 2017 at the investigation meeting. I do not find that an action for a penalty has been commenced and would need to be by way of new application rather than amendment.

[99] Putting that more technical issue aside for the moment I have also considered the role of the Authority as set out in s 157 (1) of the Act. That section provides that the Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and determining according to the substantial merits of the case without regard to technicalities.

[100] The problem before the Authority is one of unjustified dismissal. In determining that substantive matter and resolving it the Authority has considered whether there was compliance with good faith behaviour by Ballance and concluded

that there was not in respect of the right to be heard by the decision maker and Mr Cowles knowledge about that matter. That is reflected in both the finding that the dismissal was unjustified and the remedies.

[101] The threshold for a penalty under s 4A of the Act is high. A penalty for a breach of good faith is not awarded in every case. The failure must be deliberate, serious and sustained or intended to undermine the employment agreement. Findings have been made in this determination that Mr Harrison genuinely believed that he had the authority to dismiss. The above matters need to be reflected on before and if a new action is to be commenced seeking a penalty.

Costs

[102] I reserve the issue of costs. I would encourage the parties to see if costs can be agreed. If not then Ms Thomas has until 28 July 2017 to lodge and serve submissions as to costs and Ms Service has until 11 August to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority