

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 12  
3075652

BETWEEN                      IVAN ILIN  
   Applicant

AND                              GOODMAN FIELDER NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:           Philip Cheyne

Representatives:                Peter Cahill, advocate for the Applicant  
   Liz Coats, counsel for the Respondent

Investigation Meeting:        29 October 2020 at Christchurch

Submissions Received:        6 November 2020 from the Applicant  
   17 November 2020 from the Respondent

Date of Determination:        15 January 2021

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**DETERMINATION OF THE AUTHORITY**

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**A. The claims by Ivan Ilin are dismissed.**

**B. Costs are reserved, subject to the timetable set out below.**

**Employment relationship problem**

[1] Goodman Fielder New Zealand Limited operates a milk processing facility in Christchurch called Meadow Fresh. Ivan Ilin worked there as an operator from about 2010 until he was summarily dismissed, following an incident on 19 March 2019.

[2] In a letter dated 10 April 2019, Mr Ilin's personal grievance claim of unjustifiable dismissal was raised. In September 2019, Mr Ilin's employment relationship problem was lodged with the Authority. Despite mediation, the problem was not resolved. This determination resolves Mr Ilin's employment relationship problem.

[3] In his statement of problem, Mr Ilin says that shortly after the Mosque shootings in Christchurch, when asked what he thought of the shootings, he was "clowning around" and drew a swastika on his overalls saying "so scary". Later, he changed out of his overalls when told to by his team leader. Someone complained about his overalls, so he was called to see his manager. Mr Ilin explained he was just "joking around and meant nothing by it" when asked to explain what it meant. He asked who had complained so he could apologise. Mr Ilin says he did apologise. Mr Ilin says that no-one in the workforce was offended by his "silly mistake".

[4] Mr Ilin says that on 29 March he had several meetings and was told "they had decided to let him go". Mr Ilin says that Goodman Fielder did not take time to consider his explanation before dismissing him that day. Mr Ilin suggests that Goodman Fielder used the 19 March incident to dismiss him, instead of incurring the cost of making him redundant, which would have arisen in April 2019 due to process changes.

[5] Based on this account of the facts, Mr Ilin seeks compensation for lost earnings, compensation for humiliation, lost dignity and injured feelings, a penalty for breach of good faith and costs.

[6] Goodman Fielder says it justifiably dismissed Mr Ilin. It met with him on 25 March, then again on 29 March. After considering Mr Ilin's explanation, Goodman Fielder decided to summarily dismiss Mr Ilin for serious misconduct.

[7] I will first outline in more detail steps taken by Goodman Fielder, before considering the statutory test for justification and assessing whether Goodman Fielder failed to comply with its good faith obligations.

### **Steps taken by Goodman Fielder**

[8] Vicki Wishart is the Milk Station Manager at the Meadow Fresh site. On 19 March 2019 Ms Wishart was told by a team leader that there had been an incident between Mr Ilin

and another employee earlier that day which involved Mr Ilin drawing a swastika on his company overalls in front of the employee. The team leader had learnt of the incident from the other employee. The team leader went to see Mr Ilin and saw that he was wearing the overalls but had a jacket on which covered the drawing. The team leader told Mr Ilin to change out of the overalls. When Ms Wishart was told about this by the team leader, she asked him to collect the overalls from the laundry bin, which he did. A little later, the team leader spoke again to the other employee who said that Mr Ilin had come up to him, said the words “White Supremacy” and drew the swastika on the overalls.

[9] The team leader described these events in an email to Melanie Pettigrew and Ms Wishart that afternoon. Ms Pettigrew provides HR support to Goodman Fielder. There is no reason to doubt the evidence of the team leader and his description in the email as to what he was told and did.

[10] When the team leader retrieved the white overalls they had a swastika symbol drawn on the upper-chest left side, while on the right side were three groups of four short horizontal lines with a fifth line drawn diagonally across the four lines.

[11] The team leader reviewed factory CCTV footage. However, the incident had occurred out of camera view.

[12] Ms Wishart discussed the matter with Ms Pettigrew and they agreed that they should investigate the incident. Bryan Rooney is the Site Manager at Meadow Fresh Christchurch. He was told about the matter and he supported the decision to investigate the incident.

[13] A letter was drafted in Ms Wishart’s name and given to Mr Ilin. Mr Ilin signed to confirm he had received it on 20 March. The letter conveyed the allegation:

Misuse of Company property in that you, on 19 March 2019, allegedly drew a swastika and a tally on overalls which belong to the Company. This alleged action is unacceptable given that the swastika is known as a Nazi symbol is stigmatized by association with ideas of racism and antisemitism.

[14] The letter invited Mr Ilin to a meeting with Ms Wishart and Ms Pettigrew on 25 March. It included a copy of the Company code of conduct policy and Mr Ilin’s employment agreement. The letter stated that the meeting was not disciplinary action, but that a formal disciplinary process might follow. Mr Ilin was asked not to discuss the matter

with others but was advised that he could discuss it with his representative who could attend the meeting with him if he wished.

[15] At the meeting on 25 March, Mr Ilin was assisted by his union representative. Ms Pettigrew made handwritten notes during the meeting and later typed some notes. Ms Wishart referred to the purpose of the meeting and said that Mr Ilin's actions were unacceptable and had offended several people. Mr Ilin asked who and Ms Wishart mentioned several people, including herself. Mr Ilin said it was an "ill-timed joke", that he was not the most sensitive person and asked what the main concern was? Ms Wishart said that Mr Ilin's actions "reeks of 100% approval of what happened on the previous Friday". Mr Ilin said that he did not share those views. Mr Ilin said he could not recall what time he drew the swastika on the overalls or who he had spoken to. He acknowledged that the team leader had asked him to change out of the overalls in the afternoon. Mr Ilin was asked to explain the tally marks and said it was the number of broken crates. The meeting was adjourned.

[16] Ms Wishart and Ms Pettigrew spoke directly to the other employee. He said that Mr Ilin used the words "White Supremacy" when he drew the swastika on the overalls, that Mr Ilin's actions made him feel "pretty uncomfortable", that he did not think to report it immediately, but that he thought about it during the day and felt it "wasn't right" so spoke to the team leader. He agreed that his account could be reported to Mr Ilin.

[17] Ms Wishart and Ms Pettigrew reconvened the meeting with Mr Ilin and his representative. Ms Wishart said that the other employee had told them that Mr Ilin had said "White Supremacy" as he drew the swastika on the overalls. Mr Ilin said "that sounded right". Ms Wishart told Mr Ilin that they would proceed to a disciplinary process with a meeting to be held on Friday 29 March.

[18] Mr Ilin said in evidence, referring to the 25 March meeting, that he was called upstairs but had "no idea" when managers asked him if he knew what he was there for. I do not accept this evidence. The letter of 20 March properly explained the purpose of the 25 March meeting and Mr Ilin arranged beforehand for the union delegate to attend the meeting.

[19] Following the 25 March meeting Ms Wishart wrote to Mr Ilin that same day under the heading "RE: Alleged Serious Misconduct". Ms Wishart confirmed arrangements for the 29 March meeting, repeated the allegation from the 19 March letter about misuse of company

property and cautioned that it was considered serious and that dismissal was a possible outcome, depending on Mr Ilin's response. The letter included a copy of the photograph of the overalls.

[20] On 28 March Mr Rooney spoke to a Constable at Christchurch Central Police Station. His evidence is that this was partly because of Mr Ilin's actions on 19 March but also because Mr Ilin was known to have brought his own knives to work previously. Mr Rooney's evidence is that they were unaware at that time that Mr Ilin had a reputation for keeping knuckledusters at work. The Constable recorded Mr Rooney's information, told him that it did not appear to be a Police issue but it would be reviewed by a more senior officer and police would be in contact if they required anything further. Goodman Fielder was contacted by Police a week or so later, by which time Mr Ilin had been dismissed. There is no reason to doubt Mr Rooney's evidence just described, so I accept it.

[21] Mr Rooney was present with Ms Wishart and Ms Pettigrew for the 29 March meeting. Mr Ilin and the union delegate attended. Ms Pettigrew took notes. Mr Ilin was asked and agreed to Mr Rooney's presence, as his attendance had not been foreshadowed in the 25 March letter. Although Mr Ilin confirmed that he understood the purpose of the meeting, Ms Wishart read out the allegation. She referred to the earlier meeting when Mr Ilin had told them that the tally marks recorded broken crates and accepted that he had said "White Supremacy" when he had drawn the swastika on his overalls. Mr Ilin said and did this when the other employee asked him how he was, following the shootings in Christchurch several days earlier. Ms Wishart said the actions breached the code of conduct, the behaviour was totally unacceptable and could not be condoned on the site. Mr Ilin was asked if he had anything to add.

[22] Mr Ilin responded to the mention of racism in the allegation. His wife is Chinese and Mr Ilin showed a picture of her. He mentioned that he had friends from other ethnic backgrounds. Mr Ilin said his actions were an unsuccessful attempt at humour. Ms Wishart asked Mr Ilin if he had actually thought about the people who had been affected? Mr Ilin said he had not and that he was "being silly". Ms Pettigrew referred to sections of the code of conduct. Mr Ilin acknowledged he was aware of the code but not in detail. He said he had no idea of the impact of his behaviour on others. Mr Ilin's representative said that Mr Ilin did not have discrimination or white supremacy "ideals", was remorseful and that the union

would support an outcome up to a final written warning with a requirement for a written apology and training to correct behaviour. The meeting was then adjourned for Goodman Fielder to consider what had been said.

[23] The meeting reconvened about 45 minutes later. Ms Wishart said that Goodman Fielder's preliminary decision was to summarily dismiss Mr Ilin. While Mr Ilin said he did not support white supremacy, his actions and words contradicted that. Ms Wishart said that Mr Ilin had used company property as a platform to display a symbol known worldwide as a symbol of antisemitism and racism. His words "White Supremacy" and action drawing the swastika on the overalls concerned his work colleague, who reported it. Although Mr Ilin said that his actions were in jest, he had acknowledged they were against the code of conduct. Ms Wishart said that Mr Ilin could take some time to consider and respond to this preliminary decision. The meeting then adjourned.

[24] A statement was prepared during the adjournment, which Mr Ilin read when the meeting resumed. It says that Mr Ilin was "extremely remorseful" for his actions and the potential offence and harm to co-workers and the company. Mr Ilin accepted his actions were an ill-judged and ill-timed attempt at humour and parody. The statement says that Mr Ilin owned up at the earliest opportunity, even when the co-worker's account could be regarded as ambiguous. The statement refers to Mr Ilin's nearly 10 year work history, during which he had never exhibited racial or other discriminatory behaviour, at and outside the workplace. It says that Mr Ilin could provide statements from others attesting to this. It says that Mr Ilin considers that racism and discrimination have no place at the workplace, that he was approached for his views on the event (the Christchurch shootings) and that he does not support the atrocities of 15 March or the associated ideology. The statement acknowledges that Mr Ilin's actions are "punishable", and refers to a stage 3 warning (a final written warning) under the collective agreement as an outcome which would be accepted. Goodman Fielder was also given a copy of the statement. Goodman Fielder adjourned the meeting to consider what had been said.

[25] The meeting continued about an hour later. Ms Wishart said that it was still the company's view that the account of events on 19 March given by the co-worker was accurate. Ms Wishart said that Mr Ilin had confirmed the account during the 25 March meeting. She said that regardless of what Mr Ilin said were his views on racism and discrimination, his

actions and words were not acceptable. Ms Wishart said that the final decision was summary dismissal. The meeting then ended.

[26] Ms Wishart wrote to Mr Ilin on 1 April confirming the outcome of the meeting. The letter referred to the allegation set out in the 25 March letter. It summarised Mr Ilin's explanation from the disciplinary meeting and paraphrased the content of the statement given by Mr Ilin during the meeting. It then says:

After fully considering all the circumstances, including the allegation and your response, we made the decision that the appropriate outcome is to terminate your employment on the grounds of serious misconduct, effective immediately.

We have considered a lesser outcome and decided that it is not appropriate because of the following:

1. You used Company property as a platform to display a symbol which is known worldwide as a symbol of anti-Semitism and racism. You also used the words "white supremacy" as you drew the symbol.
2. We maintain that the statement from your co-worker accurately reflects the events as they occurred on the day. You confirmed this at the investigation meeting on 25 March 2019.
3. Regardless of what you maintain your views are on racism and discrimination, your actions and the words you use are totally unacceptable and are against Company Policy and values.

Ivan, it is unfortunate that we no longer have the trust and confidence in you as an employee. Your final pay, along with any leave entitlements will be made on the first available pay run.

### **Post dismissal events**

[27] Several events followed the dismissal. It is convenient to outline them now.

[28] Ms Wishart received a follow-up call from Police. Police were investigating people of interest in advance of the memorial service to be held in Hagley Park. A jobsheet was compiled by Police after this call. It includes a description of the 19 March incident. It states that Mr Ilin claimed the reason for the tally marks was to keep a count of push-ups he does at work. If that accurately records what Ms Wishart told the Police officer, it differs from what Mr Ilin is noted as giving as an explanation during the investigation meeting. Whichever explanation Mr Ilin gave, it was accepted by Goodman Fielder at the time. Goodman Fielder

did not rely on any adverse inference in relation to the tally marks. It is not necessary to make any further findings on that point.

[29] The jobsheet records that Mr Ilin had been spoken to about making knives at work, sharpening blades and fashioning handles. Mr Ilin was told never to bring the blades or handles to work again. This was in early 2018. Goodman Fielder did not rely on this issue as part of its decision to dismiss Mr Ilin. It is not necessary to make any further findings on the issue.

[30] A Meadow Fresh employee through a voluntary organisation was part of the volunteer security deployed at the memorial service. In that capacity, he received photos compiled by Police of people to be aware of and keep an eye out for. A photo of Mr Ilin was included. It appears that Police interest in Mr Ilin came from Mr Rooney's report on 28 March. The employee recognised Mr Ilin in the photo. At work after the memorial service, the employee asked their manager if Mr Ilin was still at Meadow Fresh. News of the 19 March incident would have circulated amongst other employees, but not necessarily the outcome for Mr Ilin. The manager confirmed that Mr Ilin was not still at Meadow Fresh.

[31] Mr Rooney's evidence is that neither he, Ms Wishart or Ms Pettigrew knew that Police had included Mr Ilin as a subject for security briefing until after the dismissal. There is no reason to doubt this evidence, so I accept it.

[32] Mr Ilin started working for one of Meadow Fresh's distributors in about June 2019. That resulted in Mr Ilin entering the Meadow Fresh site to collect milk. Mr Ilin's presence on the site was soon reported to Ms Wishart. Ms Wishart spoke to Goodman Fielder's distribution manager who in turn advised the distributor that Mr Ilin was not permitted on the Meadow Fresh site. The distributor knew Ms Wishart because she had previously managed distributors, so he rang Ms Wishart. Ms Wishart told the distributor that Mr Ilin was not permitted on the Meadow Fresh site. Mr Ilin's evidence is that his new employer had to lay him off and employ someone else to do the run. The issue is relevant to the assessment of remedies so I will return to it if necessary.

[33] Ms Wishart was told that other employees said they saw Mr Ilin carrying knuckledusters, polishing them and showing them at work. This played no part in Goodman

Fielder's decision to dismiss Mr Ilin. It is not necessary to say anything more about this point.

**Did Goodman Fielder sufficiently investigate the allegations before the dismissal?**

[34] Goodman Fielder is a large private sector employer. It has resources, including dedicated human resource managers, to enable it to fully investigate the allegations about Mr Ilin which caused it concern. I also note clause 47.6 of the employment agreement which says that "A complete investigation will be conducted to ensure all information surrounding the particular set of circumstances has been obtained".

[35] When the team leader reported the incident, Goodman Fielder retrieved the overalls. Goodman Fielder spoke to Mr Ilin and to the other worker, the only other person directly involved. There was no camera footage to assist. Goodman Fielder met with Mr Ilin initially to investigate the claim. Goodman Fielder met again with Mr Ilin in a disciplinary meeting.

[36] Mr Ilin cannot say that Goodman Fielder did not fully investigate. His concern is that Goodman Fielder dismissed him, despite his explanation.

[37] I find that Goodman Fielder sufficiently investigated the allegations against Mr Ilin before dismissing him.

**Did Goodman Fielder raise its concerns before the dismissal?**

[38] As explained, Mr Rooney spoke to Police before the disciplinary meeting. I accept that Mr Rooney did so out of a sense of caution given Mr Ilin's actions, the history of him having knives at work and the heightened security situation in Christchurch. Mr Rooney's contact with Police was not reported to Mr Ilin. However, to the extent the above factors were relevant to Ms Wishart's decision to dismiss Mr Ilin, they were properly raised with him before Goodman Fielder's decision.

[39] There is a submission for Mr Ilin that he was told that there had been a "complaint" but was not provided with a copy of the statement made for him and his representative to consider before he had to respond.

[40] There was an email from the team leader to Ms Pettigrew and Ms Wishart at 3.38pm on 19 March in which the team leader set out what he had been told by the other employee

about the incident with Mr Ilin, the team leader's later exchange with Mr Ilin about changing out of the overalls, the request to the team leader to retrieve the overalls from the laundry, and his second exchange with the other worker that Mr Ilin had said "White Supremacy" when drawing the swastika on his overalls. A copy of this email was not given to Mr Ilin or his representative before Goodman Fielder dismissed Mr Ilin.

[41] Mr Ilin knew of the team leader's involvement in bringing the 19 March incident to the attention of Ms Wishart and Ms Pettigrew. The substance of the team leader's account of what the other employee claimed had occurred was all raised directly with Mr Ilin in the letters and meetings. In particular, Ms Wishart and Ms Pettigrew adjourned the first meeting and went and spoke directly to the other worker. They confirmed with him that it was acceptable for them to identify him and relay his account to Mr Ilin. During the second part of the 20 March meeting, Ms Wishart did exactly that. She said that the fellow worker had told them that Mr Ilin had said "White Supremacy" as he drew the swastika on the overalls. Mr Ilin said "that sounded right". During the disciplinary process, Mr Ilin did not dispute that he had done this. He characterised his response as "owned up to my actions at the earliest possible opportunity" and "I sought to clarify the position and own up to what had happened and what my actions + words were".

[42] Ideally, Goodman Fielder would have included a copy of the 19 March email with either the 20 March or 25 March letters, and would have reduced the other worker's description of the incident to writing before the disciplinary meeting. However, Mr Ilin in evidence does not dispute the description of his interaction with the team leader and accepts that Ms Wishart outlined the other worker's account. I find the minor defect in Goodman Fielder's process did not result in any unfairness to Mr Ilin.

[43] The 19 and 25 March letters specified the allegation as "misuse of company property" by Mr Ilin's action, which was unacceptable. A photo of the overalls, the code of conduct and the employment agreement were provided to Mr Ilin.

[44] There is a submission for Mr Ilin that he and the union representative were misled as they understood that Mr Ilin was being accused of "racism" and "anti-Semitism". However, the concern was not that Mr Ilin was racist or anti-Semitic, but that he drew on company property a symbol known for its association with ideas of racism and anti-Semitism.

[45] I am also referred to Mr Rooney's evidence when he referred to the part of the Code which includes as serious misconduct "Theft or attempted theft or, wilful damage to, property belonging to Goodman Fielder..." It is said that Mr Ilin was misled as a result.

[46] While Mr Rooney in evidence referred to that section of the code, I do not accept that Mr Ilin was misled. It was clear during the investigation and disciplinary meetings that actual damage to the overalls was not the substantive concern. Goodman Fielder's concern was his use of company property to display a symbol of racism and anti-Semitism. Ms Wishart was concerned that this was Mr Ilin showing approval for the Mosque shootings several days earlier. Ms Wishart then heard that Mr Ilin said "White Supremacy" while drawing the swastika, which reinforced that view. Goodman Fielder's concern was that Mr Ilin's conduct was or could be offensive to other workers and harmful to the company's image.

[47] The written response provided for Mr Ilin shows that he understood Goodman Fielder's concern because it specifically refers to him being "extremely remorseful" for his actions and the "potential offence + harm that may have come to fellow co-workers as well as the image of the company".

[48] The 1 April letter partly summarises Mr Ilin's response to the disciplinary concerns as "You stated that you were aware and understood the content of the GF Code of Conduct, in particular, ethical standards, respect and courtesy for each individual etc". I accept that this letter accurately records Goodman Fielder's concerns and Mr Ilin's response to them during the two meetings before the dismissal.

[49] Given the above, I find that Goodman Fielder did raise its concerns with Mr Ilin before dismissing him.

**Did Goodman Fielder give Mr Ilin a reasonable opportunity to respond before dismissing him?**

[50] Goodman Fielder in letters to and by meeting with Mr Ilin properly disclosed its concerns to Mr Ilin.

[51] The meeting processes on 25 March and 29 March demonstrate that Mr Ilin had a reasonable opportunity to respond to the concerns. That included several adjournments and an opportunity to respond to the preliminary decision before Ms Wishart dismissed Mr Ilin.

[52] I find that Goodman Fielder gave Mr Ilin a reasonable opportunity to respond before dismissing him.

**Did Goodman Fielder genuinely consider Mr Ilin's explanation before dismissing him?**

[53] Ms Wishart decided to dismiss Mr Ilin but consulted with both Ms Pettigrew and Mr Rooney.

[54] Ms Wishart's evidence is that Mr Ilin seemed not to appreciate the seriousness of his actions and did not apologise to her and Ms Pettigrew during the 25 March meeting. Ms Pettigrew's evidence is also that Mr Ilin showed no remorse and did not apologise then. Goodman Fielder notes made after the meeting record "IL did not show any remorse or apologised for his actions". However, referring to the 25 March meeting, Mr Ilin's evidence is that he said he was more than happy to apologise to the complainant or anyone else who felt offended. He says he apologised to Ms Wishart when she told him that she was offended by his actions. I consider the typed note as a reliable account of Mr Ilin's response during the 25 March meeting. I also prefer the evidence of Ms Wishart and Ms Pettigrew about Mr Ilin's response at the 25 March meeting. I find that Mr Ilin did not apologise or show remorse on 25 March.

[55] During the disciplinary meeting, Mr Ilin maintained that his actions were "silly" and were "in jest". Mr Ilin's representative said that Mr Ilin was remorseful and that the union would support a final written warning, a written apology and behavioural training. Ms Pettigrew's hand-written and typed notes record this being said immediately before the first adjournment. I find the notes to be an accurate record. Ms Wishart's evidence is that Mr Ilin's response changed after she indicated her preliminary view was dismissal. After an adjournment, Mr Ilin in a prepared statement stated he was "extremely remorseful" for his "ill-judged attempt at humour + parody" and "potential offence + harm".

[56] I accept Ms Wishart's evidence that Mr Ilin did not show any remorse for his actions until after she proposed dismissal as a preliminary decision. It reflects the notes. It helps to establish that Ms Wishart genuinely considered but was not persuaded by Mr Ilin's explanation in relation to the allegations.

[57] Mr Ilin in evidence attempts to reinforce his explanation that his actions and words were “in jest”. He says that that:

To show my lack of fear I made a rather unsuccessful joke. Drew a swastika on my overalls, made a scary face and said something along the lines of “white supremacy scary”.

[58] Justification for Goodman Fielder’s decision to dismiss Mr Ilin must be assessed based on Mr Ilin’s explanation at the time. The other employee had described Mr Ilin’s conduct as “dark humour”. Ms Wishart and Ms Pettigrew repeated that to Mr Ilin on 25 March. I accept the evidence of Ms Wishart, Ms Pettigrew and Mr Rooney that in their exchanges with him before the dismissal, Mr Ilin admitted that he had said “White Supremacy” as he drew the swastika on the overalls. Mr Ilin did not refer in his explanation to making a “scary face” and saying “white supremacy scary”. Goodman Fielder made its decision based on Mr Ilin’s explanation that this was an “ill-judged attempt at humour + parody”.

[59] As part of his explanation, Mr Ilin also said that he was not racist, that he interacted at and away from work with a diverse range of people and had never discriminated against any person.

[60] The evidence of Ms Wishart, reinforced by the letter of 1 April, is that she understood Mr Ilin’s explanation was that his words and actions were an unsuccessful attempt at humour. She also understood what Mr Ilin maintained about his views on racism and discrimination. Despite this, Ms Wishart decided that Mr Ilin should be dismissed for the reasons as set out in the 1 April letter.

[61] I find that Ms Wishart genuinely considered but did not accept Mr Ilin’s explanations.

### **Did Goodman Fielder act in a procedurally fair manner?**

[62] There are issues raised by and for Mr Ilin not directly canvassed above.

[63] I am referred to *Walker v Boehringer Ingelheim (NZ) Limited*<sup>1</sup> and a recent determination of the Authority which cites that case. In *Walker*, the Court considered whether bias arose because the person who investigated and decided to dismiss the employee was directly involved in the complaint made against the employee. The submission is that

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<sup>1</sup> EmpC Auckland AEC119/95, 15 November 1995.

Ms Wishart should not have been involved as the decision-maker because she told Mr Ilin that she was offended by his actions, when he asked early during the 25 March meeting who he had offended.

[64] It is likely that Ms Wishart's sense of being offended by Mr Ilin's actions was shared by every person with authority to investigate the incident and deal with the disciplinary process that followed. Ms Wishart, at an early stage, by including herself amongst those who were offended, gave Mr Ilin an opportunity to respond to a widely held sense of offence. No predetermination or procedural unfairness arose.

[65] There is an argument for Mr Ilin that Goodman Fielder used the incident as an excuse to dismiss him, when upcoming business changes would have required a reduction in its workforce. Mr Ilin says that he would have been made redundant, so Goodman Fielder was motivated to avoid the cost of a redundancy payment to him. Ms Wishart's evidence is that Goodman Fielder was short-staffed at the time. There is no reason to doubt this evidence, which I accept. I also accept her evidence that a restructure involving Mr Ilin's role was not likely and in any event Goodman Fielder was required by the terms of the collective agreement to apply a "last on-first off" approach when selecting employees to be made redundant. There is no evidence to support Mr Ilin's argument, so I do not accept it.

[66] Mr Ilin says that extra staff were rostered to work on the day he was dismissed, suggesting an element of predetermination for the dismissal. Ms Wishart produced the relevant roster. I accept her evidence that no additional staff were rostered on that day. It follows that the roster does not indicate any predetermination.

[67] For Mr Ilin, there is a submission based on Ms Wishart's evidence that she found two previous warnings on Mr Ilin's personal records. The warnings expired in March 2015 and December 2015, under the applicable rules, so the submission is they should have been expunged from the records. The argument is that the warnings must have been considered as part of the dismissal decision, given that they were included in the documents before the Authority.

[68] Ms Wishart's evidence is that she was unaware that Mr Ilin had previously been involved in a disciplinary process. Ms Pettigrew's evidence is that she reviewed Mr Ilin's file in preparation for the investigation meeting and became aware of the earlier warnings. There

is no reason to doubt Ms Wishart's and Ms Pettigrew's evidence, which I accept. The earlier warnings played no part in Ms Wishart's decision to dismiss Mr Ilin.

[69] Mr Ilin says that "several years ago" a "real white supremacist" who worked at Meadow Fresh came to work one day wearing a T-Shirt with the slogan "White Pride Worldwide". Meadow Fresh took no disciplinary action against him. Mr Ilin contrasts that situation with his own. Ms Pettigrew's and Ms Wishart's evidence is that they have no knowledge of this incident. Ms Pettigrew says that no one who worked in the department over the past several years has any knowledge of it. Given the likelihood that reports of such an incident would have been repeated widely around the site, Ms Pettigrew doubts the veracity of Mr Ilin's evidence. Mr Ilin's evidence on this point lack detail and is unsupported by any other evidence. Mr Ilin was not treated differently to others who committed similar breaches of their obligations to Goodman Fielder.

[70] Some of the above matters arise from the statement of evidence lodged by Mr Ilin in reply to Goodman Fielder's witness statements. I have considered the statement and have set out and dealt with that evidence as necessary. The statement includes other allegations by Mr Ilin. It is not necessary to refer to those allegations or what prompted them as they do not relate to the issues in these proceedings.

**Were Goodman Fielder's actions and how it acted those of a fair and reasonable employer?**

[71] A fair and reasonable employer was entitled to investigate the report that an employee had drawn a swastika on his overalls, especially in light of the very recent Mosque killings and the security situation in Christchurch. A fair and reasonable employer could have treated the incident as a disciplinary matter, especially having been told that the employee had said "White Supremacy" while drawing the swastika. Mr Ilin acknowledged that Goodman Fielder could impose a disciplinary outcome.

[72] A fair and reasonable employer could have concluded that the employee's actions and words were totally unacceptable and contrary to the Company's policy and values. That employer could have determined that the actions and words were so serious as to amount to serious misconduct, so that summary dismissal was an available option.

[73] I find Goodman Fielder's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances. Mr Ilin does not have a personal grievance against his former employer. The claim will be dismissed.

### **Penalty claim**

[74] The specific failings said to entitle Mr Ilin to recover a penalty for a breach of good faith were not identified.

[75] In any event, it follows from my determination that Mr Ilin was not unjustifiably dismissed, that Goodman Fielder complied with the duty of good faith it owed to Mr Ilin.

[76] The penalty claim will be dismissed.

### **Costs**

[77] I am asked to reserve costs, which I will do, subject to the following.

[78] Any claim for costs should be made by lodging supporting submissions within 28 days from the date of this determination. The other party may lodge submissions in reply within a further 14 days. I will then determine costs.

### **Non-publication order**

[79] The fellow worker who witnessed Mr Ilin's actions on 19 March, then reported his concern to the team leader and who was spoken to by Ms Wishart and Ms Pettigrew was not involved in these proceedings. There is some evidence indicating he became concerned about his involvement. I am asked to make a non-publication order preventing the publication of his name. No public interest is served by allowing the name of this person to be publicised. I order that the name or identifying details of this person must not be published.

Philip Cheyne  
Member of the Employment Relations Authority