

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 599
3154461

BETWEEN

BRENT RUTENE
Applicant

AND

ASHBURTON MEAT
PROCESSORS LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Cain, advocate for the Applicant
Ashley-Jane Lodge (counsel) and Sheryl Kelly
(advocate) for the Respondent

Investigation Meeting: 27 and 28 September 2022 at Ashburton

Submissions Received: 30 September 2022 from the Applicant
7 October 2022 from the Respondent

Date of Determination: 16 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Brent Rutene comes to the Authority with employment relationship problems that arose during the second period of his employment with Ashburton Meat Processors Limited (Ashburton Meat) from 23 December 2013 until he was summarily dismissed on 20 April 2021. Mr Rutene was employed as a labourer/knife-hand on the slaughter board. His first period of employment at Ashburton Meat was from 3 August 2009 until 5 December 2010.

[2] Ashburton Meat Processors Limited is a duly incorporated company that has its registered office in Christchurch and carries on the business of animal slaughtering and processing. I shall refer hereon to the company as Ashburton Meat or the company.

[3] Mr Rutene says that he was disadvantaged unjustifiably in his employment because Ashburton Meat failed to adequately address concerns he had raised about bullying, failed to support him adequately over a period that he was on a graduated return to work plan after a work-related injury and issued him with a final written warning on 4 March 2021.

[4] Mr Rutene says that his dismissal on 20 April 2021 for serious misconduct was unjustified.

[5] He seeks reimbursement of lost wages, compensation in the sum of \$25,000 and a contribution towards costs.

[6] Ashburton Meat does not accept that Mr Rutene's employment was affected to his disadvantage by any unjustifiable action. Ashburton Meat says that the grievance about the final written warning was raised outside of the statutory timeframe of 90 days and was otherwise justified. It says that the dismissal was justified because there had been serious misconduct.

The Authority investigation process

[7] The investigation meeting took place over two days in Ashburton on 27 and 28 September 2022. The Authority heard evidence from Mr Rutene, his partner Lani, and a previous employee of Ashburton Meat who I shall call J.

[8] The Authority also heard evidence from Larry Neal who is a supervisor employed by Ashburton Meat. Mr Neal became Mr Rutene's senior leading hand in or about October 2017 and then his supervisor from August 2020. The Authority heard evidence from Nick Pope who has been a leading hand in the slaughter department since May 2020 and Amanda Morley who was the human resource and administration manager at Ashburton Meat at the material time.

The issues

[9] The Authority needs to objectively assess the following:

- (a) What are the material documents that govern the employment relationship?
- (b) What does the test of justification require of the Authority?
- (c) Was the response to concerns said to constitute bullying that of a fair and reasonable employer?

- (d) Was the graduated return to work plan (GRTW plan) and support following the work injury that of a fair and reasonable employer?
- (e) Was the personal grievance about the final written warning raised within the statutory timeframe and, if not, was there implied consent?
- (f) If the Authority is able to consider issues about the final written warning then was it justified?
- (g) Was the dismissal justified?
- (h) If grievances are made out, then what remedies should be awarded and are there issues of contribution and/or mitigation?

What are the material documents that governed the relationship?

[10] Mr Rutene was a member of the New Zealand Meat Workers and Related Trades Union (the Union). His work at the material time was covered by a collective employment agreement between Ashburton Meat and the Union dated 1 August 2019 to 31 July 2022 (the collective agreement).

[11] Mr Rutene was dismissed because there were two unauthorised departures by him from the workplace on 6 and 7 April 2021 and he disregarded instructions to return to work. Further that there was misrepresentation about a medical certificate. Clause 21.1 of the collective agreement sets out a disciplinary process and examples of serious misconduct. These are not exhaustive. The following examples of serious misconduct were relied on:

Leaving the workplace during working hours or failing to report to the assigned workplace without the prior permission of the employer or without reasonable cause.

Misrepresentation

[12] Clause 21.3 of the collective agreement provides that where an act of serious misconduct has not resulted in summary dismissal or there is less serious misconduct such as lateness or inadequate performance of work the employer may apply discretion and issue a warning. Mr Rutene was issued with a final written warning.

[13] Three different warnings are set out as ones that may be given at the employer's discretion. The first is a verbal warning, the second is a written warning and the third is a final written warning.

The test of justification

[14] The Authority is asked to consider whether actions that Ashburton Meat took and its decision to dismiss were justified. The Authority is required to apply the justification test in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Ashburton Meat and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[15] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether allegations against Mr Rutene were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them, and whether such explanations were considered genuinely by Ashburton Meat before the final written warning or dismissal. The Authority may take into account other factors as appropriate and must not determine an action or dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Rutene being treated unfairly.

[16] Ashburton Meat could be expected as a fair and reasonable employer to comply with the statutory good faith obligations in s 4 of the Act.

Was the response to concerns said to constitute bullying that of a fair and reasonable employer?

Co-employees

[17] The evidence supported the first time an issue was raised by Mr Rutene about the conduct of his co-employees was after the disciplinary meeting on 25 February 2021 for allegations that resulted in the final written warning. There was a conversation between Mr Rutene, his representative and Ms Morley. The nature of the concern raised by Mr Rutene was that some staff had called him a "bludger".

[18] Ms Morley made it clear that that sort of behaviour was not tolerated, would be taken seriously, and investigated. Mr Rutene confirmed in his evidence to the Authority that he was not prepared to give Ms Morley any further details because it would have meant that other employees would have got into trouble. Ms Morley was not able to therefore investigate specifically the concerns further.

Management concerns

[19] Another issue was that Mr Rutene felt the management team's attitude towards him had shifted after his return from injury. Ashburton Meats had become concerned about Mr Rutene's application to his work, attendance, and breaks whilst he was working in accordance with his GRTW plan. There were attempts to address concerns informally before a formal process was commenced. I do not conclude raising of concerns amounts to bullying in the circumstances of this matter. That there was some basis for concern was not denied completely by Mr Rutene.

[20] Mr Neal said Mr Rutene refused to assist with the pig burn for the last ten minutes of his shift on 23 February 2021. Mr Neal said to Mr Rutene as he was cleaning his boots, "You might as well fuck off then."

[21] Whilst what was said was not acceptable, it was said in a work environment where swearing, if not commonplace, is not unusual. It is a robust workplace where employees often rely on each other to successfully perform their work. Mr Rutene and Mr Neal shook hands after the 25 February 2021 disciplinary meeting that followed the exchange and seemingly moved forward at least about the exchange. The Authority heard no evidence that there was a repeat by Mr Neal of that behaviour.

[22] The Authority heard evidence from J who was at the material time also employed at Ashburton Meats. He explained that there was banter between supervisors and staff but he felt that he had a good relationship with Mr Neal. There were two examples given of exchanges between J and Mr Neal that had caused J some hurt. J had not escalated any concerns about these, or comments made in the workplace by co-employees. J said that he could not recall any examples of Mr Neal making racially degrading comments.

[23] I do not find grievances for unjustified actions causing disadvantage about these matters are made out.

Was the GRTW plan and support following the work injury that of a fair and reasonable employer?

[24] On 17 November 2020 Mr Rutene injured himself pushing away carcasses and felt discomfort to his shoulder. A trained first aider assisted him on that day. Whilst Mr Rutene took the following day off work, he worked the remainder of the week and the next week.

[25] Ashburton Meat came to understand in or about December 2020 that Mr Rutene's injury was being investigated as a possible right rotator cuff tear. He went on ACC in or about December 2020 and Ms Morley assisted Mr Rutene with his ACC documentation. Mr Rutene appreciated that assistance. The evidence supports that Ms Morley then worked closely with Mr Rutene and the ACC occupational therapist about his GRTW plan. There were several employees on GRTW programmes at the same time as Mr Rutene and the company had experience with returning employees to work following an injury.

[26] Ashburton Meat supported changes to the plan and kept in contact on a regular basis with the occupational therapist to monitor Mr Rutene's recovery. Initially concerns that arose about lateness, leaving early, unexplained absences and issues around breaks were dealt with informally and in a supportive manner. Ms Morley felt that in comparison to other employees engaged in rehabilitation, Mr Rutene needed to be more closely managed.

[27] Mr Rutene gave evidence about the difficulty of coping with his injury. Shortly before the Authority investigation meeting, a doctor's letter and clinical notes dated 8 April 2021 were provided. They referred to Mr Rutene being stressed and upset about work events. Mr Rutene accepted when questioned at the Authority investigation meeting that he had not provided the letter from his doctor dated 8 April 2021 to Ashburton Meats. The letter appeared to have been written for the purpose of him doing so because it suggests two days be taken as stress leave.

[28] The one time there was issues raised about Mr Rutene's mental health directly with Ashburton Meat was at the meeting of 25 February 2021. There was reference by Mr Rutene's then advocate to the toll the injury was taking on home life. Ms Morley talked to Mr Rutene about the employee assistance program and emailed him information about that. Mr Rutene accepted when questioned that Ms Morley would check in with him and she would ask how he was. Mr Rutene could also have discussed mental health issues with the occupational therapist with whom he was working closely with about his GRTW plan. There is no evidence that he did.

[29] I conclude that with the level of knowledge Ashburton Meat had about Mr Rutene's mental health it took reasonable and practicable steps to ensure he had a safe working environment. The evidence supports that the assistance and support provided to Mr Rutene on his GRTW plan was that of a fair and reasonable employer. I do not find a personal grievance established about these matters.

Was a personal grievance raised about the final written warning within the statutory timeframe?

[30] Mr Rutene was issued with a final written warning on 4 March 2021. The letter raising the personal grievance about this action was provided to Ashburton Meat on 3 June 2021. As Ms Lodge submits the grievance was raised 91 days after the warning was issued because 90 days begins with the date on which the action occurred.¹ I accept that the grievance was raised out of time by one day.

[31] Ms Lodge submits that Ashburton Meat has not and does not consent to the grievance being raised out of time.

Implied consent?

[32] The parties attended mediation before the statement of problem was lodged with the Authority. There is no reference in the original or amended statement in reply to the grievance having been raised outside the statutory timeframe in s 114(1) of the Act. There was no reference to an issue with the late raising of the grievance at the case management conference with the Authority. The issue about late raising of the grievance was only put before the Authority after the matter had been set for an investigation meeting.

[33] For these reasons I find that Ashburton Meat impliedly consented to the late raising of the grievance by one day.

Was the final written warning justified?

The written warning in letter dated 4 March 2021

[34] The final written warning is contained in a letter dated 4 March 2021. It refers to conduct on 22 February 2021 regarding an extended break. At one point the letter refers to 23

¹ Section 114 (1) of the Act.

February 2021 however I conclude that is likely a mistake because the description of the conduct on that day is the conduct of 22 February 2021. The letter set out that Mr Pope could not see Mr Rutene following the morning break and went to look for him. It set out that it was “alleged” that Mr Rutene when located in the smoking area said that he had been there for 20 minutes but in fact camera footage showed he was there for a period over 45 minutes. There was reference in the final written warning letter to earlier discussions about break times including one as recently as 10 February 2021 when Mr Rutene’s break entitlement was discussed.

[35] It was set out in the final written warning that Mr Rutene had no explanation about why he had taken the extended break. When issued with a preliminary decision of a final written warning outcome on 1 March 2021, it is recorded in the letter that he stated he was “sorry” and that “sometimes he could be naughty.”

[36] Expectations were set out in the final written warning that Mr Rutene would arrive on time, take breaks as instructed by leading hands, follow all reasonable work instructions, and devote all hours to performing all duties assigned.

Was the process fair?

[37] At a meeting on 25 February 2021 Mr Rutene was able to provide an explanation to the two allegations as they appeared in a letter dated 23 February 2021.

[38] The first allegation to answer was that Mr Rutene had taken an extended break on 22 February 2021 from 8.10am to 8:57am rather than the twenty-minute standard break. It was further alleged that Mr Rutene may have attempted to misrepresent his hours of work by remaining outside of the department for no authorised purpose before finalising work. There was reference that this potentially resulted in the falsification of time clock records.

[39] The notes taken from the meeting on 25 February do not reflect any discussion about the second allegation in the letter of 23 February 2021. Misrepresentation does not feature in the final written warning.

[40] Mr Rutene was represented by an advocate at the first meeting and a union delegate at the meeting at which the preliminary decision to issue a final written warning was discussed. The extended break allegation on 22 February 2021 was admitted, and there was no real explanation advanced as to why Mr Rutene was having extended break time on that day. Mr

Rutene said at a meeting on 25 February 2021 that he had not been given a specific task and was just helping where he could. He said that he was not aware of his assigned tasks and there was some confusion. The fact there had been a recent meeting with Mr Rutene, the occupational therapist, Ms Morley, and Mr Neal on 10 February 2021 where the break requirements were specifically discussed was set out in the final written warning letter.

[41] I do not find that the original reference by Ashburton Meat to the length of the break being an hour caused unfairness. It is clear from the content of the written warning that it was understood to be less than that duration.

[42] The main issue of procedural fairness for objective consideration is whether the final written warning was given for the extended break issue on 22 February 2021 alone. If not, did Mr Rutene have a fair opportunity to clearly understand and explain any additional concerns.

[43] There were three concerns the company had with Mr Rutene the day after the extended break was taken day. The first concern from 23 February 2021 was that Mr Rutene was standing behind a beef carcass wash shield at a time when he had been incorrectly assigned to pig blood. That job would not start until after sheep had been processed. Mr Rutene needed to be reassigned to another area. The concern there was why Mr Rutene had not proactively gone to Mr Neal or Mr Pope to see what task should be undertaken. An inference appeared to have been drawn that he was hiding.

[44] The second concern was that Mr Pope discovered a pile up of pig cheeks at the workstation where Mr Rutene was working. He could not see Mr Rutene. He recorded on a pig slaughter process control sheet that Mr Rutene had left his assigned position too early to go to smoko and product had to be thrown out. Mr Neal then spoke to Mr Rutene about the correct process for taking a break to avoid wasted product.

[45] The third concern was that Mr Rutene had refused to take over on the burn when instructed and had instead got changed. That was the incident where Mr Neal said he got frustrated and told Mr Rutene to “fuck off then.”

[46] The evidence of the decision maker Mr Neal supports that Mr Rutene’s conduct on 23 February 2021 was likely considered in the issue of the final written warning. In his written evidence Mr Neal stated that Mr Rutene had not disputed taking an extended break and failing to follow a reasonable work instruction on 23 February to take over the burn task. In his oral

evidence he said that he would have had regard to wasted product in the issue of a warning which is a matter that Ashburton Meat say arose on 23 February.

[47] I am also strengthened in a conclusion that these matters were considered in the issue of the final written warning by the fact that the expectations in the final written warning do not neatly align with the issue of concern which was an extended break. On its own that may not be as significant. There is then the letter of 9 April 2021 in a later disciplinary process involving Mr Rutene in which the final written warning is referred to as having been issued for work attendance, punctuality and following work instructions. That is a broader description than could be expected for an extended break concern.

[48] Ms Lodge submits that Mr Rutene had an opportunity to answer these further matters when he agreed to talk about them at the meeting on 25 February 2021. Mr Rutene's advocate did question at the disciplinary meeting on 25 February 2021 whether the 23 February 2021 concerns were in the meeting invitation letter. It was agreed that they were not but there was some discussion.

[49] Only two of the concerns from 23 February 2021 are in the notes Ms Morley took and had typed up after the meeting on 25 February 2021. That was the failing to follow an instruction to work at the burn and standing behind that beef carcass concern. There is no reference in the notes about the build-up and subsequent waste of pig cheeks whilst Mr Rutene was on break on 23 February 2021. The notes do not reflect specific answers to the concerns on 23 February 2021 in a way that may be expected with allegations to which an explanation is required.

[50] A fair and reasonable employer could have been expected to have made it clear that these additional matters were raised as allegations. That would likely have required a further letter with expanded allegations and a further meeting. I do not find objectively assessed that it was clear to Mr Rutene these matters in addition to the concern on 22 February 2021 would be considered in a disciplinary outcome before he discussed them at the meeting on 25 February 2021.

[51] There is the additional difficulty that the preliminary decision notes are confined to the conduct on 22 February 2021 and conclusions about that. It is to that conduct that Mr Rutene responded that he was "sorry" and "could be naughty sometimes." I do not find it would have been apparent to Mr Rutene when the meeting about the preliminary decision to issue him with

a final written warning was held that there was to be reliance on the conduct of 23 February 2021. The conduct on 23 February was not referred to in the letter containing the final written warning.

[52] I could not conclude that the 23 February 2021 matters were clearly raised as concerns for consideration in any disciplinary outcome to ensure Mr Rutene had a reasonable opportunity to respond to and explain them and have his response considered. The procedural fairness factors in s 103A (3)(b) and (d) of the Act were not satisfied.

[53] Ms Lodge submits that if the Authority got to this point, then the defects in the process were minor and did not result in the applicant being treated unfairly. I find for the reasons set out above that procedural unfairness was not minor and that it did result in unfairness. It was not clear from the final written warning itself that concerns other than those on 22 February had been relied on.

[54] The final written warning was unjustified. It disadvantaged Mr Rutene because it was a disciplinary outcome that meant his position was less secure should there be a further incident.

[55] There is some overlap between the procedural unfairness and the substantive justification for the final written warning. There is an issue as to whether a final written warning for an extended break alone would have been the outcome.

[56] I shall deal with remedies for this grievance after considering the justification of the dismissal.

Was the dismissal justified?

Reason for dismissal

[57] Mr Rutene was dismissed in a letter dated 20 April 2021 from Shannon Swete. Mr Swete is the general manager of Ashburton Meat. Mr Rutene was dismissed from his employment for unauthorised departures from the workplace on 6 and 7 April 2021 and disregarding instructions to return to the workstation and complete his shifts. There was also reference to misrepresentation about having a medical certificate.

Invitation to a disciplinary meeting

[58] The allegations were put to Mr Rutene in a letter dated 9 April 2021.

[59] There was reference to the final written warning for issues “relating to work attendance, punctuality and following work instructions.”

[60] Clause 21.1 of the collective agreement was referred to with reference to the types of matters that may be considered serious misconduct. Materially in this matter they were leaving the workplace during working hours or failing to report to the assigned workplace without prior permission of the employer or without reasonable cause and misrepresentation.

[61] It was stated that the behaviour as described potentially met the threshold for serious misconduct. Mr Rutene was invited to a meeting on 13 April 2021 to provide an explanation to the allegations. The letter advised that Mr Neal would be present. Ms Morley was at that time on maternity leave and another staff member Katherine took over her role as human resource manager on a temporary basis. Mr Rutene was encouraged in the letter to bring a representative with him.

Disciplinary meeting 13 April 2021

Mr Rutene's explanations

[62] Mr Rutene attended the meeting with a union delegate in place of the usual union representative who was away at that time. Mr Rutene accepted that he had left the workplace on 6 April and on 7 April 2021. He accepted that he did not return to work as instructed.

[63] His explanation as to why he left early on 6 April was that he was under the impression he was supposed to be working seven hours per day. Mr Neal confirmed that he should have been working eight hours a day starting that week under the GRTW plan. Mr Rutene agreed at the disciplinary meeting that he said to Mr Neal when his leaving was questioned that he had a medical certificate to confirm that he should be working seven hours a day. During the disciplinary meeting he explained that he thought he did but he was wrong and apologised. He agreed when asked by Katherine that he knew he needed permission to leave the site. Katherine also asked him what his reason was for not returning to the workplace. He said that he was confused, and the occupational therapist had made a mistake before and he thought it may be wrong again. He wanted a certificate from his doctor.

[64] There was no dispute that on 6 April 2021 Mr Neal talked to Mr Rutene in the car park before he drove away and showed him a copy of the plan as at 29 March 2021 that confirmed

Mr Rutene was to work eight hours a day that week from 5 April 2021. The evidence supported the the plan had not changed after 22 February 2022.

[65] The explanation for leaving shortly after arriving at work the following day on 7 April 2021 was because of what Mr Neal had said to him that morning when he asked for a copy of the medical certificate. He described Mr Neal as “smug” about the day before and referred to his attitude. He described himself as “feeling angry and let down.”, He said that he thought it was best to leave for the day and that he didn’t want to work for the rest of the day for those reasons.

Preliminary decision to dismiss 15 April 2021 – meeting and letter provided

[66] On Friday 15 April 2021 Mr Rutene attended another meeting with the same union delegate and Mr Neal attended with Katherine. Mr Rutene was provided with a letter containing a preliminary decision at the meeting and the notes record Mr Neal outlined its contents. The letter provided there was a preliminary decision to terminate employment on the basis that the behaviour met the threshold for serious misconduct.

[67] It was only at the Authority investigation meeting that the Authority understood there had been a brief meeting on 15 April 2021 when Mr Rutene was provided with a preliminary decision letter.

[68] Ashburton Meat notes dated 15 April 2021 were disclosed for the first time on the second day of the Authority investigation meeting. The notes contain the following paragraph:

Larry advised Brent that we have now discussed your responses with the decision maker and the proposed outcome for the investigation is termination.

[69] The Authority had before provision of these notes questioned Mr Neal about why the letter of dismissal was signed by Mr Swete. Mr Neal said in his evidence that he had “sign off” up to final written warning however not for dismissal. He described himself as the “lead decision maker.” Ms Lodge submits that the fact that the letter to dismiss was signed by Mr Swete was a formality and that Mr Neal confirmed he had made the decision and recommended it to Mr Swete for sign off.

[70] The 15 April notes were those of a human resource manager. I conclude weight can safely be placed on their contents. It is more likely as the notes reflect Mr Neal was not the decision maker, a conclusion strengthened by Mr Swete’s signing of the letter of dismissal. I

cannot be satisfied when both pieces of evidence are considered that Mr Swete's involvement was simply a formality. There was an opportunity for the representatives to make comment in submissions on this matter as these were timetabled for after the investigation meeting.

[71] The letter containing the preliminary decision dated 15 April 2021 was provided to Mr Rutene at the meeting of the same date. It made no mention of a decision maker other than Mr Neal. It set out the explanations which I have set out above. It also set out the reason Ashburton Meat did not find they explained the leaving of the workplace without authorisation as below:

- (a) You received the same communication regarding the GRTW plan as we did. It is not a satisfactory explanation to say that you "assumed" you were only supposed to be working 7 hours per day when you have information in your possession that you could and should have checked.
- (b) Your admission that you did not have a medical certificate amending the GRTW plan as you originally claimed you did, combined with the fact you have been unable to provide one on request gives us cause to believe that you intentionally misled us in this regard.
- (c) Your actions in leaving work on the 7th April are a disproportionate response in relation to my legitimate request for a copy of the medical certificate you had claimed the previous day was in your possession.

[72] It was concluded that the behaviour met the threshold for serious misconduct and there was a preliminary decision to summarily terminate employment on the grounds of serious misconduct.

[73] Mr Rutene was invited to comment on the preliminary decision and provide further relevant information including alternatives or mitigation factors before a final decision on the matter. He was asked to provide this in writing or over the phone by 12 pm Monday 19 April 2021.

Difference in the evidence about next step

[74] Mr Rutene said in evidence that he wanted a meeting in person, but Katherine sent an email or perhaps otherwise communicated on 16 April 2021 that no meeting would take place. He said that instead he was asked him to leave a letter at the front office. Ashburton Meat said they have not been able to locate any email to that effect and Mr Neal said that Mr Rutene must be confused and mistaken about that matter.

[75] Mr Rutene said that he had been planning on "begging for his job" but then lost all hope and did not bother providing a written response. Mr Neal said in his evidence that he would

have organised a meeting in person if Mr Rutene had wanted that. I do not find that would have been immediately apparent to Mr Rutene because the letter of 15 April however was clear that further feedback was to be by telephone or letter.

Termination of employment

[76] On 20 April 2021 Ashburton Meat terminated Mr Rutene's employment and in doing so confirmed the preliminary outcome.

Conclusion about process

[77] I accept Ms Lodge's submission that Ashburton Meat provided Mr Rutene with the allegations it was concerned about in the 9 April letter and he was able to provide an explanation to them on 13 April 2021. There was a preliminary decision and an opportunity for Mr Rutene to comment on that in writing or by phone. Whilst there were elements of procedural fairness I pause on the issue as to whether Mr Rutene was heard by the decision maker and, if not whether that was procedurally unfair.

[78] The right to be heard by the decision maker is one of the basic principles of natural justice on which procedural fairness is based. In an earlier Employment Court judgment, the then Chief Judge Goddard stated:

The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision -maker.²

[79] This judgment was referred to in another Employment Court judgment in *Irvine Freightlines Limited v Cross* where it was found that Mr Cross was significantly disadvantaged by not actually being heard by the decision maker. This failure was the significant factor in a finding that the dismissal was unjustified.³

[80] Of more recent times there is a statement from Chief Judge Goddard in *Ioane v Waitakere City Council*⁴ :

...that to be justifiable procedurally, or for that matter substantively, the fair inquiry that must precede every dismissal for cause must be carried out by the decision -maker. Preliminary

² *Quinn v Bank of New Zealand* [1991] 1 ERNZ 1060 at p 1070.

³ *Irvine Freightlines Limited v Cross* [1993] 1 ERNZ 424 at p 7.

⁴ *Ioane v Waitakere City Council* [2003] 104 at [25].

portions of that investigation can, and in many cases must, be delegated to others. But in the end, the decision-maker must turn his mind not only to what those under him report and recommend, but also to what the employee has to say in reply...

[81] It seems likely that Mr Rutene and his representative did not pay attention to the verbal communication at the preliminary decision meeting on 15 April 2021 that the decision maker was other than Mr Neal. Subsequent and earlier written communications did not make it clear that Mr Neal was not the decision maker. The letter raising the grievance supports Mr Rutene's instructions to Mr Cain were that Mr Neal was the decision maker.

[82] When an employee is not heard by a decision maker an opportunity is lost to persuade for a different disciplinary outcome or reach different conclusions from the explanations. Mr Rutene explained that it was the nature of Mr Neal's exchange with him on the morning on 7 April that caused him to leave the workplace. Mr Rutene said by way of explanation Mr Neal had said things that upset him. It was concluded that it was a disproportionate response on the part of Mr Rutene to leave the workplace. Mr Rutene did not have an opportunity to give his own account of what occurred that morning to the decision maker. That would have overcome any concern about possible bias on the part of Mr Neal and potential unfairness about that matter. I could not be satisfied that Mr Rutene understood that there was a remote decision maker and had a real opportunity as good faith obligations require to request to be heard by the decision maker in person. I also weigh that the final written warning has been found to be unjustified. The evidence supported it was considered at the time of the disciplinary outcome.

[83] Mr Cain raised issues of pre-determination. J's evidence was to the effect that Mr Neal told him to be careful or he would end up dismissed like Mr Rutene at a time when Mr Rutene was still working at Ashburton Meat. Mr Neal denied that he said anything like that. I was not clear about dates. I could not be satisfied to the necessary degree there was predetermination,

[84] I find that the procedural failings which I have found established were serious and not minor in nature. Mr Rutene's dismissal is unjustified.

Serious misconduct?

[85] Mr Rutene accepted he had left the workplace on two occasions and had not returned when instructed. He knew that he needed permission to leave the workplace. On 6 April Mr Rutene said that he was confused about the hours he was required to work and whether it was

seven or eight hours. Mr Neal advised that Mr Rutene had one hour left to work. Mr Rutene led Mr Neal to understand that he had a medical certificate in the car to prove that he was only meant to work seven hours. He could not locate any medical certificate in the car or subsequently. Before Mr Rutene left the car park Mr Neal went to his office and provided a copy of the most recent GRTW plan which showed Mr Rutene working eight hours from 5 April 2021.⁵ Mr Rutene did not return to work and complete a further hour of work. He drove away.

[86] A fair and reasonable employer could conclude there was no justifiable or plausible reason for confusion to continue when the GRTW plan was shown by Mr Neal. There was an opportunity for Mr Rutene to then return to work knowing what the plan said. There was no explanation at that the injury prevented Mr Rutene working another hour. He could have attempted to obtain a medical certificate after working a further hour.

[87] An allegation found substantiated was that Mr Rutene intentionally misled Ashburton Meat about having a medical certificate. It is more difficult to establish from an investigation intentional misrepresentation when the explanation is one of genuine mistaken belief. I could not be satisfied that the investigation sufficiently disclosed serious misconduct about the misrepresentation aspect.

[88] The following morning Mr Neal asked Mr Rutene for a copy of the medical certificate. When it was not produced Mr Rutene said that Mr Neal said he was going to take the matter “way further”. Mr Neal denied that and said that he indicated he would take it further but not “way further.” Mr Neal said that he asked for the medical certificate and did not discuss that matter any further because he was busy, had work to do and there were other staff about.

[89] After a short time Mr Pope was advised by another staff member that Mr Rutene was going home. He went to see Mr Rutene in the changing room, where he was in street clothes. Mr Pope asked Mr Rutene why he was changed. Mr Rutene said “I am not putting up with this shit, I am going home.” Mr Pope asked whether he was walking out for a second time. Mr Rutene responded that he was not walking out, although in his evidence said that he always intended to leave the work site. Mr Pope expected Mr Rutene to return to the slaughter board, but he did not. Allowing a period of cooling down for Mr Rutene would not have been unreasonable. A fair and reasonable employer could conclude however that leaving for the

⁵ 5 April 2021 was in fact Easter Monday and Mr Rutene did not return to work until 6 April 2021.

entire day without seeking permission and simply telling another staff member of an intention to do so was disproportionate to being asked for a medical certificate and being advised the matter would be taken further.

[90] A fair and reasonable employer could conclude the actions on 6 and 7 April 2021 in leaving the workplace without permission and not obeying reasonable instructions amounted to serious misconduct. Mr Rutene had been spoken to on several occasions about the importance of complying with the GRTW plan. There was substantive justification for the dismissal.

Could a fair and reasonable employer have reached the decision to dismiss

[91] I could not be satisfied that Mr Rutene was heard by the decision maker. For this and other reasons there was procedural unfairness that was not minor and it did cause unfairness.

[92] For these reasons the decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[93] Mr Rutene had a personal grievance that he was unjustifiably dismissed. He is entitled to consideration of remedies for that, and the grievance found of unjustified disadvantage.

Remedies

Lost wages

[94] Mr Rutene remained unemployed from the date of his dismissal on 20 April 2021 until the date of the investigation meeting. There was minimal evidence about mitigation. Ashburton Meat provided evidence that there had been 341 vacancies advertised over the previous 18 months in general labouring and meat processing roles in the Ashburton area and more evidence could be expected.

[95] Ms Lodge submits that there should be no entitlement to lost wages because with a proper procedure Mr Rutene would have been dismissed. I do not conclude it is as clear as that. There is an aspect of overlap with substantive justification because there was no ability to be heard by the decision maker. The Authority cannot therefore conclude with a fair process dismissal was inevitable.

[96] I am not however prepared to exercise my discretion and award lost wages over the three months. There is very limited evidence of mitigation.

[97] Mr Cain has assessed loss over that period at \$15,302.97 gross from the IRD statements. Ms Lodge can return to the Authority within seven days after the date of this determination if there is an issue with the gross quantum calculated by Mr Cain.

Compensation

[98] Mr Rutene seeks the sum of \$25,000 under this head.

[99] I consider it appropriate to assess compensation for both grievances globally. The impact of both is inextricably linked due to the closeness of time and the consideration of the final written warning in the dismissal outcome. Almost all the evidence to support a compensatory award was about the impact of dismissal and any award must reflect that.

[100] Ms Lodge submits that most of the evidence regarding the effect of the dismissal relates to the loss of the job. She submits that as the dismissal is substantively justified compensation is limited to the unfairness of the process. I do not conclude dismissal was inevitable for the reasons set out earlier.

[101] Mr Rutene gave evidence about the financial impact for him and his family. He said that he took money out of Kiwisaver and had to ask for assistance from the Salvation Army. He said that his biggest hope was that he would not get dismissed and that he enjoyed the job and thought he may retire from it.

[102] Lani described the impact as well. She also set out that the financial situation was very serious, and they could not afford to pay rent or put food on the table. Food parcels were collected on occasion. Lani said that Mr Rutene withdrew into himself and shut off from the family. She described almost "losing him twice" since his employment ended when he tried to take his life.

[103] The impact on Mr Rutene from his dismissal was serious. I do accept as Ms Lodge submits that the injury also caused a measure of continuing upset and hurt. I weigh that Ashburton Meat was not responsible for that matter.

[104] Ms Lodge referred the Authority to an Employment Court in *Stenhouse v Towman Towing Group Ltd* and said that it was a comparable case. There was an award in that judgment of \$12,000.⁶ The period of unemployment from that matter was unclear whereas in this matter it was ongoing for a long period of time. In *Stenhouse* there was no evidence about the more serious response to the loss of a role.

[105] In line with similar cases and carefully weighing the matters as set out above including those for which Ashburton Meat does not have responsibility, I conclude there should be a compensatory award subject to any issue of contribution of \$20,000.

Contribution

[106] The Authority is required to consider under s 124 of the Act where it has determined there is a personal grievance the extent to which the actions of Mr Rutene contributed to the situation that gave rise to the grievance.

[107] Mr Cain submits that Mr Rutene did not contribute to the circumstances giving rise to his personal grievances.

[108] Mr Rutene accepted that he took an extended break of almost double the normal break time, left work without authorisation on 6 and 7 April 2021 and did not when instructed return to work. He had been spoken to on several occasions informally about the importance of attendance at work, following the GRTW plan and the taking of breaks. He knew that he needed permission to leave the workplace. When asked why he did what he did at times he blamed others such as Mr Neal or ACC. He appeared to have less insight into, and at times failed to appreciate the needs of Ashburton Meat to have him comply with rules, the GRTW plan and carry out his work without reasonably constant supervision. I place some weight on the fact that had the staff member on 7 April 2021 not advised Mr Pope that Mr Rutene intended leaving for the day no-one in a position of authority would have known where he was.

[109] Mr Rutene's actions were both causative of the disciplinary outcomes and blameworthy.

⁶ *Stenhouse v Towman Towing Group Ltd* [2021] NZEmpC 183.

[110] I am not persuaded that this is an exceptional case however there is significant blameworthy contributory conduct which I conclude is within the mid upper range of contribution.⁷

[111] I consider it appropriate in this case to reduce the awards above by 30% for contribution.

Orders made

[112] Taking contribution into account I order Ashburton Meat to pay to Brent Rutene the sum of \$10,712.08 under s 123(1)(b) of the Act for reimbursement of lost wages. I reserve leave for Ms Lodge to return to the Authority within seven days of the date of this determination if there is any issue with Mr Cain's calculation of lost wages.

[113] Taking contribution into account I order Ashburton Meat to pay to Brent Rutene the sum of \$14,000 without deduction being compensation under s 123 (1)(c)(i) of the Act.

Costs

[114] I reserve the issue of costs.

[115] If costs cannot be resolved, then Mr Cain may lodge and serve a costs submission within 14 days from the date of this determination. Ms Lodge and Ms Kelly will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[116] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.⁸

⁷ *Maddigan v Director -General of Conservation* [2019] NZEmpC 190.

⁸ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at [https://www.era.govt.nz/assets/Uploads/practice-note-2.of lost wages.](https://www.era.govt.nz/assets/Uploads/practice-note-2.of%20lost%20wages.pdf)

Helen Doyle
Member of the Employment Relations Authority