

Attention is drawn to paragraph [67] prohibiting publication of certain information contained in this determination.

Determination Number: CA 137/04
File Number: CEA 284/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Paul Dennehy (Applicant)
AND Attorney General in respect of the Ministry of Economic
Development (Respondent)
REPRESENTATIVES Andrew McKenzie, Counsel for Applicant
Michael Quigg, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 14 October 2004
15 October 2004
DATE OF DETERMINATION 22 November 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paul Dennehy was employed in Christchurch at the Ministry of Economic Development (MED). He was dismissed on 6 August 2004 for serious misconduct. He says that the dismissal is procedurally and substantively unjustifiable and seeks remedies including reinstatement. MED says that it reasonably formed the view that Mr Dennehy should be dismissed for serious misconduct following a full and fair investigation.

[2] Mr Dennehy initially sought interim reinstatement. That aspect of the problem was resolved by everyone's co-operation in setting an early date for the substantive investigation meeting and an undertaking between the parties concerning restoration to the MED's payroll pending this determination.

Background

[3] At the time of the dismissal, Mr Dennehy was a senior insolvency officer, having worked for the MED since February 2002. He reported to an insolvency manager (Bronwyn Bindon) who in

turn reported to Rhys Cain, the official assignee and regional manager (South Island) of the Insolvency and Trustee Service of the MED.

[4] In Christchurch, the MED office is a large open plan facility. The work stations for Mr Cain, Ms Bindon and the members of the insolvency team are clustered together or near one another in one part of the open plan area. Most of an employee's work is done at or near their work station. The setting and nature of the work requires frequent interaction between team members and their managers.

[5] Mr Dennehy and others gave evidence to the effect that the insolvency team worked well together until management changes following the death of Lyn Saunders (the official assignee), the promotion of Rhys Cain from insolvency manager to official assignee, the appointment (about June/July 2003) of Ms Bindon as an insolvency manager (to replace Mr Cain) and the non-replacement of the second insolvency manager (Mr Wilson) when he left about November 2003. Thereafter, Mr Dennehy reported to Ms Bindon. That more or less coincided with a developing rift between team members, said to reflect Ms Bindon's management style apparently of a favoured inner circle that excluded Mr Dennehy and some others. Part of the change is said to include Mr Cain becoming increasingly remote. For Mr Dennehy and others, there is a sharp contrast between the work culture that existed under the direct management of Mr Cain and Mr Wilson and what developed under Ms Bindon's management. They blame Ms Bindon (particularly) and Mr Cain for the negative work culture that prevailed at the time of Mr Dennehy's dismissal. At this point it is enough to recognize that Mr Dennehy and others genuinely hold the views they expressed.

[6] Neville Harris is the deputy secretary of the Business Services Branch of the MED. Mr Harris made the decision to dismiss Mr Dennehy pursuant to a delegated authority from the Chief Executive of the MED. That decision followed an investigation process described below.

[7] On Tuesday 22 June 2004 insolvency team members participated in a team building exercise that involved a game of "Laser Strike" followed by lunch at a restaurant. Mr Dennehy, Kim Baldwin, Bronwyn Bindon, Natasha Brobyn, Joanne Coates, Justin McCullough, Michael McLay, David Moore, David Parke and Hamish Robinson were all present. Mr Cain was unable to attend because he was sick.

[8] Near the end of the lunch Michael McLay left the restaurant abruptly and made his own way back to work. There is some conflict, both in the evidence and in statements made during the MED's investigation, over what was said by Mr Dennehy and some others that preceded Mr McLay's abrupt departure. For present purposes it is sufficient to note that Mr Dennehy claimed in his statement that *A number of us made jokes at Michael's expense....* In his statement Mr McLay said *During the course of the lunch there were consistent jibes made by Paul [Dennehy] followed by laughter from Jo [Coates] and Kim [Baldwin]. Jo and Kim made some comments too but they were mainly made by Paul. Some of these jibes I could not hear because they were said behind their hands. There was no doubt that they were a continuance of the negative remarks consistently made by Paul ... as the lunch was ending I decided to walk back to the office as I did not want to travel back in the car with Paul.*

[9] Ms Bindon noticed during the lunch that Mr McLay was unhappy about something that had been said. She spoke to him later that day but he apparently did not want to talk about the matter. The next day, Ms Bindon spoke again to Mr McLay. She asked him to put a complaint in writing but Mr McLay was reluctant to do so. Ms Bindon later told Mr Cain that there had been an incident at the lunch.

