

[3] Heritage contends Mr Singh's dismissal was a fair and reasonable decision after they had completed an investigation into an allegation that Mr Singh threatened and assaulted a co-worker shortly after their work shift had ended and that they did not culpably breach Mr Singh's privacy during their employment investigation. Heritage says they concluded Mr Singh engaged in an act they viewed as serious misconduct that they assert destroyed the essential duty of trust and confidence Heritage was entitled to place in Mr Singh.

[4] The parties attended mediation, but the matter remained unresolved.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence.

[6] Milkha Singh attended the investigation meeting as did Heritage's former Care Home Manager, Gail Kerse, former Clinical Services Manager, Ranjit Kaur and Margaret Crozier, Heritage's current Chief People Officer. I have resolved pursuant to Schedule 2, s 10(1) of the Act, not to publish the name of the complainant co-worker who was the subject of the alleged threat and assault as they did not give evidence. They will be referred to throughout as the 'co-worker'. All the above-named witnesses provided written briefs of evidence and answered questions.

[7] After the investigation meeting as directed, counsel and Mr Singh provided additional documentation and written submissions.

Issues

[8] The issues the Authority must determine are:

- (a) Was Heritage's investigation of the co-worker's concerns and disciplinary process conducted in a full and fair manner; and consequently:

- (b) was the decision to dismiss Mr Singh, one that a fair and reasonable employer could have reached in all the prevailing circumstances as measured against the standard set by s 103A of the Act and consideration of s 4 of the Act's good faith requirements?
- (c) If Mr Singh's personal grievance is established what remedies should be awarded considering his claims for:
 - i. Breach of privacy.
 - ii. Lost wages.
 - iii. Compensation under s 123(1)(c)(i) of the Act.
- (d) If Mr Singh is successful in all or any element of his personal grievance claim should the Authority reduce any remedies granted because of any contributory conduct?
- (e) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[9] Mr Singh commenced working for Heritage as a full-time healthcare assistant in a Christchurch aged care facility on 18 January 2023. At the time, Mr Singh an Indian national, was the holder of a Heritage sponsored work visa. Mr Singh was the subject of an individual employment agreement he signed on 16 January 2023, and a Heritage manager signed on 18 January 2023 that expressly incorporated attached company policies including a document entitled: "The Heritage Way".

[10] The job involved rostered shifts. Up to the time in dispute, Mr Singh worked closely with the co-worker often on the same shift and says they got on well and socialised out of work time. The two managers giving evidence who interacted with Mr Singh, described no serious

concerns about his interactions with care home residents but Ms Kerse detailed some previous difficulty in getting Mr Singh to engage with Heritage's performance appraisal process. Ms Kerse completed the performance assessment in early March 2024, without Mr Singh's input, and it shows from Ms Kerse's perspective, Mr Singh had some areas for development and training including interactions with co-workers.

[11] In addition, Ms Kerse had cause to issue Mr Singh with a "Letter of Expectations" on 19 April 2024, following an investigation of transgressions in how Mr Singh had completed unit training standards delivered by an external provider. Mr Singh's academic integrity was judged to be deficient by the training provider after an investigation. Mr Singh had to re-sit the unit standards. While initially considering the matter to be potential serious misconduct (which objectively I find it was), Ms Kerse says she was confident in Mr Singh expressing belated remorse after trying to unconvincingly explain his conduct and, she consequently did not pursue a formal disciplinary sanction. Ms Kerse says she was also conscious of the potential impact on Mr Singh's sponsored work visa.

[12] Soon after the above expectations letter was issued, both Ms Kerse and Ms Kaur say they observed tension within a small group (four) of young caregivers that included Mr Singh and the complainant co-worker. This included an observation that the hitherto close relationship between Mr Singh and the co-worker appeared to have cooled. Ms Kerse and Ms Kaur resolved to meet with the four caregivers to ascertain what was causing the disharmony.

