

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 312  
3063293

BETWEEN MICHELLE MINCHINGTON  
AND THE ESTATE OF VERA LOWE  
Applicants  
AND NJ GILL LIMITED  
Respondent

Member of Authority: David G Beck  
Representatives: Peter Cahill, advocate for the Applicant  
Navjeet Singh Gill, for the Respondent,  
Investigation Meeting: 10 July 2020  
Submissions Received: 2 April from the Applicant  
None from the Respondent  
Date of Determination: 11 August 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Vera Lowe, now deceased and her daughter Michelle Minchington were employed by NJ Gill Ltd as commercial cleaners at a Christchurch light manufacturing facility until they were both summarily dismissed on 21 August 2017.

[2] Ms Minchington and Ms Lowe raised personal grievances through their advocate in a letter of 17 September 2017, alleging that they had been unjustifiably disadvantaged and

unjustifiably dismissed and that NJ Gill Ltd had failed to act in good faith during the process of dismissing them. The main contention of the grievance was an allegation that they had been treated in a disparate manner as two co-workers engaged in the same misconduct had not been dismissed. The matter was filed in the Authority on 10 June 2019 and Ms Minchington is seeking lost wages and compensation for herself and the estate of Vera Lowe.

### **The Authority's investigation**

[3] NJ Gill Ltd filed a statement in reply but despite being directed to do so, Mr Gill did not file a brief of evidence until one day prior to the investigation meeting.

[4] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

### **Issues**

The issues to be decided are:

- (a) Were Ms Lowe and Ms Minchington unjustifiably dismissed and/or unjustifiably disadvantaged on the grounds of procedural unfairness.
- (b) Was disparity evident in the employer's decision making and if so, does that render the decision to dismiss to be substantively unjustified.
- (c) If they were unjustifiably dismissed and/or disadvantaged did Ms Minchington and Ms Lowe engage in conduct that would disentitle them to any remedies - if not, and remedies are appropriate what should they be and how is the issue of contributory conduct to be assessed.
- (d) An assessment of the level of costs, if any, to be awarded to the successful party.

## **What caused the employment relationship problem?**

[5] NJ Gill Ltd first engaged Ms Lowe and Ms Minchington in June 2017 when they acquired a franchised cleaning contract. Mr Gill, the sole director of NJ Gill Ltd, explained he was a franchisee of Paramount Service Limited (the “franchisor”) and this was his first business venture aside from him operating as a contracting courier driver.

[6] The employment of Ms Lowe and Ms Minchington took place in an electronics manufacturing plant in Christchurch. Ms Lowe was a cleaning supervisor and Ms Minchington a cleaner.

[7] Ms Minchington provided a signed individual employment agreement dated 19 June 2017 with an attached schedule describing her working hours as 25 per week and workdays as Monday -Tuesday- Wednesday -Thursday - Friday (5 hours per day) and her sole work location being the aforementioned manufacturing plant. Ms Minchington indicated Ms Lowe worked the same hours as her - a point not contested by NJ Gill Ltd.

[8] Ms Lowe had worked for a previous provider at the same site for 18 years and Ms Minchington since July 2016. They had two co-workers (Steve and Sonya), who had similar working hours and cleaned at the same premises but on different floors. Ms Lowe was the designated supervisor and responsible for ordering cleaning products and oversight of the other three cleaners’ work quality and providing occasional cover for sick employees.

[9] Ms Minchington disclosed that around early June 2017 the group of four cleaners came to an arrangement whereby they would manipulate their time recording system to allow each other to start late each day and finish early on a Friday. This resulted in all four working fewer hours than they were paid for (in Ms Minchington and Ms Lowe’s cases - two and a half hours per week).

[10] The ‘arrangement’ involved each of the four indicating false start or finish times when reporting hours of work on a time recording system that operated by the user leaving a twice

daily telephone message recording start and finish times. Essentially, they ‘clocked’ each other in and out.

[11] Ms Minchington said that she could not recall who came up with the idea of the ‘arrangement’ but confirmed that Ms Lowe as supervisor did not raise any objections and was fully aware of what was being done and that neither Steve nor Sonya instigated the scheme. I reasonably conclude from this response that Ms Minchington devised the scheme and she also declared in evidence that she knew it was wrong.

[12] In the short period up to mid-August 2017, Ms Minchington indicated that she was becoming aware that Mr Gill, who also occasionally came into work to clean and familiarise himself with the business, was aware that they had been what she described as “goofing around” and taking longer tea breaks rather than focussing on their cleaning tasks.

[13] Ms Minchington recalled a telephone call from Mr Gill on Monday 21 August 2017 at 2pm as she was leaving for work, asking her to attend a disciplinary meeting that day at 6pm and that she could bring along a support person (a fact verified by an email of 2:33pm). Ms Minchington claims no other details were disclosed and Mr Gill confirmed this was so.

[14] Although not viewed by Ms Minchington prior to the meeting, Mr Gill emailed both Ms Minchington and Ms Lowe as follows at 2:33 pm :

As discussed over the phone we will have a disciplinary meeting today at 6 pm and you are most welcome to bring a support person in.

Cheers  
Navi

[15] Ms Minchington recalled discussing the proposed meeting with Ms Lowe who disclosed that she had received a telephoned invite to meet at the same time. Ms Minchington and Ms Lowe worked identical hours and travelled to work together using the same vehicle. Ms Minchington says her mother assumed all staff would be attending so once they arrived at the workplace they informed the other two cleaners (Sonya and Steve) that they should attend

the meeting with them. Ms Minchington recalls Sonya did not disclose any concerns or mention that she knew what the meeting was about. Ms Minchington's evidence was that she thought the meeting was about general poor attention to their tasks. She assumed that they would all be admonished for this.

[16] At the beginning of the meeting (6pm) Sonya and Steve were asked to leave. Mr Gill was present along with two others: Rachael Cameron, Christchurch Manager of Paramount Services Limited and Tania Matthews, Paramount's Customer Relations Manager.

[17] Mr Gill said that shortly after the meeting commenced, Ms Cameron suggested they could adjourn if they wanted a support person but both declined. When this was put to her Ms Minchington accepted this was so, but at that point she claimed she was still unaware of the specific reason for the meeting.

[18] Ms Minchington recalls Ms Cameron took the lead in running the meeting. Mr Gill confirmed this was so, and that he had been seeking her advice on how to approach the disciplinary meeting. Ms Cameron first put an allegation that they had been leaving early and falsifying time records.

[19] Ms Minchington, who took the lead in responding, said that she did not initially own up to what they had been doing and asked what proof Ms Cameron had. Ms Minchington conceded that if no evidence had been provided she would not have admitted what she had been doing.

[20] A further allegation was put by Ms Cameron that they had been followed home the previous Friday and that their finishing work time did not coincide with their clocking out time.

[21] Ms Minchington recalls then being presented with an undated but signed statement at the meeting from her co-worker Sonya, as follows:

I Sonya Mitchell have been Clocking Michelle and Vera out on Fridays. Since June and in return Michelle has been clocking me in at 4 pm when I start work at 4:50pm

everyday I have regretted this as it is being dishonest and not truthful. I am happy with myself for telling the truth and Steven has been clocking all of us out on thursdays at nine so we can go early on Friday.

[22] Ms Minchington says insufficient time was provided to digest the statement as it was handed over to them. They were provided time to read it but no break occurred in the meeting.

[23] Ms Minchington recalls immediately being stunned and angry and responding that it was unfair to single them out as the other two workers had also participated in the dishonesty around falsely recording working hours. Ms Minchington said both she and Ms Lowe were very upset about Sonya's statement. Ms Minchington concedes that this was the only response they provided.

[24] Ms Minchington says Ms Cameron then indicated that they were dismissed, asked to leave the premises, allowed to get personal belonging and then they were both escorted to their car.

[25] Mr Gill confirmed that the meeting was brief (around 10 minutes) and that Ms Cameron took the lead in the meeting and communicated the dismissal.

[26] On being asked whether he had arrived at the meeting with a pre-determined view, Mr Gill claimed that his thinking was he would allow them to retain their employment only if they accepted what they had done was wrong and given him an assurance it would not re-occur.

[27] Ms Minchington accepted the facts as described in Sonya's statement and that it could be assessed as serious misconduct but claimed the dismissals were unfair on the basis that her two co-workers did not get dismissed.

[28] When asked how she thought she and her mother had been discriminated against and the concept of discrimination was explained to her, Ms Minchington reverted to a claim that the disparity of treatment singled her out but conceded this was not on any discriminatory ground.

[29] Mr Gill explained that his suspicion of time-keeping irregularities was confirmed on the Friday before the disciplinary meeting. He said he had apprehended Sonya clocking them out when they had already left.

[30] Mr Gill says Sonya then confessed all. He then left it at that and sought advice from Ms Cameron who suggested that they obtain a statement from Sonya. Ms Cameron approached Sonya and obtained a statement over the weekend.

[31] Mr Gill said he formed the view that given Sonya had apologised and provided a commitment to properly record her time that he would allow her to continue in his employ.

[32] Mr Gill conceded that he did not issue Sonya with a formal written warning or question her further on the involvement of the other three workers.

[33] When Mr Gill was pressed to explain the difference in his approach to Sonya and Steve, he conceded neither of them was asked to a disciplinary meeting and that his investigation of the issue was limited to personal scrutiny of Ms Minchington and Ms Lowe who he had observed in the car park leaving earlier than their clocking out times indicated and, he was also relying on the statement obtained by Sonya.

[34] Mr Gill explained that he had no previous experience of running a disciplinary meeting and had heavily relied upon advice and assistance from Ms Cameron. Ms Cameron advised him to set up a disciplinary meeting with both Ms Minchington and Ms Lowe and that she would assist in attending such. No other detailed legal advice was obtained.

[35] Mr Gill did not turn his mind to running individual disciplinary meetings and conceded he treated Ms Minchington and Ms Lowe as one entity and at the meeting when they brought Sonya and Steve along, he asked the latter two to leave the meeting.

[36] When pressed further, on how he dealt with Steve, Mr Gill indicated that after he dismissed Ms Lowe and Ms Minchington he verbally counselled Steve and received an assurance from him that he would in future accurately record his time.

[37] When asked to explain why he did not also dismiss both Sonya and Steve after finding all had engaged in the same misconduct, Ms Gill said Steve was a very hard worker and reliable and so was Sonya and he had taken into account Sonya's contrition and co-operation in providing a statement.

[38] By contrast, following his conducting limited observations in the workplace, Mr Gill viewed both Ms Minchington and Ms Lowe as not so hard working. Mr Gill conceded that he had not previously raised performance issues with either of them and had not had any complaints from the company they cleaned for.

[39] Mr Gill said he took into account that Ms Lowe was his supervisor and she had actively participated in the time keeping fraud. I find that it is clear that in such a role, Ms Lowe owed her employer a higher duty of fidelity to set an example to not participate in, and thus condone, the identified misconduct and she had a co-responding duty to report to her employer the actions of others engaged in such.

[40] Mr Gill then had to explain to the company where the cleaning was occurring, that he had cause to remove two cleaners from the workplace and assure the company that the quality of ongoing cleaning would not be impacted.

[41] In summary, I find that Mr Gill summarily dismissed Ms Lowe and Ms Minchington for a mixed motive being both the timekeeping concerns and an undisclosed view of their respective work performance based on limited observations. I accept however, that the timekeeping issue was a predominant factor in the dismissals.

[42] Procedurally, no investigation took place after Mr Gill obtained a statement from Sonya that implicated all four workers.

[43] I find that given the evidence he had before the meeting, Mr Gill did not approach the issue with an open mind but it is evident that his action in not dismissing the other two

workers was reasoned. In Sonya's case this was twofold – an acceptance of her wrongdoing and a willingness to make a statement incriminating the other three.

[44] It was not abundantly clear how Mr Gill exercised a positive discretion for Steve other than a view that he was a committed and hard-working employee. Although not elaborated on by Mr Gill, Ms Minchington indicated that she was aware Steve had a vulnerable personality and had health issues.

[45] I take it on 'face value' Mr Gill's suggestion that he may not have dismissed Ms Minchington and Ms Lowe if they had been contrite and accepted their wrongdoing during the disciplinary meeting although, I have to balance that up with how the meeting was conducted and the manner in which the allegations were presented.

[46] I find that despite denying such, it was more likely than not, that Ms Minchington and Ms Lowe knew or had a reasonable inkling that the disciplinary meeting would raise their timekeeping irregularities. They had an opportunity to halt the meeting beforehand and seek advice, and they appear to have gone ahead in spite of a second opportunity being provided at the meeting to stop and seek advice.

[47] I find neither Ms Minchington or Ms Lowe displayed any contrition at the disciplinary meeting as they were, and remained thereafter, fixated on what they believe to be the unfairness of the leniency afforded their two co-workers. I was unable to question Ms Lowe but I got no impression from Ms Minchington that her mother accepted that her part in the wrongdoing was more culpable as she had a supervisory role.

[48] In a personal grievance letter of 17 September 2017, Mr Cahill on Ms Minchington and Ms Lowe's behalf, detailed procedural issues and claimed that the decision to dismiss was not open to a fair and reasonable employer as the two other workers were not dismissed at the same time for identical misconduct.

[49] In his written submission provided prior to the investigation meeting, Mr Cahill contended that the dismissal was effected in a procedurally unfair manner and was substantively unjustified as disparity was at issue.

[50] Mr Cahill also suggested two other cleaners were ready and waiting to take on the work of Ms Minchington and Ms Lowe at the time of the dismissal and that was suggestive of the decision to dismiss being pre-determined. However, the latter claim was unsupported by any evidence. When this was put to Mr Gill, he did confirm that he had made cover arrangements prior to the disciplinary meeting.

### **Were the dismissals justified?**

[51] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[52] Section 103A details factors that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner, these summarised are:

- a) Whether, given the resources available to the employer, they sufficiently investigated the allegations made against the employee;
- b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- c) was the employee afforded a reasonable opportunity to respond to identified concerns; and
- d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and

e) any other factor the Authority regards appropriate.

*Applying factors identified by the Act*

[53] I find on the facts, that NJ Gill Ltd gave insufficient attention to all of the above factors.

[54] In summary: Mr Gill did not initially identify specific concerns or put them to Ms Minchington and Ms Lowe for consideration before the disciplinary meeting, he did not disclose the result of his limited investigation prior to the meeting and he did not allow Ms Minchington and Ms Lowe a real opportunity to get advice or indeed to provide an explanation of any mitigating factors prior to issuing the decision to summarily dismiss them.

[55] Mr Gill ostensibly failed to treat all involved in the same manner and apply the sanction of dismissal in an even-handed way. I am not wholly convinced that these factors support a premise that Mr Gill approached the one disciplinary meeting with an open mind.

[56] At best (applying s 103A(e)), one could say that the issues were clear cut, Ms Minchington and Ms Lowe were afforded an opportunity to explain their actions to the decision-maker and no further investigation was necessary as the misconduct in question had been established (albeit by another employee) and was not contested in any material sense at the disciplinary meeting<sup>1</sup>.

[57] Although not a mitigating factor for the employer, I make an observation that NJ Gill Ltd was poorly served by the franchisor. Ms Cameron would have been aware that Mr Gill was inexperienced and she should have taken much more care in assisting him in setting up

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<sup>1</sup> It has been suggested that when serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter: *Murphy and Routhan t/a Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC). See also *Smith v Datamail Ltd* ERA Wellington WA125/09, 2 September 2009; *Reynolds Reynolds v Mount Cook Airline Ltd* [2013] NZERA Christchurch 155 (where the Authority expressly referred to *Enzo's Pizza* and confirmed its continuing legal relevance under s 103A).

the meeting including the basic step of drafting the initial allegation and identifying any extant performance concerns (that I find Mr Gill later partly relied upon to make his decision).

[58] Disclosing Sonya's statement at the meeting and not allowing Ms Minchington and Ms Lowe more time to get advice before the disciplinary meeting were also fairly basic missteps that an experienced employer would know about and avoid. However, I did not hear from Ms Cameron on these issues as despite filing a short evidential brief, she did not appear.

[59] Ms Cameron ran the disciplinary meeting and I find did not do so in a good faith or a careful manner. She initially sought to entrap Ms Minchington and Ms Lowe by verbally presenting the allegation of time keeping irregularities before disclosing the documentary proof. In this circumstance, I find that NJ Gill Ltd was in specific breach of s 4(1A)(c)(i) and (ii) of the Act that requires that an employer must provide an employee information where they are "proposing to make a decision that will, or is likely to have an adverse effect on the continuation of employment" and more pertinently "an opportunity to comment on the information to their employer before the decision is made".<sup>2</sup> This good faith provision reinforces s 103A(3)(b) and (c) of the Act that codifies basic procedural fairness considerations that I must apply, including:

whether, the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and whether the employer gave the employee *a reasonable opportunity* to respond to the employer's concerns before dismissing or taking action against the employee.<sup>3</sup>

[60] Further, moving immediately to a summary dismissal decision without a break in the meeting to consider the situation, leads to a reasonable implication that the matter had been pre-determined and it also breached NJ Gill Ltd's obligation under s 103A of the Act to consider other contextual matters such as Ms Lowe's length of service and other potentially mitigating factors including the absence of any previous disciplinary warnings.

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<sup>2</sup> Section 4(1A)(c) Employment Relations Act 2000.

<sup>3</sup> Section 103A(3) Employment Relations Act 2000.

[61] However, I would not go as far as to say that dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I do find that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors before making the decision but the assumption that the threshold of serious misconduct was met is reasonably evident.

[62] Ms Cameron did not assist Mr Gill in providing a follow up letter setting out the reasons for dismissal and it was not apparent that she alerted Mr Gill to the obvious disparity issues that would arise in his handling of the other two workers. It was reasonable to anticipate that Ms Minchington and Ms Lowe would raise the disparity issue at the disciplinary meeting and Ms Cameron does not appear to have prepared well for this eventuality.

[63] As a result, it is not apparent from the haste undertaken, that Mr Gill was able to explore the motivation behind the misconduct, who had formulated the scheme and what, if any, mitigating factors were present.

[64] Mr Gill did not deal with Ms Minchington and Ms Lowe separately which may have better provided either party an opportunity to explain their individual part in the clocking in/out arrangement. There may also have been information from a properly conducted investigation that required follow up.

[65] Whilst not excusing Ms Minchington and Ms Lowe's evident serious misconduct, they were entitled to be treated fairly in terms of s 103A and the good faith obligations set out in the Act.

[66] Further, I find that the defects in process were not minor as envisaged in s 103A(5)<sup>4</sup> of the Act and they did result in Ms Minchington and Ms Lowe being treated unfairly. Although

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<sup>4</sup> The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

Mr Gill was a small employer but he did have access to good resources and he was heavily reliant upon such but I cannot absolve the company from a very poorly conducted process.

[67] As a franchisee, I would encourage Mr Gill to discuss with the franchisor the serious shortcomings in their advice to him as they contribute significantly to my finding that the dismissal was procedurally deficient to the extent that I find this was an unjustified dismissal of both Ms Minchington and Ms Lowe.

### **Disparity**

[68] Although I have found the dismissal to be unjustified I will also deal with the central claim of disparity of treatment as Ms Minchington genuinely and unsurprisingly, does not comprehend how this complex doctrine operates in an employment law context.

[69] Disparity is an inquiry into whether an employer in dismissing an employee treats other employees who engage in the same misconduct in a similar manner and does not practice partiality in decision-making when applying sanctions.

[70] In *NZ IOUW v Air NZ Ltd* the Court of Appeal suggests that disparity of treatment may in some circumstances establish an unjustified dismissal if not accompanied by an adequate explanation for such.<sup>5</sup> This is sometimes known as ‘disparity of outcome’ and an expanded test to determine if disparity is unjustified is found in the Court of Appeal case *Chief Executive of the Department of Inland Revenue v Buchanan*. This involves examining:

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the dismissal justified despite the disparity for which there is no explanation?<sup>6</sup>

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<sup>5</sup> *Airline Stewards and Hostesses IUOW v Air New Zealand Ltd* [1985] ACJ (1985), ERNZ Sel Cas 156.

<sup>6</sup> *Chief Executive of Department of Inland Revenue v Buchanan* [2005] 1 ERNZ (CA) at [45].

[71] Here, an arguable case of disparity of treatment has been made out by Ms Minchington and Ms Gill. All four employees involved engaged in the same misconduct and NJ Gill Ltd did not provide, at the time, an explanation as to why two other employees (Sonya and Steve) who engaged in what appears to be equally culpable misconduct, were not also dismissed or disciplined

[72] However, an explanation for the disparity can be based upon several factors advanced by Mr Gill at the investigation meeting:

- (a) An assessment by Mr Gill that both Sonya and Steve were more committed workers.
- (b) That upon being confronted with her time recording irregularities, Sonya accepted responsibility, expressed contrition and did assist her employer in dealing with the wider problem.
- (c) That upon being counselled, Steve also accepted his wrongdoing and committed to not repeating such.
- (d) Ms Lowe was being held to a higher standard as a supervisor.
- (e) Ms Minchington and Ms Lowe had shown no contrition or ownership of their contribution to the situation.

[73] On the limited information available I conclude that there was disparity in the disciplinary outcome but in Ms Lowe's case the decision to treat her differently was justified as she was occupied a supervisory role.

[74] In Ms Minchington's case I can see no reason for the disparity of outcome given that the two other employees (Steve and Sonya) engaged in equally culpable misconduct. I observe that at the time, Mr Gill appeared to be unaware that Ms Minchington instigated the clocking in scheme or at least he failed to put this suspicion to her.

[75] However, in examining the second limb of the test, I do find the reasons for the disparity to be, in part, adequately explained. The main explanation for the difference that I find reasonable and most compelling is that despite the procedural irregularities Ms Minchington and Ms Lowe did nothing to try and restore their employer's diminishing trust and confidence in them and failed to see that their individual contributions had significantly destroyed that trust element.

[76] I did not find Ms Minchington's evidence that she (and Ms Lowe) went into the disciplinary meeting 'cold' completely unprepared for the possibility that their employer had discovered the time keeping irregularities, to be wholly credible. A more sensible approach would have been to prepare a response and think about how to explain their obvious misconduct. Apart from that being a more open and honest approach, the fact that they perceived that their employer was dissatisfied with their commitment to the job was linked to reality – they were spending 5 hours per week less time on cleaning duties. They cleaned separate floors from the other two cleaners in the building so, this work time not undertaken was likely to have impacted upon tasks undertaken. As Mr Gill pointed out, this may have jeopardised his cleaning contract in a highly competitive business and he was reliant upon Ms Lowe as his experienced quality control supervisor.

[77] If they had both been contrite and were still dismissed I may have found that the dismissal was unjustified on the ground of disparity and for an ulterior motive (Mr Gill's perception of their poor performance) and that would influence any remedies I have to consider but I have not found this to be so.

[78] In the event, I am convinced that Mr Gill dismissed both Ms Minchington and Ms Lowe predominantly for their failure to acknowledge the scale of their wrongdoing in claiming wages for time not worked.

[79] I do not need to consider the third limb of the test - that being a subjective judgment of whether the dismissal was substantively justified putting aside any explanation for the disparity in disciplinary sanctions imposed. However, for the sake of completeness, I have

looked carefully at the concerns Mr Gill raised and find that they easily reach the threshold of serious misconduct capable of destroying the essential trust and confidence that he was entitled to place in both parties.

[80] Ms Minchington and Ms Lowe deliberately engaged in calculated fraudulent behaviour. I have also held that Ms Lowe should be held to a higher standard given her supervisory function for which she received additional remuneration.

[81] This was a summary or instant dismissal after NJ Gill found Ms Minchington and Ms Lowe engaged in serious misconduct. Guidance on how “[B]ehaviour that deeply impairs or is destructive of confidence and trust” is to be assessed was summarised recently by Judge Holden in the Employment Court decision *Emmanuel v Waikato District Health Board*<sup>7</sup>.

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

[60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or

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<sup>7</sup> *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[82] Essentially the above guidance on approaching a summary dismissal without notice involves applying the same justification test in s 103A of the Act but the seriousness of the conduct has to be so destructive of the employer's trust in the employee or substantial in its level of seriousness, that no notice is warranted before dismissing – thus the sanction of summary dismissal is reserved for the most serious cases of misconduct.

### **Finding on the summary dismissal**

[83] I find in the overall circumstances, that the summary dismissal of both Ms Lowe and Ms Minchington was substantively justified on the grounds that they engaged in serious misconduct without any mitigating circumstances, but as above the significant procedural deficiencies render the dismissal unjustified.

[84] Whilst this concept may appear frankly odd to NJ Gill Limited, the concept of a dismissal being substantially justified but procedurally unfair and therefore overall being unjustified is well established having been identified by the Court of Appeal thirty five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* a judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer's right but "unjustifiable" by virtue of the way in which the matter was handled.

[85] Whilst the current approach to assessing dismissal is governed by the application of a statutory test set out in s 103A and s 4(1A) of the Act, it is to be noted that the Court of Appeal in the aforementioned case was also dealing with a situation involving a cleaner being furtively observed by her employer, then entrapped at an impromptu meeting with ‘evidence’ of her misrepresenting how much time she was actually working.<sup>8</sup>

### **Discrimination**

[86] Ms Minchington alluded to the decision being made on discriminatory grounds but Mr Cahill did not expand upon this in his submission and I find none have been made out in terms of s 104 of the Act.<sup>9</sup>

### **The disadvantage claim and breach of good faith**

[87] I find that the significant procedural deficiencies identified did also disadvantage Ms Minchington and Ms Lowe in the sense that they were denied a proper opportunity to participate in the somewhat abrupt disciplinary process that could have included both of them advancing mitigating factors.

[88] I have also found that the disciplinary process breached good faith requirements pursuant to s 4(1A)(c) of the Act in that NJ Gill Ltd did not provide sufficient relevant information prior to the disciplinary meeting or a fair opportunity for that information to be appraised and commented upon during the disciplinary meeting.

[89] Mr Cahill identified the good faith breach but did not seek a penalty for such, so none is appropriate.

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<sup>8</sup> *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IOUW* (1985) ERNZ Sel Cas 142; [1982] ACJ 663 (CA).

<sup>9</sup> Section 104 Employment Relations Act 2000 and also s 105 of same act for circumstances specifying qualifying grounds of discrimination.

## **Conclusion**

[90] Having made a finding of unjustified dismissal, disadvantage and breaches of good faith requirements solely on procedural grounds whilst rejecting disparity being established in a legal sense, I consider this to be one of those rare cases that it would be unconscionable to award compensatory remedies to the estate of Ms Lowe given that she was employed by NJ Gill Limited as a supervisor and owed them a duty of fidelity to report the serious time recording irregularities that she impliedly condoned and participated in. This was egregious misconduct.<sup>10</sup>

[91] I do however, consider that Ms Minchington is entitled to remedies as a result of my findings above and discuss below.

[92] This finding should not be taken as condoning the manner by which NJ Gill Ltd and the franchisor Paramount Services Limited approached both dismissals as that was significantly deficient.

## **Remedies**

### *Lost wages*

[93] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Minchington should I find that she has established a personal grievance and s 128(2) of the Act mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[94] Here I find Ms Minchington's lost remuneration was attributed to the personal grievance.

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<sup>10</sup> For discussion of cases involving egregious misconduct see *Emmerson v Northland District Health Board* [2019] NZEmpC 34 at [371] – [381].

[95] Ms Minchington gave evidence that she did not secure alternative employment until June 2018 as a health care assistant, a role she had previously undertaken. However, Ms Minchington gave little evidence of seeking work in the nine months between jobs despite indicating that she had a good reference from a previous employer and qualifications in health care work.

[96] Given the above and reflecting the circumstances of the dismissal, I consider overall justice is served by awarding Ms Minchington three months' lost wages in the amount of \$4,830 (gross).

*Compensation for hurt and humiliation*

[97] Ms Minchington gave evidence of the impact of the summary dismissal and the uncertainty it created at a difficult time, having to find immediate alternative employment and the upset it caused her observing the impact of the dismissal upon her mother who had worked all her life and was in declining health. However, it is evident that the upset was largely driven by a strong sense of outrage of the perceived unfairness of her co-workers being spared a similar sanction.

[98] Nevertheless, I am convinced that at the time, Ms Minchington suffered humiliation, loss of dignity and injury to feelings due to her former employer failing to adequately explain the disparity involved in dismissing her and the manner in which the dismissal was effected, including Mr Gill's failure to disclose that it was partially driven by concerns about Ms Minchington and her mother's work performance. Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which NJ Gill Limited effected this dismissal, I consider Ms Minchington's evidence only warrants a modest level of compensation in the sum of \$8,000 under s 123(1)(c)(i) of the Act.

## Contribution

[99] Section 124 of the Act states that I must consider the extent to which, if any, Ms Minchington's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>11</sup>.

[100] I find that Ms Minchington engaged in serious and blameworthy misconduct and when confronted with such did not show contrition or initially own up until her employer was 'put to proof' by her, and then even when evidence was presented establishing her culpability Ms Minchington insisted on focussing upon her co-workers actions.

[101] During the investigation Ms Minchington conceded that neither of her co-workers devised the scheme of clocking each other in to reduce attendance hours and although knowing it was wrong, her late Mother went along with it. I reasonably concluded that Ms Minchington instigated the scheme.

[102] Overall, I find Ms Minchington did significantly contribute to the situation giving rise to the personal grievance but I have balanced this up with my finding that NJ Gill Limited's approach was procedurally deficient. Ms Minchington cannot be blamed for the deficiencies in process that robbed her of the time for reflection and seeking of advice which may have led to her to adopting a different or less belligerent approach to the disciplinary meeting. The decision to dismiss was hasty but understandable from NJ Gill Limited's perspective.

[103] On balance, given the significant contribution to her own downfall, I find a 40% reduction in Ms Minchington's remedies (compensation and lost wages) is warranted and is in line with cases where a significantly high reduction is warranted.

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<sup>11</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## **Summary**

[104] **I have found that:**

- a. The late Vera Lowe and Michelle Minchington were unjustifiably dismissed and disadvantaged by the manner in which their employment with NJ Gill Limited was terminated.**
- b. NJ Gill Limited failed to adhere to good faith obligations in effecting the dismissals.**
- c. In the circumstances no remedies are awarded to the Estate of Ms Lowe but NJ Gill limited must pay Ms Minchington the sums below:**
  - (i) \$2,898.00 gross lost wages;**
  - (ii) \$4,800 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.**

## **Costs**

[105] Costs are at the discretion of the Authority and here Ms Minchington was only partially successful in her claims and has not succeeded in obtaining significant compensatory remedies in an investigation meeting that took half a day. In the circumstances, I find costs should lie where they fall and I decline to make any costs award to either party. I however consider Ms Minchington should recover the cost of her application fee in the amount of \$71.56.

**David G Beck**  
**Member of the Employment Relations Authority**