[10] Mr Cain had been sick but returned to work on Friday, 25 June 2004. He met Mr McLay who told him he had been subjected to jibes primarily from Mr Dennehy and Ms Baldwin and to a lesser extent from Ms Coates. Mr McLay said that two others had heard the remarks so Mr Cain then spoke to Mr Moore and Mr Robinson. On their accounts, Mr Dennehy and Ms Baldwin had been making derogatory comments about other team members in a deliberate attempt to ruin the lunch.

[11] At this stage Mr Cain did not intend to deal with the situation as a disciplinary matter. He had no complaint as such from Mr McLay and it appeared to him to be the sort of thing properly resolved by informal discussion. Mr Dennehy was not at work on Friday, 25 June. However, Mr Cain did speak to Ms Baldwin after which she apologized to Mr McLay for any offence caused. She did so of her own volition. Mr Dennehy later made a similar apology.

[12] Mr Cain also spoke to Ms Baldwin about an allegation that she and Mr Dennehy had recently taken a morning tea break of two and a half hours duration. That was a gross exaggeration. Later on Wednesday, 30 June Ms Baldwin explained the relevant circumstances and that matter was resolved as far as Mr Cain was concerned.

[13] Mr Dennehy and Ms Baldwin are close friends. On Friday, 25 June 2004, after her discussion with Mr Cain, Ms Baldwin rang Mr Dennehy and told him about what had happened. Mr Dennehy returned to work on Monday, 28 June 2004 expecting Mr Cain to speak to him. As he put it in an email he sent on Monday morning *Seems that 5(!) ITS staff complained about how Michael was tormented (!) at last weeks lunch; Jo, Kim and I have shown disrespect to our colleagues by having coffee together; Robyn Cox complained to Rhys [Cain] that we had a 2.5 hour coffee break (!!!) ... Dear God, it's become a farce.* In another email a little later, Mr Dennehy said that they had taken a 20 minute break and *It's just all b/s, poisonous crap, which bronwyn/cox are feeding him [Rhys Cain] & he's arse enough to run with it.* Earlier on the Monday, he had written *waiting to see what's going to happen – Bronwyn barely managed a reply to my cheery good morning. Rhys pulled Kim, Moore and Michael on Friday & was v aggressive to Kim. He's told her he is going to pull me ... Tee hee hee!.* There are also email exchanges between Mr Dennehy and Ms Baldwin on Monday discussing whether Mr Dennehy should initiate the discussion with Mr Cain.

[14] Mr Dennehy did approach Mr Cain on Tuesday, 29 June and a meeting was arranged for 2.00 pm that day. Part of Mr Dennehy's complaint about the lack of procedural justification relates to this meeting. That part of the complaint is of no merit. Mr Cain intended no more in the meeting with Mr Dennehy than the earlier meeting with Ms Baldwin – that is, an informal discussion and resolution of the situation. Mr Cain did have Ms Bindon present to take notes but nothing sinister should be taken from that. Mr Dennehy has a forceful personality and it is unsurprising that Mr Cain wanted a witness present.

[15] In large measure, Mr Dennehy in evidence accepted Mr Cain's account of the meeting based on Ms Bindon's notes. However, Mr Dennehy does say that Mr Cain shouted at him and was aggressive and threatening. I accept the evidence of Cushla Piesse that she heard Mr Cain's *raised voice* for four or five words while she was in the adjacent meeting room. The wall is not sound proofed so Cushla Piesse's evidence does not establish that Mr Cain shouted at or was aggressive and threatening to Mr Dennehy. Mr Cain said he had to raise his voice *...a little ...* to be heard because Mr Dennehy was giving sarcastic responses and talking over the top of him. Mr Dennehy denies being sarcastic. Mr Dennehy says he felt *...very shaken...* as a result of Mr Cain's *... extreme behaviour and Miss Bindon's failure to intercede.* Mr Dennehy is not a man who would be shaken by the exchange even on his account. On his account, Ms Bindon orchestrated the situation that led to his dismissal, so his evidence about being very shaken by her failure to protect him makes no sense. However, because whatever happened in the room is irrelevant to the subsequent decision by Mr Harris to dismiss Mr Dennehy it is not necessary to resolve the conflict in evidence

at this stage. It is enough to say that Mr Cain made it clear that he would be instigating a formal disciplinary investigation regarding the matters discussed on 29 June 2004.

[16] Mr Cain sent a letter dated 30 June 2004 to Mr Dennehy invoking an investigation under the MED's code of conduct. Before then, Mr Cain had phone discussions with Mr Dennehy's union representatives. There were some exchanges about matters connected to the procedural complaints referred to above but it is unnecessary to canvass those exchanges. Mr Cain made it clear that the long coffee break allegation was resolved, having been ... *wonderfully explained*.... There was discussion about the gist of the other allegations being made against Mr Dennehy, being about his conduct and not his work performance.

[17] Mr Cain also had some discussion with another employee (Natasha Brobyn) during which she made an allegation that Mr Dennehy had behaved towards her in a threatening and intimidating manner, shortly after her employment had commenced which was on 19 April 2004. Ms Brobyn told Mr Cain that she had not complained to him earlier because she was scared of Mr Dennehy. Having observed Ms Brobyn giving evidence, I have no doubt that her statements to the MED were an accurate description of her feelings at the time. In the 30 June 2004 letter, Mr Cain referred to Ms Brobyn's allegation (without identifying her or any specifics) as a matter that would also be investigated. He specified 11.00 am on Tuesday, 6 July as the time to meet over this and other allegations.

[18] Later, on Friday, 2 July 2004, Mr Cain was told by another manager (Robyn Cox) that Ms Brobyn was talking about resigning because of her fears about Mr Dennehy. Mr Cain discussed the development with Mr Harris and was delegated a power to suspend Mr Dennehy. The counsel to Mr Cain was to give Mr Dennehy an opportunity to comment before deciding whether suspension was appropriate. By this time, it had been agreed to defer the 6 July meeting until 1.30 pm to accommodate a non-work commitment of Mr Dennehy's. To deal with the suspension, Mr Cain gave Mr Dennehy a letter requiring him to attend a meeting at 4.00 pm that day (Friday, 2 July) for the purpose of consideration of a suspension on pay pending the outcome of the investigation. Mr Cain also faxed a copy of the letter to Mr Dennehy's union. There followed a phone discussion between Mr Dennehy's representative (Martin Cooney) and Mr Cain, then a fax. In the fax, Mr Cooney made it clear that ... *neither Paul nor myself as his representative are in a position to attend such a meeting or make submissions until we have the specific allegations made against him, including the identity of the person(s) making the allegations*. The fax also referred to the relevant section of the employment agreement.

[19] Neither Mr Cooney nor Mr Dennehy attended at 4.00 pm on 2 July so Mr Cain decided he would suspend Mr Dennehy. He then briefly met with Mr Dennehy and told him of the suspension, that it was on pay and would apply during the investigation process. Mr Dennehy was told not to contact employees or return to the premises meantime. Mr Cain escorted him to his work station where Mr Dennehy logged off his computer and gathered up some possessions and Mr Cain later walked with him to the front desk where Mr Dennehy relinquished his access card and left. Mr Cain later sent Mr Dennehy a letter dated 5 July 2004 confirming the suspension and updating the details of the proposed investigation process. That prompted a fax in reply from Mr Cooney. Mr Cooney repeated the criticism about the failure to provide specifics of the allegations and the identity of those making them. Complaint was also made that Mr Cain appeared to be soliciting complaints against Mr Dennehy. A grievance about the suspension was raised on Mr Dennehy's behalf and it was said that there was bias and pre-determination in respect of the intended investigation.

[20] Mr van der Schyff, the MED's acting group manager of ITS conducted the first part of the investigation. He interviewed various staff, had them confirm their statements in writing and then provided that material to Mr Dennehy and his representative with a request for a written response.

He also offered to meet. Mr Dennehy's representative (Nadine Marshall, NUPE's secretary) wrote to Mr van der Schyff asking again for the specific allegations against Mr Dennehy and for an opportunity to meet face to face. Mr van der Schyff's response to the first point was to point Ms Marshall to the statements that had been provided and to several provisions in the employment agreement and code of conduct concerning behaviour of employees towards one another. Mr van der Schyff indicated a preparedness to meet but also sought Mr Dennehy's written response within a specified timeframe. Mr van der Schyff's response was sent to NUPE by fax about 5.00 pm on Monday, 12 July 2004.

[21] Mr Dennehy provided a comprehensive written reply by fax at about 4.00 pm on Wednesday, 14 July 2004. Mr Dennehy said that he was disadvantaged by the MED's failure to highlight the specific concerns because he was left to guess which parts of lengthy statements should be responded to in more detail. He was critical of the earlier proposed short timeframe for Mr van der Schyff's report and sought an audience with Mr Harris rather than Mr van der Schyff. Mr Dennehy also listed 19 former or current MED staff members who he believed would disagree with the thrust of the allegations made against him.

[22] Mr van der Schyff next provided relevant extracts from Mr Dennehy's reply to the various employees and sought their responses. Those staff provided written responses. Mr van der Schyff copied those to Mr Dennehy for his further comment. Ms Marshall made requests for further specific information and Mr van der Schyff answered those requests over the following few days. In the meantime, on 23 July 2004, Mr Dennehy provided a further comprehensive response to the employees' written responses.

[23] On Thursday, 29 July 2004 Mr van der Schyff produced a report which included the various documents generated by his investigation. The bundle of material was given to Mr Harris and copied to Ms Marshall.

[24] Mr Cain meantime found it necessary to access Mr Dennehy's work email account. It is suggested that there was something untoward or improper in his doing this but there is no evidence to support that claim. I accept Mr Cain's evidence to the effect that he needed to access the email account to deal with MED's business in Mr Dennehy's absence. As a result, Mr Cain discovered email exchanges involving Mr Dennehy, Ms Baldwin and others, some of which I have referred to earlier. Mr Cain sent a *representative sample* of the emails to Mr Harris and the same material was provided to Ms Marshall.

[25] Following a further exchange of correspondence, Ms Marshall and Mr Dennehy met with Mr Harris and another manager eventually on 6 August 2004 commencing at 10.15 am. In evidence, Mr Dennehy said that Mr Harris acknowledged his contribution to the MED but found the allegations proven so that Mr Dennehy was guilty of serious misconduct. Mr Dennehy also said that it appeared to him that Mr Harris had failed to take on board what had been said by Ms Marshall but was merely protecting his manager. Mr Dennehy said that a small group including his two managers lied, that the lies were taken at face value and that the investigation was a sham.

[26] Ms Marshall's evidence was more descriptive about what happened during the meeting. In response to Ms Marshall's question, Mr Harris said that he wanted them to focus in particular on the issues related to the MED's requirement for a pleasant workplace free of harassment and distress. Ms Marshall then put forward Mr Dennehy's perspective on the allegations. She also requested that Mr Harris seek comment from a particular long standing staff member who it was thought might provide a balanced view. Mr Harris offered to take into account that person's view if something in writing was received in time. The meeting was adjourned at 11.00 am, to reconvene at 2.00 pm.

[27] Mr Harris said in evidence that he considered during the adjournment all the material derived from the investigation including Mr Dennehy's statements and what had been said on his behalf by Ms Marshall. He said he assessed any discrepancies and in the end concluded that Mr Dennehy's conduct and behaviour contravened the obligation to refrain from conduct that might impair the work performance of others or endanger their safety as set out in the MED's code of conduct and the collective employment agreement.

[28] When the meeting reconvened Mr Harris told Mr Dennehy that he was summarily dismissed for serious misconduct.

[29] Mr Harris sent Mr Dennehy a letter dated 10 August 2002 in which he set out his reasons for dismissing Mr Dennehy. They are:

I found that the behaviour, manner and conduct outlined in the material provided contravened the obligation that all employees have to refrain from conduct that might impair the work performance of other staff or endanger their safety (refer Code of Conduct page 2/6). It also contravened your contractual obligation to treat others with respect and behave with integrity at all times. (Refer NUPE Collective Agreement Clause 9 (a). It also contravened your obligation to assist the Ministry in providing all its staff with a safe and harassment free workplace and in that regard I refer to the NUPE Collective Agreement which also states "Harassment will not be tolerated" – Clause 9(b). Such behaviour, manner and conduct was regarded by me a destructive of the basic trust and confidence that is essential to the employment relationship. I informed you accordingly.

I found your behaviour and conduct to be serious misconduct. On the issue of penalty I considered the submission made on your behalf by Nadine Marshall and acknowledged that you had willingly filled a number of voluntary roles within the workplace (e.g. social club, fire warden, NUPE delegate) and that you have made good progress as an insolvency practitioner.

Justification for the suspension

[30] The collective employment agreement permits the employer to suspend an employee pending an investigation if *the offence is sufficiently serious*. That must mean the allegation because the employee's actions can only be established as a result of the investigation. I accept the allegation by Ms Brobyn was an offence sufficiently serious to entitle the MED to consider suspension.

[31] It is well established that a contractual power to suspend must be exercised fairly and reasonably in accordance with the rules of natural justice: see *ASTE v Northland Polytechnic Council* [1992] 2 ERNZ 943.

[32] In the present case, Mr Dennehy and his representative were invited to a meeting to consider whether suspension was appropriate. They declined to attend a meeting or make submissions until given the specific allegation made against Mr Dennehy including the identity of the person(s) making them.

[33] In evidence, Mr Cooney said that he was unavailable because of other work commitments. If that had any bearing on the situation, Mr Cooney's fax would have requested or offered an alternative meeting time, but it did not.

[34] The remaining complaint about the suspension is the failure to supply details of the allegation including the identity of the complainant(s). The obligation on an employer is to give the employee

an opportunity to comment and for that to be considered as part of the suspension decision. MED gave Mr Dennehy that opportunity. He declined it and the chance to seek during a meeting the specific allegations and identity of the complainant. He cannot now be heard to complain about the lack of particulars. I therefore find that the MED justifiably suspended Mr Dennehy.

Justification for the dismissal

[35] The law regarding justification in cases of dismissal for serious misconduct is as stated by the Court of Appeal in *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448. In that case, the Court formulated the test as:

The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would”, used in the formulation expressed in the second BP Oil case ([1992] 3 ERNZ 483 (CA) at p487).

The burden on the employer is not that of proving to the Court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. This distinction is highlighted in cases involving alleged dishonesty by employees. An employer can justify dismissal without having to prove the dishonesty by showing that, after a full and fair investigation, it was at the time of the dismissal justified in believing that serious misconduct had occurred (Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd (1990) ERNZ Sel Cas 985; [1990] 3 NZLR 549 (CA), at p989; pp 552-553).

[36] I will first consider whether there was a full and fair investigation. As mentioned earlier, events in the meeting between Mr Cain and Mr Dennehy on 29 June do not affect the fairness of the investigation that resulted in the dismissal, even on the assumption that Mr Dennehy’s evidence of the meeting is correct. The dismissal decision was made by Mr Harris following Mr van der Schyff’s information gathering exercise. Mr Harris was never involved in the 29 June meeting and his partiality cannot be impugned by Mr Cain’s alleged conduct that preceded the disciplinary investigation.

[37] Even if the exchange between Mr Cain and Mr Dennehy on 29 June was regarded as part of the disciplinary investigation, any unfairness during that exchange was put right by the careful way in which Mr Harris conducted his investigation.

[38] Mr Dennehy is critical of the investigation and says that there was a failure to advise of the specific allegations that he was being called upon to answer. I do not accept this criticism. It is apparent from Mr Dennehy’s written responses that he was sufficiently aware of the specific allegations to be able to give his own account in great detail. For the most part he denied alleged incidents and gave other information intended to put himself in a good light or throw doubt on the truthfulness of those making the allegations.

[39] Mr Dennehy also says that the investigation was predetermined and took on a life of its own, having started as a minor issue over which there was no complaint made by Mr McLay. There is no credible evidence to support the claim of predetermination. I accept that Mr Harris kept an open mind and considered but ultimately rejected Mr Dennehy’s explanations. An employer is not restricted to only investigating and acting on complaints in situations such as the present. The team building incident came to the attention of the MED management, so there was an obligation to take some steps to deal with the issue. It is not disputed that Mr Cain initially sought to deal with it

informally and I accept his evidence that Mr Dennehy through his sarcastic responses caused the matter to escalate into a formal disciplinary inquiry.

