

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 498
5299697**

BETWEEN CHRIS PUHIA
 Applicant

AND OVATION NEW ZEALAND
 LIMITED (FORMERLY
 BERNARD MATTHEWS NEW
 ZEALAND LIMITED)
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Webster, Counsel for Applicant
 Tim Cleary, Counsel for Respondent

Investigation Meeting: 15 September 2011 at Gisborne

Submissions received: 28 September 2011 from Applicant and from Respondent

Determination: 18 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Chris Puhia, claims that he was unjustifiably dismissed by the Respondent, Ovation New Zealand Limited (formerly Bernard Mathews New Zealand Limited) (“Ovation”) on 18 November 2008.

[2] Ovation denies that Mr Puhia was unjustifiably dismissed and claims that Mr Puhia was justifiably dismissed on the grounds of serious misconduct.

Issues

[3] The issues for determination are:

- Whether Ovation had substantive justification for finding that Mr Puhia had committed serious misconduct

- Whether the process carried out by Ovation was procedurally fair and reasonable
- If there was serious misconduct, would a fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

Background Facts

[4] Ovation is involved in the meat export industry, the plant at Gisborne (“the Plant”) slaughters and processes lamb for the export market. Stringent food hygiene processes are in place at the Plant in order to ensure there is no risk of spreading microbiological disease.

[5] All meat exporters in New Zealand must comply with the Animal Products Act 1999, one aspect of which is that a plant must have an effective risk management plan in place. In Ovation the plan is called HACCP which is set out in the Ovation Handbook and which is the recommended control system adopted in 1999 by the Codex Alimentarius Commission, based in the European Union.

[6] Mr Puhia was employed by Ovation as a Contract Slaughterman for approximately 8 years. Mr Puhia was also a deputy union delegate of the New Zealand Meatworkers and Related Trades Union Inc (“the Union”) which was party to the collective agreement with Ovation covering the employees at the Plant (“the Collective Agreement”).

[7] Mr Puhia said he had visited the Plant on 16 November 2008, which was a non-work day for him, because he had left his glasses and a wood burner in the smoko room.

[8] Mr Puhia said he had driven in through the main entrance of the Plant and had parked outside the smoko room. On entering the smoko room Mr Puhia said he had looked for his glasses and the wood burner but had been unable to find them, therefore he had written a message on the whiteboard requesting their return should another employee find them.

[9] Upon leaving the smoko room, Mr Puhia said he had driven approximately 50 metres to a skip bin and had deposited two Pak’n’Save marked grocery bags containing rubbish into the non food skip located on the Plant. Mr Puhia said that the rubbish in the Pak’n’Save bags consisted of rubbish which had accumulated in his car, primarily empty drink cans and food wrappers. After this action, Mr Puhia left the Plant.

[10] Mr Sean Naden, who was the Gisborne Plant Manager during the period when Mr Puhia was employed by Ovation, said that on the morning of Sunday 16 November 2008 he had received a telephone call from Mr Willie Rutene, the Nightshift Supervisor, who had told him that he had seen Mr Puhia drive up and deposit rubbish into the non food skip, and then drive off. Mr Naden said that he had not thought to ask Mr Rutene to check the skip to ascertain the nature of the rubbish Mr Puhia had deposited, and that the next day the skip had been emptied so it had not been possible to check the contents.

[11] On arrival at the Plant the following day, 17 November 2008, Mr Naden said he had explained the situation to Mr Takarua and asked Mr Takarua to locate Mr Puhia and accompany him to his office. Mr Puhia said he was telephoned by Mr Takarua who asked him to report to his office, but he was not informed of the reason why Mr Takarua wanted to see him. Mr Puhia, who was on light duties at that time, said he had assumed that Mr Takarua had wanted to speak to him about another light duty task.

[12] Mr Puhia said that he was not told that he was entitled to have a support person with him. When Mr Puhia and Mr Takarua arrived upstairs, he said they were called into Mr Naden's office.

[13] Prior to the meeting Mr Naden stated that he had explained to Ms Peti Koia, the union secretary, that he had received a report that Mr Puhia had been seen depositing rubbish at the Plant the previous day, and asked her to attend the meeting he was to have with Mr Puhia. Mr Naden explained that this was the normal practice when dealing with an issue involving a union member, particularly when the union member was a delegate.

[14] Mr Puhia said that Ms Koia had not been present at the meeting on 17 November 2008, however Mr Takarua confirmed in evidence that she had been present and that Mr Puhia had not objected to her being present. A diary note by Ms Koia dated 17 November 2008 states: "*Chris P suspended*", which would appear to indicate that she was present, but the entry on its own is inconclusive.

[15] Mr Naden stated that he had asked Mr Puhia if he had attended the plant site the previous day. Upon Mr Puhia confirming that that was correct, Mr Naden told him that he had had a report that he (Mr Puhia) had been seen depositing two bags of rubbish into the non food skip. Mr Puhia had also confirmed that this report was correct.

[16] Mr Naden said he had asked Mr Puhia if he had anything further to say but that Mr Puhia stated he had not, whereupon Mr Naden said he had informed Mr Puhia that it was a

potentially serious misconduct issue and that he was being suspended from work on full pay while further investigation took place. The meeting concluded with Mr Naden asking Mr Puhia to attend a further meeting at 8.00 a.m. the following day.

[17] Mr Puhia said that at the conclusion of the meeting he had not been informed of the purpose of the meeting to be held on 18 November 2008, or that his employment would be in jeopardy, or that he had the option to bring a support person with him. However, Mr Takarua confirmed in evidence that Mr Naden had informed Mr Puhia that his actions were considered to be serious misconduct.

[18] After the meeting on 17 November 2011 Mr Naden said that he had checked the Collective Agreement and the Ovation handbook (“the Handbook”) for reference to this situation, and had telephoned Mr David Gusscott, the retired Human Resources Manager of Ovation. Mr Gusscott said Mr Naden explained the situation to him and had expressed his view that what had occurred was serious misconduct, with which view Mr Gusscott said he had concurred.

[19] Mr Gusscott stated that he had concurred in this view on the basis firstly that the Plant was a licensed premises which employees should not be accessing on a non-work day without first reporting to a person in authority, and secondly, that the requirements were that employees bringing food and items of an edible nature into the Plant, consumed them on the premises and deposited the residue into the waste bins provided for this purpose.

[20] On 18 November 2008, Mr Puhia arrived at Mr Naden’s office for the scheduled meeting and noticed that Mr Takarua and Ms Koia were present. Mr Naden told Mr Puhia that Ms Koia would be representing him at the meeting; however Mr Puhia said he had objected to Ms Koia being present and explained at the Investigation Meeting that the reason for this decision was that he considered her to be corrupt.

[21] Mr Naden then explained that Mr Syd Gudgeon, the Union President, was available to attend the meeting. Mr Naden said that he had been aware that Mr Puhia had previously made a complaint about Mr Gudgeon, but that he had understood it to have been amicably resolved. However Mr Puhia stated that he did not want Mr Gudgeon present either, explaining to the Authority that the reason for this decision was that he considered Mr Gudgeon to be corrupt also.

[22] Mr Puhia having expressed a preference for having Mr Crete White, also a union delegate, as his support person, Mr White was asked to join the meeting and Ms Koia left. Mr

Puhia said that he did not have an opportunity to speak to Mr White prior to the meeting commencing, nor was he aware that it was a disciplinary meeting and that he might lose his job.

[23] Mr Naden said he had updated Mr White on the situation and as neither Mr Puhia nor Mr White had asked for an adjournment, he had proceeded with the meeting. Mr Puhia said that Mr Naden had not provided him with an opportunity to provide an explanation, but had read aloud from a dismissal notice, referring to various breaches of the Collective Agreement and to the Ovation handbook. Mr Puhia said that Mr Naden had told him that he should be aware of the relevant clauses as they were in his employment agreement.

[24] Mr Puhia stated that at this point he had given Mr Naden the names of five other people, which included that of Mr Naden himself, who had put rubbish in the same bin. This statement is not supported by the evidence of either Mr Naden or Mr Takarua.

[25] Mr Naden said he had read out his handwritten notes which he had written the previous day and which referred to sections and clauses in the Collective Agreement and the Ovation handbook, and advised Mr Puhia that his actions constituted serious misconduct, and that he faced dismissal. Mr Takarua confirmed in evidence Mr Naden's version of events.

[26] Mr Naden said that he asked Mr Puhia for an explanation, but that Mr Puhia did not offer any explanation, nor did he request a break to speak to Mr White. Mr Naden said that Mr Puhia and Mr Crete were then asked to leave the meeting. Mr Puhia said he did not recall being asked to leave the meeting, but agreed that it was possible that he and Mr White had been asked to leave the meeting.

[27] Mr Naden said that after Mr Puhia and Mr White had left the meeting, he had considered the current situation which was that an employee had been seen on a non-work day driving into the plant and depositing two bags containing personal rubbish into a non food skip and had offered no explanation for doing so.

[28] Mr Naden said that he had taken into account that there were no signs in place and that Mr Puhia had not been stopped from placing the bags of rubbish into the skip. However he had also taken into account the fact that Mr Puhia was not authorised to be on the site and had misused company property.

[29] Mr Naden said that in his opinion Ovation employees would have known the depositing of personal rubbish into a non food skip to be wrong. Mr Naden said he had also

considered Mr Puhia's long service, but had taken the view that this reinforced his opinion that Mr Puhia should have been aware of the Plant rules, regulations and standards.

[30] Mr Naden stated that he had considered whether a final warning would be an appropriate outcome but had decided against this due to the seriousness of the offence and the demanding hygiene standards that Ovation had to maintain. Mr Naden said that his decision had also been influenced by Mr Puhia's attitude which he considered indicated that Mr Puhia did not care if he abused the employment relationship.

[31] Mr Puhia and Mr White were asked to return to Mr Naden's office. Mr Naden said he had asked them whether they had any new information on the matter, but they had both replied in the negative. Mr Naden said he had then written out the dismissal notice in front of Mr Puhia, Mr White and Mr Takarua, which is supported by the evidence of Mr Takarua.

[32] The hand written dismissal notice read:

Incident Sunday 16 November 1) Entered the perimeter fence for non work related purpose on a non work day (E16). 2) This was a planned deliberate entering for a non work purpose. 3) Upon entering the worksite he did not follow usual protocols (10.1 of handbook). 4) Wilfully drove his car to non food area causing a health and safety hazard (22.1 3) misuse of company facility (F8). Dumped material in skip bin that could have placed meat establishment licence at risk (E)

[33] Mr Naden said he had asked Mr Puhia if he had anything he wished to add and that Mr Puhia had said 'No', whereupon he had handed him a copy of the dismissal notice.

[34] Mr Puhia said that after leaving the meeting he had gone to see his wife, Ms Antoinette Sartor, who also was employed at Ovation, to tell her what had occurred.

[35] Following Mr Puhia's dismissal, the branch secretary of the Union requested a meeting with Mr Naden. The meeting took place on 21 April 2009. Present at the meeting were Mr Puhia, Mr Naden, Ms Koia, Mr Alastair Bayliss, Ovation's Operation Manager, Mr Gusscott and his wife, and Mr Graham Cooke, the Secretary of the Aotearoa sub-branch of the Union.

[36] Mr Naden said that Mr Puhia had claimed at the meeting on 21 April 2009 that he had not been given an opportunity throughout the disciplinary process to explain his actions, and that he had provided an explanation concerning his having returned to the site which was for

the express intention of finding his glasses and wood burner. Mr Naden stated that this was the first time he had heard this explanation from Mr Puhia.

[37] Mr Naden said that Mr Rutene and Mr Takarua then joined the meeting. Mr Takarua confirmed that this was the first time he had heard the glasses and wood burner explanation from Mr Puhia.

Determination

[38] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”

[39] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[40] Mr Naden was the decision maker in the matter. In determining the findings of Mr Naden with regard to serious misconduct, I have to consider s103A of the Act and whether the findings are those which the fair and reasonable employer would have made. In *Fuiava v Air New Zealand Limited*¹ Judge Travis stated:²

The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.

Did Ovation have substantive justification for finding that Mr Puhia had committed serious misconduct?

¹ [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)

² At para [50]

[41] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*³. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:⁴

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[42] In *Garden v Lovich Floor Décor Ltd*⁵ Judge Shaw observed that serious misconduct might arise not just from the misconduct, but where there are “*inconsistent and unsatisfactory explanations*” which undermine the employer’s trust and confidence in the employee.

[43] The reasons for Mr Puhia’s dismissal were

- That he had breached the perimeter fence on a non-related purpose on a non-work day in breach of clause E16 of the Collective Agreement;
- That this was a planned deliberate entering for a non-work purpose
- That upon entering the worksite, he did not follow the usual protocols as detailed in clause 10.1 of the handbook;
- That he had driven his car to a non food area causing a health and safety risk and misused a company facility in breach of clause F8 of the Collective Agreement;
- That he had disposed of material in a non food skip that could have placed Ovation’s meat export licence at risk

Breaching the perimeter fence

[44] Clause E of the Collective Agreement itemises offences which Ovation considers to be serious misconduct. Clause E16 itemises as a serious misconduct offence: “*Climbing through, under or over perimeter fences (i.e. boundary fences surrounding the site).*”

³ [1992] 3 ERNZ 483

⁴ Ibid at p.487

⁵ AC 86/00

[45] Mr Puhia did not climb through, under or over the Ovation perimeter fence, he entered by driving through the main gates. Moreover clause 5.9 of the Handbook states that: “*Only current employees are permitted to enter the site*” which infers that Mr Puhia, as a current employee, was entitled to enter the site. Ms Sartor also gave evidence to the effect that she had returned to the Ovation premises on one occasion after she had finished working to collect her mobile telephone which she had forgotten.

[46] I do not find that Mr Puhia’s actions in breaching the perimeter fence alone to constitute serious misconduct.

Planned, deliberate entering for a non work purpose

[47] In the circumstances in which Mr Naden said that he was never provided with any other explanation for Mr Puhia’s presence at the Plant, he clearly understood Mr Puhia to be there for the express purpose of disposing of the two rubbish bags.

[48] It is not disputed that Mr Puhia deposited two Pak’n’Save bags containing personal rubbish into the non food skip. Without any other explanation being provided, Mr Naden’s conclusion was that Mr Puhia was at the Plant for the sole and deliberate purpose of depositing of the rubbish on site.

[49] Mr Naden considered this was planned and deliberate. However given the circumstances in which Mr Puhia had to drive some distance from his home to the Plant, and the amount of rubbish was relatively small, I do not consider Mr Naden’s conclusion in this respect to have been valid

Not following the usual protocols

[50] Clause 10.1 of the Handbook states that: “*All site speed limits must be observed on company roadways and within the carpark provided for employees’ use.....Employees must use the authorised carparks*”.

[51] There was no suggestion that Mr Puhia had been speeding, however he had not parked in an authorised car park. Mr Puhia explained that other employees did not always use the designated car parking areas; however this does not act as an excuse for his failing to adhere to the company policy.

[52] I note also that on the day Mr Puhia arrived on the site, there was maintenance work in progress and heavy machinery present. By not parking in a designated area, and by not making his presence on site known, Mr Puhia was placing himself in a situation in which his

safety might have been compromised. However I do not consider that this aspect in isolation to be a serious misconduct matter.

Misusing a company facility and causing a health and safety risk

[53] Mr Puhia described his actions in disposing of the rubbish as spontaneous, or as an after-thought upon not finding his glasses and the wood burner which were the reason for his being at the Plant.

[54] Mr Puhia also explained that many employees used the facility for the disposing of their own personal rubbish, a statement which Mr Milton Namara, an ex-Ovation employee, supported in his evidence.

[55] The fact that many employees may act in a certain way does not necessarily make the misdemeanour acceptable. In this case Mr Namara was quite clear that if a manager had been watching him, he would not dispose of his personal rubbish in the non food skip, and Mr Puhia himself was hesitant when questioned on the same point.

[56] I find that it is more likely than not that in general employees were aware that depositing personal rubbish in the non food skip would be adversely viewed by management. Indeed Mr Naden confirmed that he had no knowledge of employees placing personal rubbish in the non food skip, and that had he been so aware the employees would have been disciplined.

[57] Mr Naden explained that the skip was emptied once daily. In the circumstances of the widespread use of it by employees disposing of their own rubbish as described by Mr Puhia and Mr Namara, Mr Naden said he would have expected it to have been emptied more frequently, however this was not the case.

[58] Clause 22.1 of the Collective Agreement states employees are not to: “*interfere with or misuse anything provided for the purposes of health, safety or welfare*”. The non food skip was provided for the purposes of health and safety.

[59] I take into account that there were no signs in, on, or around the skip informing employees that it was not permitted to dispose of personal rubbish in the non food skip. However refuse bins were provided for employees to dispose of personal rubbish at the places where they were likely to consume the food and drinks which they had brought on site, and given the high emphasis placed on hygiene protocols, employees including Mr Puhia should have had a heightened awareness of the ramifications of food disposal in a non food area.

[60] I find that Mr Puhia did misuse a company facility, the non food skip, if not deliberately, then recklessly, without thought for whether there might be any adverse consequences for Ovation in regards to their eligibility to slaughter and process lamb for the meat export market.

Placing the meat export licence at risk

[61] Mr Lindsay Nicholls, Manager, Food Assessors, Compliance and Enforcement Group, Ministry of Agriculture and Forestry, gave evidence that the disposing of the two rubbish bags in the non food skip would not have, in his opinion, jeopardised the ability of Ovation to either process product or export product, nor would MAF have imposed any sanctions on Ovation.

[62] Mr Puhia's actions took place in a context of a meat export plant, which was also a Halal plant, inspected by the Halal auditors. Mr Naden explained that the Halal standard requirements were stringent, and expressed the view that had an Halal auditor seen Mr Puhia, or any other employee, disposing of rubbish bags in the non food skip, there could have been significant adverse implications for Ovation in regards to the Halal certification.

[63] Mr Nicholls stated that MAF would have oversight of the Halal audit process, but agreed that these were special audits with their own requirements. I consider that Mr Naden's belief of the difficulties which could ensue, particularly in respect of the Halal certification, were reasonable.

[64] Mr Puhia said that he was fully aware of the hygiene rules; he was a long-serving employee who had been fully aware of the strict requirements.

[65] I find that Mr Naden was entitled to take the context of Mr Puhia's work environment and experience into consideration in reaching his decision that this was a case of serious misconduct. Mr Lindsay gave evidence to the effect that the probable consequences of Mr Puhia's actions were not of such a serious nature as to jeopardise Ovation's ability to continue to process or export product. However I find that Mr Naden genuinely understood the offence to be of such a serious nature as to jeopardise Ovation's ability to continue to process or export product, especially as regards the certification of Ovation as a Halal meat processor and exporter.

[66] Mr Naden was adamant that Mr Puhia had provided no explanation for his actions until the later meeting on 21 April 2011. I find that Mr Naden was entitled to find that Mr Puhia's lack of explanation influential in his decision making process.

[67] Mr Naden considered that Mr Puhia's actions in disposing of his personal rubbish in a skip provided by Ovation for non food refuse to be unacceptable. In terms of s103A the Authority has regard to the objective standard which requires it to take into consideration: "*the generally accepted values of our society in matters such as this*"⁶.

[68] Mr Namara confirmed that he would not have disposed of his personal rubbish in the non food skip had management been watching, Mr Puhia himself replied evasively when questioned on the same point. I find that Mr Naden's view that Mr Puhia's actions, accompanied by his lack of explanation and his attitude, constituted serious misconduct such as to destroy the requisite trust and confidence Mr Naden needed to have in Mr Puhia as an employee, to be that of a fair and reasonable employer.

[69] I find that Ovation had substantive justification for finding that Mr Puhia had committed serious misconduct.

Was the process carried out by Ovation procedurally fair and reasonable?

[70] Mr Puhia stated that Ms Koia was not present at the preliminary meeting on 17 November 2009, Mr Naden and Mr Takarua stated that she was present. Mr Naden explained that having a Union representative present was the normal procedure at Ovation, and especially so in the situation in which the employee involved in disciplinary action was a union delegate.

[71] I have considered whether, in considering Mr Puhia's adverse reaction to Ms Koia being present at the meeting the following day, Mr Puhia's evidence that Ms Koia was not present was more likely to be the correct version of events.

[72] Taking into consideration the evidence of the parties, the likelihood that having a Union representative present at a disciplinary meeting was standard procedure, Ms Koia's diary note and the fact that Mr Puhia was not aware of the nature of the meeting when he entered Mr Naden's office, I find it more likely than not that Ms Koia was present.

⁶ *Safe Air Limited v Walker*(2009)6 NZELR 71 per Judge Couch at para [40]

[73] Mr Puhia has claimed that he was not told that Mr Naden considered the matter to be one of serious misconduct. I note that Mr Puhia expected to be informed about a light duty task and consider that it is possible that Mr Naden's explanation as to the seriousness of the matter was not understood by Mr Puhia given the unexpected nature of the meeting.

[74] Mr Puhia said he was not warned that dismissal was a possible outcome; Mr Naden and Mr Takarua's evidence contradict this statement. I consider it more likely than not that Mr Naden did advise Mr Puhia of the seriousness of the situation. However this was a preliminary meeting, and as such although it is preferable that an employee has the opportunity to have a support person present and to be advised of the possibility of dismissal, it is not essential.⁷

[75] Mr Naden said that following this preliminary meeting he had consulted the Collective Agreement and the Handbook, and had sought the advice of Mr Gusscott. Mr Naden's preliminary view at this point was that Mr Puhia's actions constituted serious misconduct.

[76] Mr Puhia said that at the meeting on 18 November 2009 he was unable to consult with Mr White, that he was not aware that it was a disciplinary meeting or that he could lose his job, and Mr Naden had predetermined the outcome by having the dismissal letter pre-prepared.

[77] I observe that Mr Puhia was a union delegate who should have been fully acquainted with the disciplinary procedures as set out in the Handbook since he was in the position of representing, and had represented, other employees facing disciplinary action.

[78] Mr Puhia should also have been aware of his right to representation and I find that he demonstrated his awareness of this right by insisting upon having a representative of his choice at the meeting. Mr White was himself an experienced union delegate, and together they should both have been aware of their right to request an adjournment of the meeting in order to discuss Mr Puhia's situation if they had considered this to be necessary or desirable.

[79] I do not accept that Mr Puhia was unaware that it was a disciplinary meeting; he had been placed on suspension the previous day, the fact that Ms Koia was present and he was told that she would be representing him should have further highlighted this fact to him, as indeed should the subsequent suggestion of having Mr Gudgeon as his representative. Mr

⁷ *Murphy and Roughan v van Beek* [1998] 2 ERNZ 607

Puhia's insistence on having Mr White present also belies his statement that he was unaware of the nature of the meeting.

[80] Mr Puhia stated that he was unaware of his right to discuss the matter with Mr White, or that he could provide an explanation for his behaviour as he had had no training in these matters. I find this explanation to be unconvincing in circumstances in which Mr Puhia had not only represented other employees facing disciplinary action, but had also given evidence concerning his successful challenge to a warning issued to his son, also employed at Ovation.

[81] I accept that Mr Puhia was asked for an explanation by Mr Naden, and that he failed to provide one. The statutory duty of good faith is relevant to the consideration of this issue. Employers and employees have a duty to deal with each other in good faith under s 4(1A) of the Act which states:

The duty of good faith in subsection (1) –

- a. is wider in scope than the implied mutual obligations of trust and confidence; and*
- b. requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...”*

[82] Mr Puhia was under a duty to behave in a responsive and communicative manner during the meeting with Mr Naden. I find that in not providing an explanation when so requested, he failed to behave in a manner consistent with the good faith duty he owed to Ovation.

[83] Mr Puhia said that Mr Naden had prepared the dismissal notice prior to the meeting and that he had read from this at the commencement of the meeting. Mr Naden had produced in evidence his pre-prepared meeting notes which he said he had prepared following his perusal of the Collective Agreement and the Handbook and his discussion with Mr Gusscott the evening before the meeting. Mr Naden said that after reading these to Mr Puhia, he had asked Mr Puhia once again for an explanation, and had then provided Mr Puhia with an adjournment to consider what had been said.

[84] Whilst Mr Puhia was ambivalent on the subject of whether an adjournment had been provided, he did concede at the Investigation Meeting that an adjournment may have taken

place. I find in this respect Mr Naden's evidence, as supported by that of Mr Takarua, to be the more credible.

[85] I accept that an adjournment did take place during the meeting, and that it was only after Mr Puhia and Mr White rejoined the meeting and failed to provide any new information or an explanation for Mr Puhia's actions, that Mr Naden proceeded to confirm the dismissal decision and to write out the dismissal notice.

Disparity of Treatment

[86] Mr Puhia claimed disparity of treatment in regards to other employees. I find no evidence of disparity of treatment. Whilst Mr Puhia stated that many other employees deposited personal rubbish in the non food skip, Mr Naden said that he was unaware of this and that if he had been so aware, disciplinary action would have ensued.

[87] Mr Puhia further claimed disparity of treatment as regards Mr Rutene, stating that Mr Rutene was in a similar position to himself, and that no disciplinary action was taken in respect of his actions of not removing the rubbish bags Mr Puhia had placed in the non food skip. I do not find disparity in these circumstances, Mr Rutene had not himself deposited any rubbish in the non food skip and he had taken what he believed to be the appropriate action in a timely manner by reporting the matter to Mr Naden.

[88] I determine that Ovation carried out a fair and reasonable process.

If there was serious misconduct, would the fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

[89] Mr Puhia had been employed by Ovation for 8 years. During that period he had not been the subject of any formal disciplinary action, and he had no disciplinary warnings.

[90] Mr Puhia had explained that he was aware of the strict hygiene rules which operated in the areas of the Plant which he used on a daily basis, and that he had adhered to these at all times.

[91] In reaching the decision to dismiss Mr Naden said he had considered Mr Puhia's long service, but was of the opinion that this confirmed that Mr Puhia should have been aware of the necessity of ensuring high standards of hygiene.

[92] Mr Naden said that although Mr Puhia did not have a formal disciplinary record, he had been disruptive, and that he had had an unusual amount of time off from work on ACC.

[93] Mr Naden further explained that he had considered whether a final warning might have been appropriate, but had decided against it on the basis of the seriousness of the offence, Mr Puhia's non conciliatory behaviour and the stringent hygiene standards which Ovation needed to maintain.

[94] Whilst Mr Naden said that Mr Puhia had been disruptive, I note that Mr Puhia described himself as a model worker. Both are subjective views and there is no evidence to substantiate either version, although the lack of formal disciplinary action is more supportive Mr Puhia's view. The time absent on ACC I do not consider to be a valid consideration as regards the outcome of disciplinary action.

[95] I consider that a fair and reasonable employer would have given more consideration to Mr Puhia's length of service and previous clear disciplinary history in circumstances in which there was no signage warning employees not to use the non food skip, and no advice to employees as to the consequences of such an action. I note that signs are now in place and employees are aware of the consequences of misusing the non food skip.

[96] I determine that a fair and reasonable employer would not have dismissed Mr Puhia in all the circumstances at the relevant time. I determine that Mr Puhia has been unjustifiably dismissed.

Remedies

[97] Mr Puhia has been unjustifiably dismissed and is entitled to remedies.

Reinstatement

[98] Mr Puhia is seeking reinstatement. Reinstatement is no longer the primary remedy, but may be provided in accordance with s125 of the Act if it is practicable and reasonable.

[99] I have determined Ovation to have had substantive grounds for finding that Mr Puhia's actions constituted serious misconduct such as to destroy the requisite trust and confidence Ovation needed to have in Mr Puhia as an employee,.

[100] Mutual trust and confidence are essential in an employment relationship, without it reinstatement cannot be either practicable or reasonable.

[101] For reinstatement to be practicable, I also consider that Mr Puhia should be able to fulfil his duties as a Slaughterman, however Mr Puhia stated that initially he could return to light duties only. Judge Couch in *Pacific Blue Employment & Crewing Ltd v B*⁸ remarked of this expectation:⁹ “*To my mind, successful reimposition of the employment relationship requires the parties to be able to fully discharge their responsibilities in that relationship*”.

[102] In all the circumstances, I do not find reinstatement to be practicable or reasonable.

Reimbursement of Lost Wages

[103] Mr Puhia was on light duties at the time of his dismissal due to a Carpel Tunnel injury which he sustained at work. During the period from 18 November 2008 until the end of May 2009 Mr Puhia continued to receive income as part of his injury payment.

[104] At the end of May 2009 Mr Puhia had had a Carpel Tunnel release operation and following his recovery received medical clearance. Mr Puhia did not challenge the medical clearance.

[105] Employees are under a duty to mitigate their loss. Following medical clearance without challenge, Mr Puhia must be considered as having the capacity to work, but he has not produced evidence to support his efforts to obtain work. Mr Puhia said that he had been offered work as a pruner but was unable to take it due to injury, and that he was unable to complete a carving course due to pain.

[106] I am not convinced that Mr Puhia made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment.

[107] I award Mr Puhia 3 months lost wages pursuant to s 128(2) of the Act. I note that Mr Puhia was in receipt of Working for Families income and this amount is to be deducted from that award.

[108] I order Ovation to pay Mr Puhia the sum of \$14,157.00 being 3 months payment at an average rate of \$4,719.00 per month, less the Working for Families income received. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

⁸ [2010] NZEMPC 112

⁹ Ibid at para [22]

Interest

[109] Mr Puhia is seeking interest. Mr Puhia is entitled to interest which is to be applied in accordance with clause 11 of Schedule 2 of the Act at the rate prescribed under s 87(3) of the Judicature Act 1908 of 5% on the sum of \$14,157.00 less the Working for Families income.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[110] Mr Puhia is also entitled to compensation for humiliation and distress. I find that in respect of the dismissal grievance, Mr Puhia has experienced humiliation, loss of dignity and injury to feelings. Mr Puhia and Ms Sartor also stated that there has been an adverse impact on his health, although this is unsupported by medical evidence.

[111] In respect of the disadvantage and dismissal grievances, Ovation is to pay Mr Puhia the sum of \$6,000.00 pursuant to s 123(1) (c) (i) of the Act.

Contribution

[112] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[113] Mr Puhia was fully aware of the stringent hygiene standards which applied on the Plant. In placing his personal rubbish in a non food skip Mr Puhia misused a company facility and did so recklessly without thought for any consequences that might ensue.

[114] During the process Mr Puhia failed to advise Mr Naden of his reasons for accessing the site. Mr Puhia was under a duty of good faith dealing throughout the process and by failing to be responsive and communicative omitted to advise Mr Naden of a material fact which might have had the effect of averting the dismissal decision.

[115] To a significant extent I find Mr Puhia to have been the author of his own misfortune.

[116] I find contributory fault on the part of Mr Puhia and reduce the figures awarded in respect of the remedies by 75 %.

Costs

[117] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the

date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority