

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 574  
3110512

BETWEEN                      DEWALD VAN DER BERG  
Applicant

AND                              JAMES HARDIE NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:      Sarah Blick

Representatives:            Robert Morgan, advocate for the applicant  
Charlotte Parkhill and Charlotte Evans, counsel for the  
respondent

Investigation Meeting:      4 and 5 August 2022 at Auckland

Submissions received:      At the investigation meeting

Determination:              4 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1]      The applicant, Dewald van der Berg, worked for the respondent, James Hardie New Zealand Limited (JHNZ) from 2015 to 2020. He was dismissed on the grounds he breached JHNZ's health and safety policies and procedures. Mr van der Berg says he has a personal grievance for unjustified dismissal. Mr van der Berg claims compensation for hurt and humiliation in relation to both grievances. He also seeks reimbursement of lost wages.

[2]      JHNZ says its actions were justified and Mr van der Berg's claims should be dismissed and no remedies awarded.

### **What has the Authority's process been?**

[3] Mr van der Berg provided a witness statement for himself and Gavin Stone, a former Senior Engineer at JHNZ's Penrose Manufacturing Plant (Plant).

[4] JHNZ provided witness statements for:

- a. Brian Billingsley, its former Plant Manager;
- b. Avinash Haridayil, former Environmental Health and Safety Manager;
- c. Jake Barker, former People and Performance Business Partner.

[5] All witnesses attended the investigation meeting in person except Mr Billingsley who attended by audio visual link (Zoom video conferencing). All witnesses answered questions under affirmation from the Authority and the representatives. The representatives gave helpful closing submissions at the conclusion of the evidence at the investigation meeting.

[6] As permitted by s 174E of the Employment Relations Act (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **What are the issues?**

[7] The following are the issues for investigation and determination:

- a. Was Mr van der Berg unjustifiably dismissed from his employment?
- b. If JHNZ's actions were not justified, should remedies be awarded and are there any issues of contribution?
- c. Should either party contribute to the costs of representation of the other party?

### **What happened?**

#### *Parties*

[8] JHNZ is incorporated in New Zealand with a global presence as a building product manufacturer. JHNZ operated the Plant which manufactured fibre cement

cladding for residential and commercial clients. Early in 2020, JHNZ announced a proposed change to its New Zealand business and as a result the Plant was closed and shifted manufacturing out of New Zealand. The closure was implemented over 2020 and was completed some months after the termination of Mr van der Berg's employment.

[9] Prior to his employment with JHNZ, Mr van der Berg worked as an engineer overseas from 1994. After his arrival in New Zealand he was employed by JHNZ from 30 November 2015 as a Shift Fitter. In November 2018 he was promoted to the position of Maintenance Supervisor.

*Employment agreement and health and safety policies*

[10] Mr van der Berg commenced employment with JHNZ on 21 November 2015. The parties entered into an individual employment agreement on 28 November 2018. Mr van der Berg's terms and conditions of his employment included the following:

- a. complying with all occupational health, safety and environment legislation and with JHNZ's environment, health and safety policies and procedures and any lawful directions issued by JHNZ in relation to health and safety matters;
- b. a requirement to take all practicable steps to ensure his fitness for work and safety and the safety of others in the workplace;
- c. assisting JHNZ to reduce, minimise and monitor hazards.

[11] Clause 37.4 of the agreement provided:

Any breach or failure to comply with James Hardie's health and safety rules will be treated very seriously by the Company and could result in disciplinary action being taken against the Employee which could include termination of employment.

[12] Clause 38 of the agreement incorporated JHNZ'S company rules, policies and procedures.

[13] JHNZ had a document in place entitled "Minimum Behavioural Standards for Penrose" which included the following statement:

While present at the James Hardie Penrose site, it is unacceptable to bypass established safety barriers, guarding and interlocks and safety procedures and that doing so may lead to disciplinary action which may include instant dismissal

[14] JHNZ also had an “Asia Pacific Safety Pledge” (‘Zero Harm Pledge’) which included a commitment to not put productivity ahead of safety or enter machinery without locking and testing isolations. On 9 June 2017 Mr Van Der Berg signed the Zero Harm Pledge.

[15] JHNZ says the Zero Harm Pledge was displayed on posters throughout its Penrose plant and is referred to daily as part of the plant meetings. Mr van der Berg acknowledges he referred to the Zero Harm Pledge at daily toolbox meetings he held with employees.

[16] The position description at Schedule 2 of the agreement stated Ms Van Der Berg was to:

- a. comply with all JHNZ policies and procedures;
- b. align activities with the JHNZ’s Vision, Mission and Values;
- c. undertake all maintenance work in a planned, safe and efficient manner;
- d. work in alignment with the JHNZ’s Zero Harm Pledge and workplace safety requirements;
- e. act as a safety leader at all times and ensure that he and others performed their work safely.

#### *Health and safety training*

[17] Mr van der Berg acknowledges receiving refresher training, including “Worker Induction” training in 2019 which outlined JHNZ’s approach to Zero Harm and its systems for managing hazards and risks within its sites. The training materials outlined JHNZ’s two systems for managing critical risk – standard operating procedures for normal work duties, and clearance to work (CTW) for non-standard or non-routine work. The materials also describe how a completed general CTW is a “contract” between the permit issuers and permit receivers that provides a record of steps to ensure work is carried out in accordance with JHNZ’s commitment to Zero Harm. At the investigation meeting, Mr van der Berg accepted a CTW was a contract between the permit issuer and receiver. The materials further state:

- A CTW will focus on areas of Critical Risk but will seek to identify all hazards relating to a specific task.
- As part of the CTW process, workers must only complete work for which they are given clearance. Any changes in job scope needs to be discussed with an Authorised Person and specific clearance given for specific work.

[18] Mr van der Berg also successfully completed a CTW refresher training written assessment which, among the questions included, asked “*If the scope of work changes, what should the recipient do?*” Mr van der Berg answered that question by choosing the answer “*STOP. Go and see the AP [Authorised Person] to have the CTW amended, suspended, or re-issued.*”

[19] Mr van der Berg also attended lockout and isolation theory training in 2020 which explained isolation principles and LOTO procedures. He also successfully completed a written assessment in relation to that training.

#### *Sheet scrap conveyor machine*

[20] The Plant operated a sheet scrap conveyor machine (the machine). A conveyor belt ran under the main machine that was forming material, and any excess material that fell off landed on the conveyor and was moved to a machine that recycled it. The conveyor was guarded on every side except at the back, which is where operators required access to the conveyor as they rolled up scrap material and tossed it on to the belt. JHNZ says when the machine operated in accordance with normal operations, it presented a low risk to workers as everything happened outside of the guarding and well outside any zone that presented risk.

[21] An employee had previously been killed at the Plant in 2009 when they were pulled into the machine when the conveyor had not been isolated and where the lock out, tag out procedure (LOTO) had not been utilised. This resulted in the employee suffering fatal crush injuries. JHNZ says this accident was well known to employees at JHNZ and was known to Mr van der Berg, which he acknowledges. JHNZ says strict safety protocols were put in place to protect employees working on the machine following this incident.

[22] JHNZ had a maintenance day at the Plant once a week which involved carrying out maintenance on the heavy machinery, otherwise known as a “down day”. During the down day, after disconnecting and locking out the conveyor, an operator would

climb into the conveyor and undertake any necessary maintenance and cleaning. On 21 May 2020 (a down day), an operator was cleaning the machine. This involved climbing over a vertical cross bar and onto a metal guard plate which sat over the end of the conveyor belt. The operator had isolated the machine so that it could not operate, but fell while moving over the cross bar and hit his chest causing injury.

[23] As a result, the Plant's Maintenance Manager made the decision to undertake corrective action on the machine to minimise the risk of this occurring again. In particular, it was identified that the installation of a step and handrail would facilitate getting in and out of the machine.

#### *Incident of 28 May 2020*

[24] JHNZ says a step was to be installed on the conveyor on 28 May 2020, with the installation of the handrail to be completed on the next down day, 29 May 2020, under LOTO. The work was to be completed with contractors engaged by JHNZ.

[25] Under LOTO conditions, JHNZ says an employee is required to:

- a. complete a CTW identifying all risks involved if applicable;
- b. shut down all sources of energy;
- c. apply personal lock(s) on either the machine or lockbox as required;
- d. clear the work area and ensure no one is in the area or in harm's way;
- e. manually try and operate the equipment;
- f. if there is no movement and all the above steps have been completed, the employee is deemed safe to enter machinery.

[26] On 28 May 2020 two contractors engaged by JHNZ arrived on site. Mr van der Berg says he and the contractors discussed the installation job and hazards on site. He says the contractors and another JHNZ employee who was the Authorised Person (AP) for the purposes of issuing the CTW, discussed the work and drafted a CTW. Mr van der Berg says he went away to do other work on site, and just after the CTW was completed, he arrived back to where the contractors were. The CTW was signed by the AP and the contractors. Mr van der Berg says he read through the CTW and also signed it. The CTW stated he read and understood the requirements of the CTW and would comply with it. The work described the work to be carried out as "make up step &

install". It identified hazards including "moving machinery" and a number of control methods including "3 point contact" and "Do not cross into conveyer area, guarding."

[27] The CTW did not refer to the installation of a handrail.

[28] Prior to starting the work, Mr van der Berg also filled in a Take 5 form which was required to be completed. The Take 5 form read stated "*STOP AND THINK ABOUT THE TASK – WHAT COULD GO WRONG?*" In answer to the question, "*Can the work be done without clearance to work?*", Mr van der Berg ticked the answer no. In a comments section, Mr van der Berg wrote:

WORKING WITH CONV. RUNNING BUDY [SIC] SYSTEM NO ENTRY OF GAURDED [SIC] AREA. 3 POINT CONTACT.

[29] Mr van der Berg's witness statement to the Authority describes what then happened as follows:

21. After the work on the footstep had finished, we spoke about how we would secure the handrail. The two bolts needed to secure the hand rail nearest the step could be securely fastened by lifting the platform and standing in front of the plate. This was done by either [contractor 1] or [contractor 2]; I cannot recall which one.
22. However our concern was without the handrail being secured at its other end, if someone grabbed hold of it, believing it was secure at both ends, and slip and injure themselves if the other end of the hand rail was not secure. This was the exact action we had been instructed to remove.
23. The decision was made between all three of us, that we needed to secure the handrail at its furthest point, and the best way to do this was to place and tighten a single bolt at the top end of the rail, thus having three of the four bolt secured before it was used.
24. A person could then climb onto the platform during the shutdown and secure the fourth and final bolt. However having three bolts attached made it safe to use.
25. As I was the tallest person of the three, it was decided that I should secure the third bolt.
26. I stood on the platform and drilled the hole. However the action of drilling a hole and trying to tighten in a bolt require different weight balances, as they are different actions.
27. [Contractor 2] had the lanyard to pull should he feel there was any risk, and [Contractor 1] was standing by the conveyer stop button, again should he feel there was any risk.
28. You will ask why not stop the conveyer. The simple reason is at the time we thought there was no risk of injury or need to stop it. And as you will see there was no injury, or need to stop it.
29. The distance from the platform to the plate is approximately 450mm, and the distance from the platform to the crossbar is approximately 700mm. The best comparison I can give is placing your leg over the back of a chair and putting your foot on the seat of the chair. One of those ones they have in waiting rooms or staff rooms.

30. So after drilling the hole, I put my right leg over the crossbar, and onto the plate at the front just behind the crossbar, with my toes being where the plate starts to curve up towards the mesh fencing. This allowed me to maintain three points of contact. My left leg on the platform. My right leg on the plate. My left arm holding the mesh fencing. My right arm securing the bolt.

[30] While undertaking a plant walk to conduct safety observations, Mr Haridayil, JHNZ's former Environmental Health and Safety Manager at the plant, observed Mr van der Berg tightening the bolt with one leg over the cross bar. Mr Haridayil asked Mr van der Berg why he had not locked out the machine, who stated he considered it was safe to go on. Mr Haridayil told Mr van der Berg not to continue the task and that it would be completed the next day when the machine was isolated and locked out. Mr van der Berg followed Mr Haridayil's instruction straight away.

[31] Following the incident Mr van der Berg provided an EHS Incident Investigation Statement ('Incident Statement'). In the Incident Statement Mr van der Berg stated he had discussed the risks and safety factors of the job he was required to undertake with JHNZ's AP and the contractors. Mr van der Berg stated that it was safe to execute the job while the conveyor was running in the manner that he did.

[32] Following the incident, Mr van der Berg attended a call with JHNZ's Asia Pacific Health and Safety Manager. The Health and Safety Manager then prepared a "Significant Investigation Report" outlining the incident. JHNZ says the report presented an initial view of what had occurred and it was conducted in accordance with JHNZ's health and safety procedures. It says this process did not take the place of an employment investigation.

#### *29 May 2020 suspension meeting*

[33] On 29 May 2020, Mr van der Berg attended a meeting with JHNZ's Technical Services Manager (the Manager), and Mr Barker, People and Performance Business Partner. Mr Barker drafted minutes of the meeting. The minutes record that Mr van der Berg was asked if he wanted to have a support person present for the meeting but stated he did not.

[34] During the meeting, the Manager advised Mr van der Berg that JHNZ proposed to stand him down due to an allegation received from Mr Haridayil regarding a "LOTO breach" he had observed. The Manager advised JHNZ considered the actions may represent a significant breach of health and safety and that they had the potential to put

its people at risk. The Manager also advised JHNZ was considering suspending him on full pay while it investigated the incident.

[35] Mr van der Berg declined an offer to take time to consider the proposal to suspend him and stated he understood it was an important safety breach and he would follow the process.

[36] During this meeting, Mr van der Berg was also provided with a notification of investigation in relation to the alleged safety breach of a LOTO violation. Later on 29 May 2020, the Manager wrote to Mr van der Berg confirming what was discussed during the meeting and that Mr van der Berg was suspended while it investigated concerns regarding health and safety.

*Disciplinary meeting letter*

[37] On 5 June 2020 Mr Billingsley, JHNZ's Plant Manager at the time, wrote to Mr van der Berg and advised him that, following its investigation, JHNZ considered his actions may amount to serious misconduct. The letter set out two allegations against him as follows, that Mr van der Berg:

- a. ...breached the James Hardie Safety Pledge of Zero Harm in the workplace. More specifically you were performing corrective action following a prior incident on the 21<sup>st</sup> May 2020 on the scrap conveyor of SM4, whereby it is alleged that you placed your right foot over the rail on the live side of the guard while drilling/tightening a bolt hole to secure the top of the handrail base plate...
- b. ...failed to follow our LOTO procedures, placing yourself and other employee(s) and contractor(s) of James Hardie at significant safety risk in the workplace. More specifically it is alleged that you continued with corrective measures to SM when the scope of work changed, without completing a new clearance to work, discussing with the Authorised Person or Take 5 to assess the risk associated with the new scope of work. Further it is noted that the top handrail was discussed to be installed under LOTO conditions on the down day planned on the 29<sup>th</sup> May 2020...

[38] The letter invited Mr van der Berg to attend a formal disciplinary meeting on 8 June 2020 to discuss his response to the allegation and was invited to bring a support person or representative to this meeting. Mr van der Berg was provided with a copy of statements taken from Mr Haridayil and one of the contractors, as well as the completed CTW signed by Mr van der Berg relating to the work.

*8 June 2020 meeting*

[39] On 8 June 2020, Mr van der Berg met with Mr Billingsley and Mr Barker to provide his response to the allegations. Mr Stone, Senior Engineer at the Plant, attended as Mr van der Berg's support person. Mr Barker again drafted minutes of the meeting.

[40] The minutes record Mr van der Berg stating in relation to the first allegation that his foot was not over the cross bar when drilling, only when putting in the bolt. He also stated there was no guard in that area of the machine – it was is a “rail” only. The minutes record Mr Billingsley agreeing it was not a guard and they could call it a rail if that was more accurate. For ease of understanding, I continue to the rail in question as the “cross bar” to avoid confusion.

[41] The minutes show Mr Stone made reference to a study done whose findings were that the part of the conveyor under discussion was seen as “extremely low risk” with no pinch points. Mr Barker asked for a copy of the study and said they could follow up with them to get the report and review its findings. Mr Stone also stated it was important to remember that Mr van der Berg was not working on the conveyor belt - his foot was used on a stable area (the guard plate) to ensure a safe three point contact.

[42] The minutes also record Mr van der Berg as stating:

- a. that he works around moving parts all the time – for him just 20cm from moving parts of a machine is safe. Someone who is not used to it daily would need 1 metre minimum to remain safe;
- b. that he knows his own limits;
- c. there were a lot of technical things he could have thought about more and there were no excuses for safety;
- d. he and the contractors discussed the risks, but did not change the CTW;
- e. that the original CTW was to “install fully”;
- f. his mindset was “safety safety safety”, but he wanted to get the work done;
- g. he would always find a way to get jobs done;
- h. he would rather climb in and do the work than the team not do the work;
- i. if he had to do it again, he would have still climbed in and done it.

[43] Mr Stone also stated “in hindsight” you want to eliminate and not minimise, and you would switch the conveyor off, and install on a down day, to which Mr van der Berg responded “yes you would”.

[44] Mr van der Berg also said the Manager had advised him the work needed to be done on 28 May, but then said it was one of the “three guys” and would not confirm who advised him to do the work. When Mr Billingsley referred to the previous fatality on the conveyor, Mr van der Berg stated that that was not in his time, he believed his actions were safe and that does jobs quick, fast and safely. He then said he still believed that the action he took was fully safe, but that he would not do it again unless the conveyor was locked down – even if it looked safe for him, because it did not look safe for someone else. Mr van der Berg also stated he and the contractors should have had more people involved so their opinion could be considered. Mr van der Berg also disagreed with the allegation that he placed other employees and contractors at risk, to which Mr Barker commented that if Mr van der Berg fell onto the conveyor, natural human reactions might mean that other employees would try to assist and put them at risk.

[45] The meeting was adjourned and then recommenced shortly after. Mr van der Berg was advised that JHNZ was going to consider his response and that it would look into some of the points he had raised.

#### *Proposed outcome meeting*

[46] On 12 June 2020, Mr van der Berg was invited to a proposed outcome meeting, which he attended on 15 June 2020 with Mr Billingsley and Mr Barker. Mr Stone attended again as Mr van der Berg’s support person. Mr Barker took minutes of the meeting. At the meeting, Mr Billingsley outlined Mr van der Berg’s responses at the 8 June 2020 meeting. Mr Billingsley advised that allegation one, relating to a breach of JHNZ’s Zero Harm Pledge was substantiated. In doing so Mr Billingsley stated the following:

- a. JHNZ acknowledged Mr van der Berg’s description of his foot placement on 8 June 2020 was accurate;
- b. JHNZ acknowledged there was uncertainty around whether the cross bar was a “guard” – however, it refuted that there was any uncertainty around

- the potential safety implications of standing on the guide plate, inside the line of the machine, while the conveyor is moving and not under LOTO conditions;
- c. JHNZ was investigating whether further safety controls were required for the area now a step was installed, but did not consider that this mitigated the actions taken by Mr van der Berg who was a safety leader in the business;
  - d. JHNZ acknowledged peoples' arms cross above the cross bar during everyday use of the machine, but refuted that operators push their bodies over the cross bar or stand on the plate during their usual duties;
  - e. JHNZ had located the report Mr Stone referred to at the 8 June 2020 meeting, but stated it was regarding the safety of guarding, when the issue in this incident related to standing on the plate that covers the moving conveyor belt, not under LOTO conditions;
  - f. Mr van der Berg's actions had the potential to put himself, other employees and contractors at risk of harm;
  - g. Mr van der Berg's statements regarding the safety of his actions caused concern for his ability to effectively and safely assess all risks and this had the potential to put himself, other employees and contractors at risk;
  - h. Mr van der Berg's statements were in direct breach of putting productivity ahead of safety and did not align with the Zero Harm Pledge.

[47] Mr Billingsley also advised that allegation two, relating to a failure to follow LOTO procedures, placing Mr van der Berg and others at risk was substantiated. Mr Billingsley outlined Mr van der Berg's responses at the 8 June meeting. In doing so Mr Billingsley stated the following:

- a. the description in relation to the CTW did not refer to installing a handrail. This contradicted Mr van der Berg's comments on 8 June 2020 where Mr van der Berg had said the original CTW was to fully install the handrail – including both the bottom and the top rail;
- b. the CTW identified the hazard of moving machinery with the control of “do not cross into conveyor area, guarding”;
- c. following JHNZ's investigation, its position was that only the bottom plate of the handrail was to be installed on 28 May 2020 as it fell outside

- of the 'machine line' and 'safety zone'. Installation of the top plate was to occur on the following day, a day down under LOTO procedures;
- d. the requirement to stand inside the machine, needed to install the top handrail, required the CTW to be changed - the CTW was not changed;
  - e. stepping on to the guard plate and over the cross bar was in direct breach of the LOTO procedures;
  - f. Mr van der Berg's actions placed others at risk;
  - g. Mr van der Berg placed productivity ahead of safety, in breach of the pledge of Zero Harm and in breach of LOTO procedures;
  - h. despite there being discussions between Mr van der Berg and the contractors about the requirement to stand inside the machine, the CTW was not changed and this was in breach of LOTO procedures;
  - i. Mr van der Berg's self-identification that the bottom bolt of the top plate of the new handrail was too unsafe to install demonstrated the risk he was exposed to.

[48] In relation to the proposed outcome, Mr Billingsley outlined JHNZ's view that Mr van der Berg's behaviour had irreparably damaged the trust and confidence essential to the employment relationship and amounted to serious misconduct. In terms of disciplinary sanction, JHNZ proposed to terminate Mr van der Berg's employment with notice for serious misconduct. Mr van der Berg was provided with the opportunity to provide feedback prior to 17 June 2020 in advance of any final decision being made.

[49] Mr van der Berg was provided with a letter outlining the above assessments and proposed outcome later that day. The letter confirmed JHNZ's request for feedback in relation to the proposed outcome. JHNZ also provided a photo "recreation" of another JHNZ employee demonstrating how far over the cross bar a persons' arms might cross when operating the conveyor in normal use.

[50] On 16 June 2020, Mr van der Berg provided written feedback to the proposed outcome. Mr van der Berg refuted the allegations against him. Mr van der Berg did not consider that he had all the documents that JHNZ had considered or received, and he felt that he needed them all, especially the minutes of the 8 June meeting. Mr van der Berg considered what he had said was misunderstood or his true intent was missing due to English not being his first language. He also asked JHNZ to reconsider its

decision to dismiss and suggested he be fully reinstated with no further action, reinstated with disciplinary action for misconduct only, or any other option. Mr van der Berg commented on the photograph provided, saying it did not resemble to truth about how close operators stood to the conveyor prior to the installation of the step.

[51] He further stated certain comments from the 8 June meeting were taken out of context and/or were a misrepresentation:

- a. his comments about his actions being safe for him and not others was taken out of context – he said he merely gave an example of the difference between an experienced person as opposed to an inexperienced person and their different comfort zones;
- b. his comment about “climbing in” and doing the work was not meant to be taken as literally meaning climbing into the conveyor. He says his words directly translated from Afrikaans (Mr van der Berg’s first language) meaning “to do the job himself”.

[52] Mr van der Berg reiterated it would have been unsafe to leave the handrail unbolted at the top plate as the handrail may move if someone tried to use the handrail, that the scope of the work did not change and he still believed the work included installation of the handrail on 28 May 2020. Mr van der Berg stated that he put no one else at significant risk by his actions – the contractors were standing ready for any unlikely event, with one at the safety lanyard and one at the emergency stop button.

[53] Mr van der Berg also requested a copy of statements taken from the contractors.

#### *Follow-up outcome meeting*

[54] On 17 June 2020, Mr van der Berg attended a meeting with Mr Billingsley and Mr Barker, with Mr Stone attending as support person. Mr Barker again took minutes of the meeting. Mr van der Berg advised he had received legal advice about recording the meeting. Mr Stone stated the main reason for recording the meeting was because Mr van der Berg’s English “isn’t the best”. JHNZ consented to the meeting being recorded.

[55] At the meeting JHNZ provided Mr van der Berg with a printed copy of information including all minutes of their meetings, statements obtained from

witnesses, JHNZ's Zero Harm Pledge, the relevant CTW, photo recreation, JHNZ's Minimum Behavioural Standards and its LOTO process and role of the AP. Mr van der Berg confirmed that there was nothing else he needed. The meeting was short and Mr van der Berg agreed to provide any further response by 19 June 2020.

#### *Feedback meeting*

[56] On 19 June 2020, Mr van der Berg met with Mr Billingsley and Mr Barker to provide his response to the proposed outcome. Mr van der Berg's representative attended along with Mr Stone as a support person. At the meeting Mr van der Berg's representative stated he had read through all of the documentation and looked at the pictures provided, and that the conduct was not serious misconduct. Mr Barker adjourned the meeting to consider Mr van der Berg's responses.

#### *Final outcome meeting*

[57] On 22 June 2020, Mr van der Berg was invited to attend a meeting to discuss JHNZ's decision regarding the outcome. Mr van der Berg was invited to have a support person or representative to attend the meeting with him. On 25 June 2020, Mr van der Berg attended a meeting with Mr Billingsley and Mr Barker, who took minutes. Mr van der Berg's representative and Mr Stone also attended this meeting. Mr Billingsley read out verbatim a letter that was presented to Mr van der Berg following the meeting. It outlined the process that had occurred and advised both allegations had been substantiated. JHNZ confirmed its view that Mr van der Berg's behaviour had irreparably damaged the trust and confidence essential to the employment relationship, and Mr van der Berg was advised his employment was terminated effective immediately.

[58] Mr van der Berg was also advised that, in recognition to of his service to JHNZ, it would be terminating his employment with notice and this meant it would be providing him with four weeks' pay in lieu of notice. The meeting was briefly adjourned at the request of Mr van der Berg's representative, following which Mr van der Berg verbally raised a personal grievance through his representative in relation to an unjustified dismissal and unjustified disadvantage.

[59] Following the meeting, Mr Van Der Berg confirmed his personal grievance for unjustified dismissal and unjustified disadvantage.<sup>1</sup> On 26 June 2020, Mr Billingsley confirmed the outcome and the process that occurred via a further letter.

[60] Mr Billingsley says he considered Mr van der Berg's response and this emphasised the fact that he did not share JHNZ's concerns about following its procedures and that Mr van der Berg would put productivity ahead of safety. In reaching the decision to dismiss, Mr Billingsley says he:

- a. considered whether he was comfortable sending Mr van der Berg back to work when his attitude demonstrated a clear disregard for JHNZ's safety procedures;
- b. considered Mr van der Berg had confirmed he would do the same again;
- c. took the view there was a risk that Mr van der Berg could put his own and other's safety at risk;
- d. took into consideration the fact that Mr van der Berg was a supervisor and was responsible for leading by example in terms of safety requirements.

#### **Does Mr van der Berg have a personal grievance for unjustified dismissal?**

[61] 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.

[62] Section 103A of the Act details elements 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 elements summarised and discussed further below, are:

- (a) Whether the employer properly identified the issues of concern with the employee prior to deciding to dismiss;
- (b) Whether given the resources available to the employer, did they sufficiently investigate the identified concerns;

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<sup>1</sup> Mr van der Berg has not pursued a personal grievance for unjustified disadvantage before the Authority.

- (c) Was the employee afforded a reasonable opportunity to respond to the identified concerns?
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss?
- (e) Any other contextual factor the Authority regards as appropriate to consider.

*Mr van der Berg's submissions on process*

[63] Mr van der Berg's representative submits the dismissal was unjustified on procedural grounds on the basis the process followed was flawed. It is submitted:

- a. JHNZ largely based its conclusion on photographic evidence taken in a staged way after the event, without Mr van der Berg or the contractors' involvement – this denied JHNZ the ability to reasonably assess the situation and reach a fair and reasonable conclusion;
- b. not all people present at the time of the incident were interviewed as part of the investigation, nor was the Manager;
- c. had JHNZ performed a full and thorough investigation it would have most likely viewed Mr van der Berg's behaviour as "unwarranted" rather than serious misconduct, and it would not have dismissed him;
- d. JHNZ has not shown why Mr van der Berg's actions were so serious that a warning could not be considered.

*Disciplinary process*

[64] Based on the evidence, particularly its written correspondence and minutes of its meetings with JHNZ, I conclude that JHNZ did follow a fair and reasonable process and Mr van der Berg's dismissal was justified on a procedural basis.

[65] I am satisfied the minutes provided more likely than not an accurate description of the meeting discussions. While Mr van der Berg had believed the minutes' recording of his responses at the 8 June meeting were taken out of context or misrepresented what he said, he corrected the potential misunderstandings by raising them. For example, at the investigation meeting Mr Billingsley was clear that he did not take Mr van der Berg's comments at the 8 June meeting about "climbing in" as referring to literally climbing into the conveyor.

[66] I am not satisfied JHNZ largely based its conclusion on staged photographic evidence. The evidence was that JHNZ provided one photograph to Mr van der Berg demonstrating how far over the bar a persons' arms might cross over the cross bar when operating the conveyor in normal use. I accept additional photographs provided to the Authority were taken and disclosed for the purposes of mediation, following the dismissal. They are therefore not relevant to my assessment regarding the disciplinary process followed leading up to dismissal. JHNZ was entitled to carry out its investigation in the manner it did. This did not require it to involve Mr van der Berg or the contractors in a demonstration or recreation of the incident as suggested. I do not consider JHNZ denied itself the ability to reasonably assess the situation and reach a fair and reasonable conclusion on this basis.

[67] JHNZ obtained statements from Mr van der Berg, the contractors and Mr Haridayil regarding the incident. It considered evidence of the key people who witnessed the incident. During questioning Mr van der Berg's representative put it to Mr Billingsley and Mr Barker that they should have spoken to the Manager as part of JHNZ's investigation. Mr van der Berg's evidence to the Authority was that the Manager asked him to carry out the full corrective action that day. At the 8 June meeting, while Mr van der Berg mentioned the Manager asked him this, he then said it was one of the "three guys". JHNZ did not question Mr van der Berg about who Mr van der Berg was referring to or interview the Manager.

[68] I find that any direction given to Mr van der Berg by his manager regarding the timeframes and JHNZ's decision not to interview the Manager did not have a bearing on the outcome of the investigation. I note JHNZ made the finding that only the bottom plate of the handrail was to be installed on 28 May 2020 and not the top plate which was to be installed the following day under LOTO procedures. In making this finding, it acknowledged Mr van der Berg's claim that both the step and handrail were to be installed (albeit the installation not fully completed) on 28 May 2020. I further note Mr van der Berg does not suggest the Manager advised or directed him to ignore LOTO safety protocols to carry out the corrective action – if a direction was given regarding the timeframe in which the job was to be completed, that could not have constituted a direction to ignore protocols on which JHNZ demonstrably place importance.

[69] Mr van der Berg was provided with the details of the allegations and concerns raised against him, given opportunities to respond to them, and when he requested relevant documents, JHNZ provided them. I am satisfied JHNZ took into account Mr van der Berg's responses about what happened before it reached its findings.

#### *Grounds for dismissal*

[70] The Employment Court has long considered safety issues to have a status of their own, and where safety is genuinely involved in the operations of an employer it is not just another ingredient in the mix.<sup>2</sup> The Court has noted caution should be exercised in reaching a decision contrary to that of an employer where safety issues are involved.<sup>3</sup>

[71] Mr van der Berg says the dismissal was unjustified on substantive grounds. Having carefully considered the evidence and the parties' submissions, I conclude that JHNZ's decision that Mr van der Berg's actions constituted serious misconduct and dismissal was an appropriate outcome were fair and reasonable decisions it could have come to.

[72] Mr van der Berg disputes whether or not his action of stepping over the bar amounted to him entering the machine and says that there was no need to initiate the LOTO procedure. In support of this he says the bar was originally installed for the purpose of allowing a trolley to be used to dump scrap materials onto the conveyor. JHNZ does not accept this was the only purpose of the bar – it says it also served to act as a safety barrier to prevent entry from any person accessing the "high-risk zone". Mr Haridayil explained that the height of the bar was at waist height to prevent people going into the machine and the reason for there being a stop button and lanyard by the conveyor was due to it being a high-risk zone.

[73] I find JHNZ could reasonably conclude the cross bar delineated where the machine started. JHNZ says that a reasonable person would have considered that Mr van der Berg entered the machine when he made the decision to put his leg over the cross bar and on to the guide plate, under which the conveyor was housed. I accept Mr van der Berg did enter the machine by his actions, and as such JHNZ's LOTO procedure ought to have been initiated. Mr van der Berg's representative submits JHNZ did not

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<sup>2</sup> *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 (EmpC) at 95.

<sup>3</sup> *Willis v Fonterra Cooperative Group Ltd* [2010] NZEmpC 80 at [66].

show how harm could have happened as a result of Mr van der Berg's actions – he submitted the risk was extremely minor to the point of being “nonexistent” and highlights that no actual harm or loss occurred as a result of Mr van der Berg's actions. I consider a vertical nip or pinch point clearly existed between bottom of the machine's metal shute opening and the surface of the conveyor belt, towards which the conveyor belt headed. I consider this posed risk to a person who entered the machine in the way Mr van der Berg did, in the event they tripped or fell forward into the machine. Having another person ready to hit the stop button and another ready to pull the lanyard to halt the machine were not simply adequate preventative safety controls in the circumstances. That no harm occurred in this instance is not relevant to the assessment of whether a breach of health and safety procedures occurred. It also completely ignores the preventative and protective focus of the Health and Safety at Work Act 2015 and the obligations it places on an employer such as JHNZ and on employees such as Mr van der Berg.

[74] I further find Mr van der Berg was well aware of the importance JHNZ placed on health and safety and of its Zero Harm Pledge, to which he had signed up to as an employee. He had also recently received training on CTW and LOTO requirements and knew the procedures relating to both. Mr van der Berg was also aware of the danger conveyor belts posed including the conveyor machine at issue here, on which a crush fatality had occurred some years prior to the 28 May 2020 incident. That fatality had occurred following a failure to comply with the LOTO requirements.

[75] I note the CTW at issue did not refer to the installation of the handrail. Following the investigation, JHNZ determined that only the bottom plate of the handrail was to be installed on 28 May 2020, and the top plate of the handrail was to be installed the following day. I find when Mr van der Berg concluded the top plate needed to be fastened, the scope of the job changed – this involved Mr van der Berg cross over the cross bar and into the conveyer belt area of the machine to secure the top bolt of the handrail plate. As such, in accordance with JHNZ's procedures (which it was entitled to implement and enforce) Mr van der Berg ought to have stopped the work and discussed this change with the AP who issued the CTW and sought clearance in relation to the change. The CTW was a contract between the issuer and receiver, and Mr van der Berg was aware of that. Having received CTW training, he would also have been

aware the CTW may need to be amended, suspended, or re-issued. He did not take these steps.

[76] I find the minutes of meetings show Mr van der Berg was given a number of opportunities to acknowledge his misconduct and the safety breach and to demonstrate he would not allow similar conduct would not reoccur. Whilst Mr van der Berg agreed with a comment of Mr Stone's at the 8 June meeting that in hindsight the hazard should be eliminated and not minimised by switching the conveyor off and installing the handrail on a down day, other responses he provided clearly indicated he still believed he was right and indicated he would not adjust his behaviour in future. Indeed, in his statement to the Authority, Mr van der Berg stated:

I am aware of what safe work practices should be. This is shown in me working for over 25 years on the shop floor without injury. I see the practical side to the risks. This is being involved and understanding what the real risks are. Not imagined risks set down by people in offices who do not work with the machinery.

[77] This passage demonstrates Mr van der Berg had and continues to have little insight into the safety risk posed by his actions on 28 May 2022. At the time it reached its decision to dismiss, JHNZ considered there was a risk Mr van der Berg would repeat the behaviour and fail to follow the required procedures again. I accept that a fair and reasonable employer could have taken this into account and terminated the Applicant's employment for serious misconduct.

### **What is the outcome?**

[78] I accept Mr van der Berg was a motivated worker who took his job very seriously, and JHNZ has not taken the position that he acted out of malice or insolence. Having heard from Mr Billingsley, I consider JHNZ valued him as a worker, and would have preferred he remain employed until the closure of the Plant later in 2020.

[79] It is also clear to the Authority that Mr van der Berg has found his dismissal very difficult and that it has had a negative impact on his career and at a personal level. However, the decision to dismiss, I find, was one a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred. Mr van der Berg's application is unsuccessful.

**Should either party contribute to the costs of representation of the other party?**

[80] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[81] If they are not able to do so and an Authority determination on costs is needed a party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>4</sup>

Sarah Blick  
Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).