[40] Mr Dennehy has a strong sense of antipathy towards Ms Bindon and he is very critical, with some justification, of her role in gathering and encouraging statements that were critical of Mr Dennehy. However, the level at which the decision to dismiss was made is too remote from Ms Bindon's sphere of influence for her behaviour to impugn that decision. Nor does it necessarily follow that the things said by staff were untrue simply because of Ms Bindon's enthusiasm for them to make their statements.

[41] I conclude that Mr Harris conducted a full and fair investigation.

[42] Mr Dennehy also says that the behaviour complained of and established by the investigation could never amount to serious misconduct. To deal with this part of the problem, it is necessary to summarise the results of the investigation and consider whether such behaviour could fairly be regarded as serious misconduct in the context of this employment.

[43] In her statement, Ms Bindon said that staff are scared of Mr Dennehy because he tends to fly off the handle. She said she had seen him respond when things were not going his way by exhibiting body language such as staring down a person and clenching his fists. She referred to an email in which Mr Dennehy chastised another staff member in a derogatory and sarcastic manner for leaving the coffee-pot empty. Ms Bindon counseled Mr Dennehy about that but she felt her advice was not well received. Ms Bindon said she had been told by Ms Brobyn of an incident where Mr Dennehy told Ms Brobyn to keep her mouth shut about things she might have overheard. At the time, Ms Brobyn expressed concern for her and her family's safety. Ms Bindon also described a situation where she had been shouted at by Mr Dennehy and gave her account of the team building incident. Ms Bindon said that staff are incredibly scared of Mr Dennehy and that she finds him intimidating, insubordinate and continually undermining Mr Cain and herself.

[44] Robyn Cox gave a statement explaining how she had supported Ms Brobyn after learning that Ms Brobyn was fearful of some reaction from Mr Dennehy, she having told Mr Cain about an incident that I will refer to shortly.

[45] Mr McLay reported that Mr Dennehy had made comments to him from his first day of work which he interpreted as an attempt by Mr Dennehy to recruit him into the *clique* in the office comprising Mr Dennehy, Ms Coates and Ms Baldwin. After Mr McLay made it clear he would not be involved in that way, Mr Dennehy started to make jibes at Mr McLay in the nature of personal comments. He described an occasion when Mr Dennehy *stood over* Ms Bindon and argued angrily with her about an email from Mr Cain. He also reported that Ms Brobyn had spoken to him at the time of her incident. He summarised Mr Dennehy's behaviour as *extremely offensive* which had caused him to consider resigning.

[46] Ms Brobyn gave an account of the team building lunch and reported comment by Mr Dennehy about Mr McLay following the latter's departure. Mr Dennehy made snide comments such as *he's so weak; he's so gay; look at him – he can't handle it*. She said that Mr Dennehy gets aggressive, stares at you, clenches his fists or cracks his knuckles if challenged about his behaviour. Ms Brobyn described an incident with Mr Dennehy that occurred on her second day in the section. He made comments such as the following:

- *there's some stuff going on and you're going to hear things*
- *I need to know you're going to keep your mouth shut*
- *I need to know you're on my side and if it gets back I'll know it has come from you*

- *We don't agree with the way Rhys and Bronwyn are managing the team*

Ms Brobyn felt intimidated and expressed her belief that Mr Dennehy was capable of causing physical harm, having seen his behaviour after the Christmas function. She said that Mr Dennehy had bullied all the new staff members for months. She described the situation as being like cliques at school and expressed her concern for her personal safety.

[47] Mr Robinson expressed his concern that Mr Dennehy might become physically violent and referred to his behaviour such as throwing down his phone or storming around the office. He said he was considering seeking a restraining order because of his concern about Mr Dennehy's possible reaction to his statement.

[48] Mr Moore said that he had observed Mr Dennehy using intimidating behaviour such as standing over people and being in their personal space although he had not experienced this himself.

[49] Mr Parke and Mr McCullough did not find Mr Dennehy intimidating and were surprised by the allegation that Mr Dennehy had intimidated others. They did not attribute the poor office environment to any blameworthy behaviour by Mr Dennehy. Both Ms Baldwin and Ms Coates made similar points in their statements. They also gave an account of events at the lunch, in essence that things said by Paul and others were intended as jokes or harmless teasing. In addition, Ms Coates said she was present during Mr Dennehy's exchange with Ms Brobyn. She said that Mr Dennehy's request for discretion was made in a pleasant manner and Ms Brobyn responded similarly at the time.

[50] For his part, Mr Dennehy comprehensively responded to the things said about his behaviour. There was then another opportunity for those who had made statements to respond to Mr Dennehy's comments as they related to their original statements and a further opportunity for Mr Dennehy to comment on that material. It is not necessary to summarise these further statements because they do not affect the substance of the allegations against Mr Dennehy. I should also note that Mr Harris necessarily rejected at least part of what had been said by Mr Parke, Mr McCullough, Ms Baldwin, Ms Coates and Mr Dennehy where it conflicted with others' statements.

[51] There are some contractual provisions relevant to the assessment of the nature of Mr Dennehy's misconduct. One of the MED's values identified in the collective employment agreement is respect for others. There is a strong statement at clause 9 of the agreement to reinforce this. It also says bluntly that harassment such as bullying will not be tolerated. The agreement permits the employer to dismiss an employee summarily or with less than the usual period of notice in the event of serious misconduct.

[52] There is a code of conduct with relevant provisions that were also referred to during the investigation. It includes a statement of principles. Under the heading *Efficient and Competent Performance of Duties* the code requires employees *to refrain from conduct (such as the use of intoxicants) which might impair work performance or endanger the safety of others*. Under the heading *Respect for Rights of Colleagues and the Public* it requires employees *to avoid behaviour that might cause distress to other employees or otherwise cause or contribute to disruption of the workplace*.

[53] The code also refers to and gives examples of behaviour that is regarded as serious misconduct. The former may result in summary dismissal while the latter would be dealt with under the warning procedure. Serious misconduct is said to include a wilful failure or refusal to comply with the statement of principles. Another example is wilfully endangering other employees, including violent behaviour. An example of misconduct is behaviour which causes distress to other employees.

[54] There is substantial jurisprudence against which contractual provisions such as those above must be construed. In *Oram*, the Court of Appeal held it was for the employer to show the conduct was such that a fair and reasonable employer could see it as deeply impairing the basic confidence and trust essential to the employment relationship. That itself involves an objective assessment of whether the behaviour complained of is of sufficient gravity.

[55] In my view a fair and reasonable employer would regard Mr Dennehy's behaviour as established by Mr Harris as comprising behaviour causing distress to other employees amounting to misconduct.

[56] I do not accept that Mr Dennehy's behaviour could fairly be seen as a **wilful** failure to comply with the statement of principles referred to above. In *Roydvale Transport Ltd v Hobson* 19/10/95, Travis J, CEC 36/95 the Employment Court held that wilful misconduct meant deliberate, intentional or headstrong conduct for which the employee could not plead compulsion, ignorance or accident as an excuse. What the investigation disclosed was in large measure an insensitivity or lack of awareness on the part of Mr Dennehy to the effect of his behaviour and mannerisms.

[57] That conclusion must stand all the more strongly because I accept the point made by Mr Dennehy that some of the grounds on which Mr Harris made his decision were stale. A fair employer is obliged to deal with disciplinary matters as they arise: see *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421. In the present case, Ms Bindon, as Mr Dennehy's manager, knew about the incident between Ms Brobyn and Mr Dennehy at the time it arose. She also knew of her own incident obviously. For reasons deemed adequate at the time, no disciplinary steps were taken. If both incidents are ignored, what Mr Dennehy did during the team building lunch and in general in the other matters referred to, was cause distress. That amounts to misconduct sufficient to entitle MED to invoke the warning procedure.

[58] It follows that the decision to dismiss Mr Dennehy is unjustifiable.

Remedies

[59] Mr Dennehy seeks reinstatement. Section 125 (2) of the Act requires me to provide for reinstatement, wherever practicable.

[60] There are only two matters of significance that point to reinstatement being impracticable. The first of these is the effect the reinstatement would be likely to have on other staff. I have already indicated that I do not doubt that the staff who expressed their concerns genuinely held those beliefs. It is not necessary to canvas that evidence further because it would not be sufficient to deny reinstatement given the finding of a lack of substantive justification.

[61] There is a wealth of evidence to confirm Mr Dennehy's animosity towards Ms Bindon and Mr Cain. These feelings predated the dismissal. By way of example, in an email on 28 June 2004 to a former MED employee, Mr Dennehy said of his two immediate managers *...Rhys is crap & Bron is the anti christ's mother in law* I make no criticism of Mr Dennehy for expressing such feelings, he is entitled to hold such views. The point is that it indicates the true depth of his animosity towards his two managers. Since then he has been dismissed and his evidence leaves me in no doubt that his animosity towards Ms Bindon and Mr Cain has intensified. In addition, he has similar feelings towards those other existing employees who he believes assisted with his dismissal. I find that Mr Dennehy could not work co-operatively with colleagues or his two line managers if reinstated. Accordingly, reinstatement would be impracticable and I decline it.

[62] Having reached that point, I accept that the loss of his position has caused Mr Dennehy a considerable amount of hurt and humiliation. There is no reason to doubt any of the evidence given

by him and others about this. The loss will be ongoing because of the decision to decline reinstatement. Assessing that and the evidence of loss to date, a substantial award is required. Subject to what follows, I order the MED to pay Mr Dennehy compensation of \$20,000.00.

[63] At this point Mr Dennehy has suffered little loss of remuneration because of the undertaking that resolved the interim reinstatement application. Again subject to what follows a fair award of lost remuneration would be in the order of six months salary from the date of dismissal. This involves an award for a prospective loss for several months following the date of this determination. During the six month period Mr Dennehy must bring to account any other earnings achieved during the time he would otherwise have worked for the MED and he now has an obligation to mitigate the loss. I will leave it to the parties to agree on the quantum and when the payments should be made but leave is reserved in case there is any disagreement.

[64] There is no doubt that Mr Dennehy's actions contributed towards the situation that gave rise to his grievance. Frankly, there is an air of so called *Reality TV* to the way that Mr Dennehy behaved towards other staff. Mr Dennehy claimed that it was simply good natured banter in which everyone joined. That is true to an extent but it also went beyond banter. At the team building lunch, Mr Dennehy (mostly), Ms Coates and Ms Baldwin were making comments which they knew or should have known would be hurtful and upsetting to Mr McLay. Ms Coates thought she was part of that clique because they included her in the put-downs aimed at Mr McLay. However, as is apparent from emails between Mr Dennehy and Ms Baldwin, those two secretly shared a negative view of Ms Coates. Ms Coates was hurt and upset when she became aware of that secret just as was Mr McLay from the open taunts and put-downs. This behaviour by Mr Dennehy at the lunch and towards Ms Coates is consistent with the general tenor of things said by Ms Bindon and others who were critical of Mr Dennehy in their evidence.

[65] While I consider that the comments about violence are somewhat overplayed (although the fears are genuinely held), I do accept that Mr Dennehy engaged in manipulative behaviour using put-downs, sarcasm and his physical presence which contributed significantly to office discord and dissension. Mr Dennehy behaved that way at least partly because of his contempt for Ms Bindon and Mr Cain. It is all behaviour that requires remedies to be reduced by a quarter.

Other matters

[66] There was evidence critical of Mr Dennehy's character and behaviour in work and non-work situations apart from that referred to above. Mr Dennehy strongly refuted it. Those matters formed no part of the decision to suspend then dismiss Mr Dennehy nor are they relevant to an assessment of remedies. Accordingly, I have ignored it.

[67] I confirm the order I made during the investigation meeting prohibiting the publication of any evidence about a letter received by Mr Robinson.

Summary

[68] MED justifiably suspended Mr Dennehy.

[69] MED unjustifiably dismissed Mr Dennehy and he therefore has a personal grievance.

[70] To remedy the grievance, I order MED to pay Mr Dennehy:

- (a) pursuant to section 123 (c)(i) of the ERA 2000, the sum of \$15,000.00 compensation.

(b) pursuant to section 123 (b) and (c)(ii) of the ERA 2000, reimbursement of remuneration lost for the period of 4 ½ months from the date of the dismissal.

[71] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority