

Attention is drawn to the order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 468
3039434

BETWEEN	DAVID CRAIG Applicant
AND	LYTTELTON PORT COMPANY LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Geoff Davenport, counsel for the Applicant
Tim Mackenzie, counsel for the Respondent

Investigation Meeting: 6 & 7 March 2019

Submissions and further evidence received: 7 March 2019 from the Applicant
7 March & 12 March 2019 from the Respondent

Date of Determination: 9 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Craig began working for Lyttelton Port Company Ltd (LPC) in February 2008 as a casual cargo handler. He worked as a logistics handler after that and from about February 2015 worked as a Logistics Officer (LO).

[2] LPC dismissed Mr Craig on 7 May 2018. He claims that was an unjustified dismissal. He asks for reinstatement to his job, compensation for loss of salary since his dismissal and compensation of \$20,000 for humiliation, loss of dignity and injury to his feelings.

[3] LPC says the dismissal was justified and therefore Mr Craig is not entitled to any of the remedies he seeks.

[4] This determination has been issued outside the statutory period of three months after receiving the last piece of evidence from the respondent. The Chief of the Authority has decided that exceptional circumstances exist for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[5] I have had regard to all the evidence given and all the submissions made by both parties. However, I have not set them all out in this determination.

Prohibition from publication of some information

[6] During the Authority proceedings Mr Craig disclosed a number of sensitive details about his personal and family circumstances that he asked be withheld from publication. LPC agreed that the details need not be published. Having considered Mr Craig's situation and that of his family I agree that it is in the interests of justice that the details are withheld from publication. Therefore, I extend and confirm the non-publication order made by Member Appleton on 26 October 2018 and make it permanent.

[7] I have taken Mr Craig's personal circumstances into account in making this determination. However, I do not refer to the most sensitive and confidential of them in this published determination.¹ No party or witness in the Authority's investigation meeting is entitled to discuss those details, except with Mr Craig with his permission, or refer to them in writing, including online, in any way that would publish those details. This order also prohibits any dissemination of any written reference to those details in documents prepared for and presented as evidence in the Authority's investigation. I make this order under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Issues

[8] The issues that require my investigation and determination are:

- (i) Was Mr Craig unjustifiably dismissed? This includes consideration of:

¹ Except those that are crucial to my determination.

- whether LPC acted as a fair and reasonable employer in all the circumstances, including in its consideration of Mr Craig’s personal circumstances; and
 - LPC’s allegedly unfairly disparate treatment of Mr Craig compared to other employees.
- (ii) If Mr Craig was unjustifiably dismissed, should he be reinstated? What other remedies is he entitled to?

Background

[9] On most nights of the week Mr Craig worked as part of a two-person team of LOs. He was on permanent night shift.

Collective agreement and letters of expectation from LPC

[10] LOs are covered by a collective agreement that includes the following in Schedule Four:

2. The parties agree that the roster is a guideline for the Logistics Officers and the working of the roster is flexible to suit workloads. Manning and hours of work may be adjusted to reflect work demands. The Employer will be consulted when adjustments of manning and hours are required. This flexibility represents the self-managed work group formed by the Logistics Officers.
3. It is expected that the self-managed group of Logistics Officers will manage meal/rest intervals to meet both operational requirements and appropriate breaks from the job.

[11] In April 2017, Douglas Parker, LPC’s Container Terminal Manager, wrote to all logistics officers, including Mr Craig, to outline LPC’s proposed expectations of the self-managed teams:

I document proposed operational guidelines for our expectations of the work to be undertaken by the Logistics Officers when on shift. The purpose of these guidelines is to ensure that all parties are clear on what is expected from the Logistics Officers before they leave work before the end of their rostered shift.

Below I have documented the expectations I have on regarding the minimum work to be completed by the Logistics Officers (based on the information they have at the time) before they leave their shift.

1. [all emails to a particular email address] are answered
2. Planning of upcoming vessels completed based on the information available at the time

3. The Radio Function should be manned at all times whilst yard activities are being carried out
4. The Ship Control function should be manned at all times whilst vessel operations are being carried out
5. Other Logistics Officers on duty have been relieved for meal and other required breaks
6. Support has been provided to other Logistics Officers on duty to complete their work to the above expectations as to ensure work is completed as far as possible with the information they have at that time.

The above list is a list of minimum operational expectations of what is required from the Logistics Officers each shift, from an operational perspective. These guidelines are consistent with, and clarify, the job description for Logistic Officers set out in the Position Description in Schedule 2 of the CEA (which states, amongst other things, that the Logistics Officer “will undertake other duties as reasonably directed by the Logistics Manager from time to time”, and that the role will include “any other duties which are consistent with the above job description as directed by the General Manager”). This list does not exclude the Logistics Officers from also undertaking the other normal duties and responsibilities as per the Position Description in the CEA.

[12] The Manager of LOs, Joe Smedley, discussed those expectations with Mr Craig in person. Mr Parker confirmed the expectations in writing.

Mr Craig’s family circumstances

[13] During early 2018 Mr Craig and his family were under considerable pressure due to a close family member’s health. From time to time Mr Craig was suffering from headaches. Mr Craig has disclosed details about his personal circumstances to the Authority during these proceedings.

LPC’s discovery of Mr Craig leaving shifts early

[14] On 5 April 2018 LPC discovered that Mr Craig had left a shift early, instead of at 7am when his shift would have finished. On the same day Mr Craig informed the Logistics Manager at midday that he had had a headache earlier that morning and therefore left his shift early.

The beginning of the employment investigation

[15] On 6 April 2018 LPC informed Mr Craig that it knew that he had left his shift on 5 April early. LPC decided to analyse earlier gate records which recorded the arrival and departure of Mr Craig’s vehicle.

[16] Doug Parker, LPC's Container Terminal Manager, wrote to Mr Craig and outlined LPC's concerns. He directed Mr Craig to complete his full rostered shifts while LPC extracted data and reviewed it in order to undertake an investigation into whether he had left site early on multiple occasions over the prior two weeks. Mr Parker also directed Mr Craig to ensure that if he was ill or could not complete his shift for any reason that he should contact the Logistics Shift Manager on duty to let them know that he needed to leave early.

[17] Mr Craig continued working and completed his full shifts after he received that letter until he was dismissed.

[18] On 9 April 2018 LPC sent Mr Craig a letter outlining that the following were dates that he was rostered to work a full shift but appeared not to have done so:

- Sunday 25 March;
- Monday 26 March;
- Thursday 29 March;
- Friday 30 March;
- Tuesday 3 April;
- Wednesday 4 April.

[19] Mr Parker wrote that his concern was specifically about Mr Craig leaving a shift early:

despite there being vessel operations under way. Despite our discussions and the letters of expectation sent to all Logistics Officers, it appears that you may not be complying with the expected actions for the Logistics Officers team.

[20] Mr Craig was invited to a meeting in order to discuss that concern and to provide LPC with an explanation as to why he left his shifts early without complying with LPC's expectations.

The first meeting

[21] Mr Craig was represented by Heiner Benecke, the branch secretary of the Rail and Maritime Transport Union (RMTU), at the meeting which took place on 11 April 2018.

[22] Mr Parker, Mr Smedley and Tonia Denize, an HR adviser, attended for LPC. There are two pages of handwritten notes. There is also 1 page of typed notes, which Ms Denize completed on the same day relying on her handwritten notes and her memory. I take the following description of what was said in the meeting from both sets of notes.²

[23] Mr Parker explained that LPC's concerns were outlined in the letter and that there were also health and safety concerns in leaving one person on shift. He disclosed that he had looked at another LO's hours over the previous 10 days. I will refer to that LO as Mr X as he did not give evidence in the Authority although documents relating to an investigation and disciplinary process involving him form part of these proceedings. Mr X was left on duty alone on the nights Mr Craig went home early.

[24] Mr Craig was asked for his explanation for leaving early. He said that, although he had not previously told a manager, he had been having headaches for some time. He said he had extenuating personal circumstances and that permanent night shift had ramifications for relationships.

[25] He disclosed some family circumstances. In terms of leaving early, he said he wanted to be at home to make sure everything was OK. He said "night shift takes its toll."

[26] Ms Denize's typed notes also record that Mr Craig said that he considered his family circumstances to be private, and wanted to keep them private.

[27] Mr Craig disclosed some personal information and said:

My son's wellbeing is paramount. I take on board what you have said in the past. I value working for LPC.

[28] Mr Parker asked Mr Craig how long he had been leaving early. The notes record Mr Craig's response as:

On & Off. Not to extent of last 10 days.
Even in old building.

² Mr Craig and Mr Benecke's evidence is that Mr Craig disclosed more specific details of his family circumstances in that and/or the following meeting. LPC's witnesses deny they knew the exact nature of Mr Craig's circumstances. I consider this below at paragraphs [109] to [120].

Endemic in company.
Thought once ship was done self-management applied, obviously I was wrong.

[29] Mr Craig said:

at the end of the day I haven't adhered to the contract. I apologise. It won't happen again.

The Union raises its concerns about Saturday night rosters

[30] On 17 April 2018 Mr Benecke had a discussion with Mr Parker about a shift on which only Mr X was rostered and turned up to work.

[31] Mr Parker responded that had been because of a mistake by the logistics shift managers because no reliever had been called in to work with that LO. He confirmed that Mr Craig had done nothing wrong in that case but he was concerned if Mr X was saying that only one LO being on was a regular occurrence.

[32] Mr Benecke replied to Mr Parker by email that the comment about it being a regular occurrence at weekends might be because of the standard practice for Saturday nights, which meant that between 2300 Saturday until 0700 Sunday only one LO was ever rostered on.

[33] Mr Parker replied that was correct because no "R&D" (receivables and delivery) was worked on Saturday night.

[34] On 23 April 2018, John Kerr, RMTU's South Island Organiser, responded by email that his understanding was that even if no R&D was taking place he understood it was common for a ship or ships to be worked and/or berthed on Saturday nights. Mr Parker confirmed by return email that was correct.

The LPC letter finding serious misconduct

[35] On 24 April 2018 Mr Parker wrote to Mr Craig outlining the progress of the investigation and disciplinary process so far. He wrote that:

... you admitted that you had been leaving work early on a number of occasions over a lengthy period – including in our previous ... building.

You openly admitted that you had breached the terms of the contract, and that you understood the expectations that have been given to you by Management about working your shift in the past. ...

I am bitterly disappointed with your actions – specifically that you have repeatedly left your rostered shift early despite there being vessel operations underway. Despite our discussion and the letters of expectation ... you have not been complying with the expected actions for a Logistics Officer.

... I am driven to the conclusion that you do not take the responsibilities of your position seriously.

I have given genuine consideration as to whether your actions are justifiable given your personal circumstances. ... *leads me to conclude that I cannot have trust and confidence in you to conduct the senior position you hold, therefore I am considering now whether to terminate your employment for serious misconduct.*

Before making a final decision on the outcome I am offering you an opportunity to discuss potential outcomes and to give your views on them.

[Emphasis added]

The second meeting: 30 April 2018

[36] Mr Parker, Mr Smedley and Ms Denize attended the meeting for LPC. Mr Benecke and Joe Satherley, a very experienced LO, attended in support of Mr Craig.

[37] There are seven pages of handwritten notes and two typed pages of the notes kept by Ms Denize. I have taken the following description of what happened in the meeting from those notes.

[38] Mr Parker emphasised that he had not yet made a final decision. I assume that meant he had not made a final decision about the outcome, because the letter shows he had decided that he could no longer have trust and confidence in Mr Craig.

[39] Mr Satherley questioned how LPC could have had safety concerns about Mr Craig's behaviour if on Saturday nights only one LO was routinely working, and yet apparently LPC had no safety concerns about Saturday nights. There were disagreements between Mr Parker and Mr Satherley and Mr Benecke about what difference there was between Saturday nights and other nights.

[40] Mr Parker made it clear that sometimes Mr Craig had gone home while vessels were being worked and there was R&D.

[41] Mr Benecke asked that if safety was one of LPC's concerns had "there ever been an ICAM/or risk assessment to say there is a factor from only 1 person being on?" He strongly

suggested that safety was not a legitimate concern when LPC did not roster more than one LO on Saturdays although vessels were being worked and there was also R&D.

[42] Mr Benecke also questioned whether there was any evidence of the effectiveness of operations being jeopardised.

[43] Mr Parker said that safety must be one of the considerations for an LO when they are considering whether they can leave a shift early.

[44] Mr Benecke said that Mr Craig had a clean employment record, had been working as an LO for three years and had willingly engaged in the process. Mr Craig had also “expressed remorse not because he willingly breached safety or jeopardised operations.”

[45] Mr Craig was given the opportunity to add anything relevant and he said that he felt a bit “cut adrift” on permanent night shift and would like the opportunity to work days and nights.

[46] Mr Parker and Mr Smedley were surprised by that. They referred to the last round of bargaining of the CEA when LOs, including Mr Craig, had said they were happy with permanent night shift. Mr Craig denied being happy with permanent night shift. However, he appears to have agreed that he was involved in bargaining. He said the RMTU was trying to get a night shift allowance for LOs. However, he said he would be happier working day shift.

[47] Mr Parker asked how long Mr Craig’s personal circumstances had been impacting on his decisions to leave early. Mr Craig replied that it had been since Christmas/about the last three months. He repeated that he was sure that if there “wasn’t a ship on it was OK to leave early (as everyone else).”

[48] Mr Craig said that he thought people were happy with his performance. He also said “this hasn’t been going on for years, only been the last few months, if that.” He also expressed regret and commitment to working for LPC.

[49] Mr Satherley again said that there was frequently “only one person on doing R&D and ship operations” on a Saturday night.

Further information about Saturday nights

[50] On 2 May 2018, Mr Parker wrote to Mr Benecke and Mr Satherly that he had sought information to clarify whether there were R&D and ship operations on Saturday nights.

[51] After seeking some data on Saturday nights and on the nights Mr Craig left early, Mr Parker concluded that no R&D requirement was rostered on Saturday nights, although on average there was one truck per hour which was dealt with “by straddles working the vessel.”

[52] However, he wrote that on 26 March 2018, Mr Craig left a shift before there were three cranes working, an average of seven trucks an hour and staff rostered for R&D.

[53] He also wrote that on 27 March, when Mr Craig left his shift, there were two cranes working with a third crane starting after he left and 13 trucks per hour. However, I note that 27 March is not one of the nights LPC had notified Mr Craig that it was concerned about. Instead, it is one of the nights Mr X left his shift early. I deal with this below at [125] – [126].

[54] Mr Parker invited any further response from Mr Craig or the RMTU on his behalf.

Response from RMTU for Mr Craig

[55] On 3 May 2018, Mr Benecke responded by email that the RMTU had procedural and substantive concerns about LPC’s approach to Mr Craig. He listed them in the email.³

Letter of dismissal

[56] On 7 May 2018, Mr Parker wrote to Mr Craig dismissing him. The reasons he gave for losing trust and confidence in Mr Craig to carry out his “senior position” resulting in his dismissal are:

- Mr Craig had not undertaken a reasonable assessment of safety and operational effectiveness in deciding to leave his shifts early;
- That Mr Craig admitted he understood the expectations management had outlined in letters to LOs in 2017 by his admission he had “breached the terms of the contract;” that is, LPC found he had purposefully not complied with LPC’s expectations;
- Repeatedly leaving his shifts “early despite there being vessel operations underway”;

³ See [118] below.

- His failures to make a reasonable assessment of operational effectiveness and health and safety before leaving the control room thereby jeopardising safety and effectiveness of operations;
- Not putting the requirements of LPC's operations at the forefront of his decision making;
- Although explaining that at the time he was "preoccupied by his personal circumstances" which had existed for a few months he had not told management he was not fit to work due to his "personal affairs".

Did LPC act as a fair and reasonable employer?

[57] I need to consider whether LPC acted as a fair and reasonable employer could have in all the circumstances at the time of the dismissal. The Authority needs to assess whether, before deciding to dismiss Mr Craig, LPC:

- sufficiently investigated the allegations against him;
- raised its concerns with him;
- gave him a reasonable opportunity to respond to the concerns; and
- genuinely considered any explanation regarding the allegations.

[58] The Authority also needs to be satisfied that LPC had reasonable grounds for concluding that:

- the misconduct in question occurred, and
- it amounted to serious misconduct.

[59] I may also examine any other relevant factors. However, I must not find the dismissal to be unjustified solely because of procedural errors if those errors were minor and did not result in Mr Craig being treated unfairly.

Submissions for Mr Craig

[60] Mr Davenport's submissions to the Authority contain numerous criticisms of LPC's processes as well as its substantive decision that Mr Craig's actions were so serious as to result in total loss of trust and confidence. While I have considered all the submissions for both parties I concentrate below on the areas of concern I have about LPC's actions when looked at through the objective lens of a fair and reasonable employer.

Could a fair and reasonable employer have totally lost trust and confidence in Mr Craig?

[61] Mr Parker's total loss of trust and confidence is what LPC relied on to dismiss Mr Craig. Could a reasonable employer have reached that conclusion in all the circumstances at the time?

[62] On 6 April 2018, Mr Parker's letter directed Mr Craig to remain for his full shifts during the period of investigation. Mr Craig did so from then until the date of his dismissal: a period of a month.

[63] Mr Parker decided he had totally lost trust and confidence in Mr Craig's judgement after hearing from Mr Craig on 11 April 2018. However, LPC was content to keep Mr Craig working the night shift after the 24 April 2018 letter conveying Mr Parker's loss of trust and confidence until 7 May 2018 when he was dismissed.

[64] LPC did not suspend Mr Craig after Mr Parker reached the conclusion he had lost trust and confidence in Mr Craig. I accept that Mr Craig was working under Mr Parker's directive to remain for his entire shift. However, the fact that Mr Parker trusted Mr Craig to continue doing that from 11 April until 7 May, despite what he says were safety and operational concerns, is not compatible with a total loss of trust and confidence in Mr Craig.

What does self-management mean?

[65] There is a clear lack of agreement between LPC and the RMTU and its members, including Mr Craig, about what self-management means and how the letters of expectation of April and May 2017 impact on that or if they do. On Mr Craig's behalf the RMTU said that the letters of expectation could not override the self-management ability of LOs enshrined in the collective agreement. LPC disagrees.

[66] That is a problem that predated Mr Craig's behaviour in March and April 2018. By the end of the Authority's investigation meeting it was clear that the parties remain far apart on how the letters of expectation and Schedule Four of the collective agreement relate to each other.

[67] Mr Craig and Mr X understood that it was acceptable to leave only one LO on duty when ship operations on that shift were complete. They expressed this to LPC during their

disciplinary processes. This was never either denied or accepted by LPC. That is one specific aspect of LPC's expectations of LOs that could easily be clarified, and should be. It should have been clarified during Mr Craig's disciplinary process.

[68] Depending on the other circumstances of work being done or yet to be done on the rest of the shift, leaving a shift early would not necessarily counteract the letters of expectation. The letters of expectation do not say that there should never be only one LO on shift.⁴ Therefore, merely leaving early would not necessarily risk safety or operational effectiveness.

[69] LPC and the RMTU need to give urgent attention to agreement on how to align the parameters of self-management and the necessity for safe and efficient work within the LOs self-managed group.

The significance of rostering on Saturday nights compared with other nights

[70] This was a matter raised by the RMTU because LPC characterised Mr Craig's actions as unsafe. The RMTU argued that if Mr Craig's actions were unsafe so was the LPC's rostering on Saturday nights when only one LO was working.

[71] Mr Parker began with the view that no R&D was undertaken on Saturday nights, unlike the other six nights of the week. Therefore, he considered the comparison could not be made between Saturday and the other busier nights. Once Mr Parker collected comparative data on Saturday nights and other nights he realised there were some truck arrivals and departures (some R&D), although they were smaller in number than on other nights.

[72] I consider the question about Saturday nights was a legitimate one for the RMTU to raise on Mr Craig's behalf. The rostering of all nights needed to be considered under the same criteria, with safety being the paramount consideration. However, the fact that Saturdays nights had previously been worked for part of the night by one LO only did not mean that LPC could not investigate Mr Craig and Mr X's specifically leaving shifts on other nights early.

⁴ Although that was the effect of Mr Parker's letter of 6 April 2018 to Mr Craig.

[73] LPC was not only entitled to be concerned about safety but was and is obliged to be. It operates safety sensitive sites where there have been a number of accidents in recent years that have had serious and even tragic consequences. The RMTU is also concerned with safety, but it wanted to make sure that safety was the real consideration being discussed in Mr Craig's case.

[74] Indeed, once Mr Parker realised the extent of work done on a Saturday night LPC decided to put a second LO on shift on Saturdays. Mr Parker told the RMTU this on 30 April 2018 in the disciplinary meeting with Mr X.

[75] I consider the fact that prior to the investigations into Mr Craig and Mr X's behaviour all LOs knew that there was only one LO on for several hours on a Saturday night and that may have contributed to their view of what LPC's expectations were of them on other nights, despite Mr Parker's 2017 letters.

[76] Mr Parker took the issue of Saturday nights into account in terms of investigating the workload and making the decision to ensure two LOs were rostered on for the whole night from then on.

[77] However, he did not consider that the Saturday night situation was a legitimate issue for Mr Craig and the RMTU to concentrate on in the disciplinary process. On the other hand, I consider Mr Craig's knowledge of the Saturday night situation was likely an issue he took into account in weighing up whether he could leave early on the nights he did.

[78] Instead, Mr Parker allowed the clash between LPC and the RMTU's view on self-management and its calling of LPC to account if safety was the real concern to colour his view of Mr Craig's actions. He saw the Saturday night issue as unrelated to Mr Craig and almost as a red herring.

The significance of Mr Craig's acceptance that he had "breached the contract"

[79] Submissions for LPC are to the effect that Mr Craig's conduct was wrong, he knew it was wrong at the time, he admitted it was wrong and therefore it was reasonable of LPC to lose trust and confidence in him. He was not disciplined for being unable to cope with his

significant personal problems at the time but for six incidents of leaving shifts early. It “was a pretty black and white situation.”

[80] Mr Parker decided that Mr Craig had acted wrongly on at least six occasions, that each time Mr Craig knew he was acting wrongly and in contravention of LPC’s letters of expectation and had therefore “breached the contract.”

[81] Mr Craig accepted he had been wrong. I consider he did so only in relation to the times he left while vessel operations were being undertaken or were going to be undertaken. However, I am not satisfied that from an admission of being wrong Mr Parker could safely conclude that Mr Craig had left early knowing that he was doing so wrongly at the time and on each occasion he did so. I accept Mr Davenport’s submissions that Mr Craig accepted he had been wrong only with the benefit of hindsight and after reflection.

[82] Submissions made to Mr Parker by the union emphasised that Mr Craig did not accept that each time he left he had jeopardised health and safety and/or operational effectiveness. It is notable that the issue of health and safety is not one mentioned in the letters of expectation that Mr Parker decided Mr Craig had breached.

[83] In addition, there were times that Mr Craig had left early when there were no ongoing vessel operations and none planned for later that night. Mr Craig and Mr X were of the opinion that leaving once vessel operations were complete was acceptable, and they informed LPC that the practice was widespread.

[84] Mr Craig made an up-front admission of having done something wrong, in this case acknowledging that he had not exercised good judgment, partly because of extenuating personal circumstances. He effectively apologised for his behaviour and gave an undertaking not to act in the same way in the future. He expressed his commitment to working for LPC.

[85] Mr Parker did not put it to Mr Craig that he did not believe his assurances not to do it again because the union was still questioning whether there really had been risks to health and safety and operational effectiveness from his behaviour and LPC was afraid that he would act the same way again. That concern formed a significant part of Mr Parker’s

decision that he had lost trust and confidence in Mr Craig. Mr Criag had no opportunity to answer that concern.

[86] That was more than a minor procedural error and contributed to Mr Craig being treated unfairly.

Sufficient investigation?

Investigation of what work was done on each of the six shifts once Mr Craig left?

[87] In relation to the dates and times of Mr Craig leaving early there was a sufficient investigation. I am also satisfied that Mr Parker acted correctly in investigating the issue of Saturday night staffing when it was raised with him.

[88] LPC gained information from its Navis system on the ships being worked on the six nights, when they arrived, when they were being worked and when they left. By the time of the Authority's investigation meeting LPC knew that ships were being worked, as well as R&D happening, on 4 out of the 6 nights.

[89] However, it is not clear if all of this information was gained during the investigation part of the disciplinary process into Mr Craig's behaviour. If it was not, it should have been. At least some of it was known to LPC because Mr Parker referred to it in his email of 2 May 2018.

Mr Craig compared with Mr X

[90] Mr Craig and Mr X's cases were intrinsically interconnected. They worked together on the same shifts. Mr Craig left Mr X alone, with Mr X's agreement.

[91] Mr Parker's evidence of one reason why he was able to retain trust and confidence in Mr X but not in Mr Craig is that Mr Craig was the more dominant or "more experienced" controller. Mr Parker considered that Mr Craig had more experience of the working parameters of the LO role than Mr X and therefore had more knowledge of what was needed. Mr Parker took that into account in deciding that Mr Craig's behaviour was worse than Mr X's and so required a more serious sanction.

[92] Mr Parker also thought that Mr Craig's longer experience as an LO meant that Mr X would have found it difficult to say "no" to Mr Craig when Mr Craig checked if it was OK that he left early. However, the problem with that is that it was simply Mr Parker's assumption and it is not clear that he checked that with Mr X. Did Mr X feel that Mr Craig was more dominant than him, for example? LPC did not investigate the possibility that Mr Parker's assumption was incorrect.

Did LPC put all of its concerns to Mr Craig for his explanation?

[93] If the Navis information was available to LPC during the disciplinary process it should have been put to Mr Craig during the disciplinary process. It was not.

[94] Mr Davenport submitted that LPC did not convey its view to Mr Craig before dismissal that he was more senior and therefore his behaviour was worse than Mr X's, or should not have happened because of his seniority. Mr Parker's evidence was that he had used the word "senior" in his letter of 24 April 2018 to Mr Craig and therefore Mr Craig knew that was a consideration for him.

[95] Mr Parker's letter referred to "the senior position you hold". The problem with that is that there is no indication that he was referring to anything other than the LO position itself, which could be considered a more 'senior' position at the port than, say, a cargo handler, because of the long period of training and experience necessary before anyone is appointed as a permanent LO. Mr Craig was not officially a senior LO, as there is no such post.

[96] In addition, Mr Parker's reliance on his view of Mr Craig's dominance was not put to Mr Craig for his response.

[97] I consider that the failure to put those concerns to Mr Craig for his response was unfair and was more than a minor procedural error. Had those concerns been put to Mr Craig he could have asked LPC to investigate them with Mr X and find out if Mr X felt influenced in his behaviour by Mr Craig's longer period of experience. The failure to raise those concerns contributed to Mr Craig being treated unfairly.

Disparity of treatment?

[98] Mr Craig claims that he was treated in an unfairly disparate manner from Mr X and that this should render his dismissal unjustified.

[99] Mr X left his shifts early on 27 March and 1 April 2018. As I understand it, he was also the LO who agreed that Mr Craig could leave him there alone on at least some of the six nights LPC identified.

[100] During the investigation and disciplinary process Mr X said that he had left early on those two nights because he:

thought it was alright to leave as there was no ship on. ... because the Port was quiet [I] went home. As night workers that's how we manage our sleep.

[101] At least on 27 March 2018 there were multiple cranes working as referred to by Mr Parker in his email of 2 May 2018, although Mr Parker refers to Mr Craig having left his shift that night, rather than, as we know, Mr X.

[102] Mr X had no extenuating personal circumstances. Mr X was given a first written warning.

[103] I have had regard to the Employment Court's judgment in *Smith v Director General of the Ministry for Primary Industries*.⁵ Judge Smith set out the relevant law on disparity of treatment.

[104] The issues I need to determine to decide whether Mr Craig was treated unfairly disparately to Mr X, or the earlier situations in which other logistics officer have been investigated for either leaving a shift unreasonably early or allowing another logistics officer to do the same, are:

- (i) Whether there was disparity of treatment.
- (ii) Was there an adequate explanation for the disparity?
- (iii) Is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

⁵ [2017] NZEmpC 20.

Was there disparity of treatment?

[105] There was disparity of treatment between Mr Craig and Mr X. However, there are other cases in which Mr Craig also alleges unjustified disparity. There were earlier cases in which LOs had been disciplined for leaving shifts early or advising a second LO not to come back to work and carrying out the rest of the shift alone. None of them had been dismissed.

Was there an adequate explanation for the disparity?

[106] Although there was disparity of treatment in cases other than Mr X's, I am satisfied that LPC has adequately explained the disparate treatment, bearing in mind that employers are not bound forever by any previous leniency they have shown and Mr Parker's evidence that in at least one case the LO would have been dismissed had he not resigned. In that case there had been earlier incidents in which warnings had been given. I also note that in one case, to do with an incident in January 2018, there were fewer incidents than in Mr Craig's case. In addition, I have no cause to doubt Mr Parker's evidence that one LO who resigned did so after it became likely he would be dismissed.

[107] Mr X left early twice and Mr Craig left early six times over the same 10-day period. Mr Parker's explanation that Mr Craig's situation was different from the other staff, including Mr X, due to the extent, or number, of the incidents, is a reasonable explanation for why Mr X was treated more leniently, and therefore differently to Mr Craig.

[108] In relation to disparity there is an adequate explanation. Therefore, disparity of treatment does not render this dismissal unjustified.

What did LPC know about Mr Craig's personal circumstances?

[109] There is significant disagreement about how much LPC knew about Mr Craig and his family circumstances. In deciding whether LPC acted fairly and reasonably in all the circumstances at the time, I can only take into account information that LPC had at the time it made its decision.

[110] If Mr Craig or his union representatives did not disclose what LPC now knows about Mr Craig's personal circumstances, but only knew of them to a lesser degree and knew fewer details, then LPC cannot be expected to have included those considerations in its deliberations about Mr Craig.

[111] Mr Davenport's submissions ask me to conclude that specific wording used about a family member's admission to hospital, and the consequent obvious effect on Mr Craig, should have been sufficient to alert LPC to the specifics of the health problem. I disagree, I consider the specific word Mr Craig says was used was not obviously more nuanced or specific enough to bring the cause of that hospitalisation to LPC's notice.

[112] LPC's witnesses say that Mr Craig and Mr Benecke made it very clear in the two meetings that Mr Craig wished to keep the details of his personal circumstances private and that he only revealed the actual details recorded in Ms Denize's notes. Mr Parker says that he did take those circumstances into consideration before making his decision, but did not consider that they could excuse or mitigate the behaviour.

[113] Ms Denize's evidence was that she had not heard the specific circumstances Mr Craig now relies on in the two meetings in April 2018. When I asked her how she could be sure of that although she indicated that her notes were not a complete record of everything said, Ms Denize replied that her previous work experience in a particular area⁶ meant that if the details had been disclosed then she certainly would have remembered and paid particular attention to the circumstances revealed. The circumstances and Ms Denize's previous work experience fall within the same area. I accept Ms Denize's evidence as credible and reliable.

[114] I have considered all the evidence on Mr Craig's behalf about what his representatives knew about his circumstances, and when they knew of them. I am satisfied that they knew of the details of his family circumstances before the two meetings with LPC, or in Mr Satherley's case, before the meeting he attended. However, I consider the preponderance of evidence points to the conclusion that Mr Craig's private nature and wish to keep details of his personal life private meant that he and his representatives did not disclose all the details they now say LPC knew.

[115] However, there are two details that LPC knew, which are recorded in Ms Denize's notes, and I need to consider whether they were sufficient to put LPC on notice of the seriousness of Mr Craig's personal situation. Ms Denize's notes record that Mr Craig told LPC he had been suffering from headaches recently, and that his son's wellbeing was

⁶ Which she identified. I have not given details of this as it may lead to identification of some of the specific details that I have prohibited from publication.

paramount. He also told LPC about an earlier stressful family situation but what he said about that may have led LPC to conclude that issue had largely been resolved.

[116] The comment about Mr Craig's son's wellbeing was not specific enough to alert LPC to the cause of Mr Craig's concern about his son. Nor did Mr Craig link the cause of his headaches specifically to the stress he was under with his personal circumstances.

[117] I have concluded that those two facts were not sufficient to draw LPC's notice to the fact that Mr Craig's level of personal stress was extreme at the time and was likely to have been affecting his judgement. However, I accept that was highly likely to have been the case.

[118] There is a further specific difficulty with Mr Craig's reliance on his personal circumstances to prove his dismissal was unjustified. In Mr Benecke's 3 May 2018 email making final representations on Mr Craig's behalf before LPC made its final decision, Mr Craig's personal circumstances are not mentioned at all as a mitigating factor. In the RMTU's final submission to LPC before Mr Craig was dismissed Mr Benecke wrote:

- Pre-determination on the decision to dismiss – LPC put Mr Craig in an impossible situation of proving why he should not be dismissed;
- Expected an opportunity to make submissions on penalty and that has not happened;
- Logistics officers are self –managed and that includes being able to leave their shift if their work is up to date and cover is in place;
- The directive to complete full rostered shifts dated 6 April runs counter to the self-management aspect enshrined in the collective agreement;
- How could Mr Craig have jeopardised safety and effectiveness of operations when LPC only rosters one LO on Saturdays? That is contrary to the letter of 6 April 2018 to Mr Craig reading “it is imperative that two LOs remain on shift in the control room for the duration of the operation;” and
- LPC has an obligation to have regard to all the circumstances including Mr Craig's clean employment record, long period of service, his honesty and cooperation with the process, his genuine remorse and his undertaking it would not happen again.

[119] However, Mr Craig's explanation about his personal circumstances coupled with his feelings of being "cut adrift" on permanent night shift, and statement that he would be happier on day shift, were sufficient to point LPC to the fact that Mr Craig had been suffering personal stress over the past three to four months.

[120] Mr Parker's letter of dismissal makes reference to Mr Craig having told LPC he was preoccupied by his personal circumstances "for a few months." I do not consider this to have been an unreasonable conclusion. Mr Parker did take Mr Craig's personal circumstances into account to an extent, so far as he knew what they were.

Mr Parker's consideration of Mr Craig's other work for LPC outside his night shifts

[121] In his written statement for the Authority Mr Parker recorded that Mr Craig was undertaking other work with LPC that was not part of his LO duties during the time Mr Craig described as being problematic for him and his family. That work included Mr Craig volunteering to be the second person on Sunday night shifts. Mr Parker wrote that Mr Craig "could have been removed from these [roles/duties] if he had raised any personal or pressure issues."

[122] I asked Mr Parker why he included those comments in his written statement. There is no record of Mr Craig being challenged about that during the disciplinary process. I asked Mr Parker if he could, instead, have viewed that extra work being a demonstration of Mr Craig's commitment to LPC despite the personal pressure he was under. Mr Parker replied that before Mr Craig's six identified nights of leaving early he had thought Mr Craig was a very committed employee. However, "I had struggled to reconcile that with his explanations about night shift and his personal circumstances."

[123] That was a factor Mr Parker considered in weighing up the seriousness of Mr Craig's behaviour. He allowed it to affect how he viewed Mr Craig's explanation but did not ask Mr Craig how he could reconcile his description of his personal circumstances, meaning he had to go home early some nights, but could do some other work during daytime and Sunday nights, when those duties were not part of LPC's requirement of him. If he had put that to Mr Craig, Mr Craig would have been able to give the explanation that he gave at the Authority investigation meeting, which made it clear why night times were a particular point of

pressure for him and why he needed the extra money he earned through the additional Sunday night shifts.

[124] Mr Parker's failure to reveal that part of his thinking to Mr Craig for an explanation was a procedural error that was more than minor and resulted in Mr Craig being treated unfairly.

A factual error

[125] In Mr Parker's email of 2 May 2018 he wrote to the union that Mr Craig left work on 27 March 2018 at 0423 after which "a third crane started and 13 trucks per hour." However, that night was not a night Mr Craig actually went home early. It is a significant material mistake in which Mr X's behaviour was sheeted home to Mr Craig. I cannot be sure Mr Parker did not mistakenly take that into account in making his decision to dismiss Mr Craig.

[126] That error is more than minor and contributed to Mr Craig being treated unfairly.

Conclusion on justification of the dismissal

[127] I do not accept that LPC had grounds to have totally lost trust and confidence in Mr Craig. I reach that conclusion based on LPC's own behaviour. That and all of the other issues I have outlined above that were unfair to Mr Craig combine to mean that a fair and reasonable employer could not have acted as LPC did in all the circumstances at the time. Therefore, Mr Craig was unjustifiably dismissed and I must consider remedies.

Remedies

[128] In considering remedies I need to consider the extent to which Mr Craig's behaviour contributed towards the situation that gave rise to his personal grievance. If his actions require it, I must reduce the remedies that would otherwise have been awarded.

[129] In awarding the remedies below I have taken into account the fact that on the nights Mr Craig left either when vessel operations were to commence or recommence his behaviour was blameworthy, despite his personal circumstances affecting his judgement, and I have adjusted the remedies accordingly.

Reinstatement

[130] Mr Craig seeks his reinstatement as an LO. Section 125 of the Act makes reinstatement the primary remedy. However, that became the case only after the passage of amending legislation in December 2018. Therefore, Mr Craig's case needs to be decided under the earlier legislation in which it was a discretionary remedy.

[131] It is the Authority's role to consider carefully whether reinstatement:

will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.⁷

[132] LPC does not support Mr Craig's reinstatement. It needed to substantiate its opposition by evidence. There was very little evidence brought forward by LPC to counter the reasonableness and practicability of Mr Craig's reinstatement.

[133] Submissions for LPC opposing Mr Craig's reinstatement are that Mr Craig:

- is not convincing in his assurance that he accepts the LPC expectations set out in the 2018 letters;
- questioned those expectations in his final submissions in the disciplinary process and to an extent still questioned them during the Authority's proceedings;
- his previous behaviour justifies LPC in continuing to have trust and confidence concerns because there were extensive absences during several months and he never raised any issues with his employer but simply walked away from his role.

[134] I asked Mr Parker for his reasoning on why Mr Craig should not be reinstated. Mr Parker said he would still have trouble trusting Mr Craig and having confidence in him. However, he said that could be managed by Mr Craig being on a shift other than the night shift, where he could be more closely supervised.

[135] Mr Parker also said that there are a number of long term relievers on LO rosters and it would be possible to manage Mr Craig's reinstatement to a full time LO role. I thank him for this useful evidence.

⁷ Full Court of the Employment Court, *Angus v Ports of Auckland (No. 2)*, [2011] ERNZ 466, [67].

[136] Mr Craig's evidence was that his job as an LO meant a great deal to him. He very much enjoyed working for LPC and found the work rewarding.

[137] He said that the circumstances leading to his significant stress over the period starting with Christmas 2017 until his dismissal in May 2018 are no longer in existence and so will have no further impact on his ability to work shift work.

[138] Mr Craig apologised to LPC during the disciplinary process in April and May 2018, and in his written evidence for the Authority's proceedings he issued a further and fulsome apology. He stated that the period through to April 2018 had been the hardest time in his life and the disciplinary process brought into clear focus that he was not coping and could not carry on in the way he was.

[139] Mr Craig's remorse and his commitment to being a better employee in the future is genuine and in my view is reliable.

[140] I consider reinstatement to be practicable; it is feasible and there is a high likelihood of a successful employment relationship being established. It is a result that is very important and valuable to Mr Craig and is not one that unduly disadvantages LPC. Prior to the disciplinary proceedings in April 2018 Mr Craig had an unblemished work record over a period of three years as an LO. His personal circumstances have changed since then and therefore there is no chance of those circumstances impacting on his future work as an LO.

[141] I also consider reinstatement to be reasonable in all the circumstances. Any loss of trust and confidence was based on very specific and unusual circumstances in Mr Craig's life that meant he was not coping and was not making good decisions. Those circumstances no longer exist, and Mr Craig is very aware that if he gets into such a stressful personal situation again he needs to let LPC know and seek support from it.

[142] I suggest Mr Craig discusses any other stress from his personal life or own health that might impact on his work in the future with his union so that he can be supported to take appropriate steps to manage that and to assist to liaise with LPC and minimise any impact on his work.

[143] LPC must reinstate David Craig to an LO role on a shift that is agreeable to him and that maintains the same or substantially similar terms and conditions, including the level of income that Mr Craig would have been on if he had remained employed since May 2018.

Lost wages

[144] Mr Craig has claimed all salary lost as a result of his dismissal.

[145] I am satisfied that Mr Craig adequately mitigated his loss by searching for a new job. He was not able to find one and instead he has obtained work as a contract arborist, a skill he already had before working for LPC.

[146] Mr Craig earned \$100,373.00 gross per annum, or \$1,930.25 per week. He was told of his dismissal on 7 May 2018 and, at LPC's discretion, was paid four weeks' notice. The notice period ended on 4 June 2018.

[147] Section 123(1)(b) of the Act allows the Authority to provide for the reimbursement by LPC of the whole or any part of wages Mr Craig lost as a result of his grievance.

[148] Section 128(2) of the Act provides that I must order LPC to pay Mr Craig the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[149] Mr Craig's actual loss of remuneration to the date of the investigation meeting, six months after 3 September 2018, was approximately \$47,048.75, based on the financial information he supplied.

[150] Three months ordinary time remuneration would have been \$25,093.25 gross (\$1,930.25 x 13 weeks) to 3 September 2018.

[151] Three months' ordinary time remuneration is the lesser amount and therefore \$25,093.25 is what LPC must pay Mr Craig as reimbursement of his lost wages under s 128(2) of the Act.

[152] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than three months.

[153] I have considered doing so in this case, however, I consider that Mr Craig contributed to the situation leading to his dismissal by failing to alert LPC to the issues he was facing in his home life that meant he felt compelled to leave his shifts early, despite, in a few cases, vessel operations not being finished. Therefore, bearing in mind that I have ordered his reinstatement, which has significant ongoing monetary value, I consider three months ordinary time remuneration to be sufficient reimbursement for lost wages.

Compensation

[154] Mr Craig claims \$20,000, or more or less as the Authority considers appropriate, as compensation for humiliation, loss of dignity and injury to his feelings arising out of his dismissal.

[155] Mr Craig's evidence is that his dismissal made him feel physically sick. He had no idea how he was going to be able to support his family. He says the dismissal had a severe impact on him emotionally and he was devastated. He said the manner of his dismissal – “being removed from the workplace” – made him feel like a criminal – “like I was the lowest of the low”. I understand this to be a reference to the fact Mr Craig's notice was paid out, rather than allowing him to work it out.

[156] Mr Craig's evidence was also:

What made this all the more upsetting was that over the period from when I was first told about these allegations right through until 7 May (more than a month later), LPC did not suspend me or remove me from the workplace in any way. Bu suddenly from 7 May I needed to be removed immediately. Being summarily removed from employment left me feeling like trash – like the garbage that someone was throwing out. It also left me with an overwhelming sense of hopelessness that my employer was failing to show me any compassion or humanity about my errors of judgment.

[157] LPC submits that the Authority needs to assess whether it was the dismissal that caused Mr Craig's ‘woes’ or his personal situation at the time. I have taken that into account and consider that to a great extent Mr Craig's unjustified dismissal worsened his personal

situation. I am satisfied that Mr Craig's evidence addresses the effects of the dismissal on him and not the effects of his pre-existing family situation.

[158] I consider that the effects on Mr Craig were significant. Even taking his contribution into account I consider the amount of \$20,000 a reasonable amount of compensation for humiliation, loss of dignity and injury to his feelings arising from his dismissal.

Costs

[159] Costs are reserved. I encourage the parties to agree on costs.

[160] If that is not possible, the party applying for costs has 28 days from the date of this determination to do so, bearing in mind the Authority's usual daily tariff approach.

[161] The other party should make its written response within 14 days after that.

Orders

- 1. Lyttelton Port Company Limited must work with the Work Place Team referred to in the Logistics Officers' Collective Employment Agreement to:**
 - (i) From Monday, 19 August 2019 reinstate David Craig to the payroll and roster as a Logistics Officer on the level of pay and same terms and conditions that he would have been on if he had remained employed from 7 May 2018; and**
 - (ii) As soon as possible provide David Craig with any training that the other LOs have had since 7 May 2018; and**
- 2. Lyttelton Port Company Limited must:**
 - (i) Pay David Craig \$25,093.25; and**
 - (ii) Pay David Craig \$20,000 in compensation for humiliation, loss of dignity and injury to his feelings.**
- 3. Costs are reserved.**