Friday, 10 May 2024 meeting

[13] In the afternoon of 10 May, Ms Kerse and Ms Kaur met with the four young caregivers to discuss their negative interactions. Ms Kerse led the meeting and recalled listening to each team members perspective of their interpersonal disputes before explaining to them that they should seek to work together and move on from past grievances. Ms Kaur recalled that Ms Kerse was clear in setting out her expectations that niggling behaviour would not be tolerated as it had the potential to spill over into caregiving responsibilities. Ms Kerse says after about 45 minutes, when the group had exhausted accusing each other of various slights, she asked

them to buy into a ‘clean slate’ approach and recalled all four nodded in agreement. However, Ms Kerse says the meeting did not end well and she had to make clear her expectations of ongoing behaviour. Ms Kerse also recalled Ms Kaur urging the group to behave like adults.

The incident

[14] At the end of their shift on 10 May at around 10 pm, Mr Singh and the co-worker met by a bus stop just outside the care facility’s car park. The nature of the interchange between the parties is disputed.

[15] Ms Kaur recalled being rung by the co-worker late on the evening of 10 May and being advised he had been hit by Mr Singh. Ms Kaur described the caller as sounding anxious and upset, but when asked if he was safe and had someone with him, he said yes but he was intending to call the police. Ms Kaur recalled suggesting he should advise Ms Kerse of what had happened and when they returned to work on Monday the situation would be investigated.

[16] Ms Kerse recalled getting a text from the co-worker at around 10:30 pm on 10 May and an email at 11:05 pm which she accessed the next day. The email subject heading: “Hit and threaten by Milkha” said:

Good evening Managers,

I have been hit and threaten by Milkha. He has blocked my while going to home and asked to stop me. Started the same conversation that we had in the meeting, while that he started screaming and threatening me to kill. In sudden, he hit me and ran off. I have already reported to police.

[17] Ms Kerse after viewing the text but not the email, recalled calling the co-worker in the morning of the following day (Saturday) and asking him if he was all right – Ms Kerse recalled him saying he was not injured and he recounted what had occurred.

[18] Ms Kerse says she phoned someone in the Heritage People and Culture team, and they agreed an investigation was needed. Ms Kerse recalled being concerned that Mr Singh and the co-worker were rostered together the coming Monday. Later, the Saturday, Ms Kerse went to the workplace and came across the co-worker who while he was not rostered to work, had

arrived to check with neighbours adjacent to the bus stop to see if any CCTV footage of the incident was available. Ms Kerse says the co-worker seemed unsettled and said he was not okay. Ms Kerse took no notes of either of these encounters and did not ask the co-worker to elaborate on the nature of the assault, but recalled at some point he disclosed Mr Singh had slapped him. Ms Kerse could not recall whether the co-worker had any visible marks on his face from the alleged assault.

[19] Ms Kerse also disclosed she called Mr Singh on the Saturday and told him something had been brought to her attention that needed discussing and he need not work the next day but had to come and talk to her when he arrived at work on Monday.

[20] Ms Kerse received a further email from the co-worker on the afternoon of Sunday, 12 May, with some additional details of the 10 May incident. This included (in summary that Mr Singh had allegedly:

- Blocked him from exiting the car park then asked to meet him at the nearby bus shelter.
- Remonstrated with him using abusive language, concerning a matter that had been discussed earlier in the day – Mr Singh suggested he felt unsupported by the co-worker.
- Suggested he was playing Mr Singh off against other workers.
- Got angry at his response and proceeded to abuse him further and then “hit me on my face” and ran off.

[21] The email concluded the co-worker had contacted the police shortly after the incident. Evidence provided demonstrated the co-worker rang the police at 10:15 pm on 10 May and then made a more detailed report to the police on the morning of 11 May.

[22] Ms Kerse says she obtained further advice on the Monday morning from a Heritage Senior People and Culture Advisor, that led to a formal meeting with Mr Singh, shortly after

he arrived at work to communicate an intention to suspend him on pay to carry out an investigation with the rationale for the suspension being to keep the two caregivers apart.

13 May suspension meeting

[23] On 13 May, Ms Kerse and Ms Kaur were provided with a script from People and Culture to run the suspension meeting but no verbatim notes were taken. A later uncontested report of the meeting that Ms Kerse had prepared, shows Mr Singh was apprised of his right to be represented but he chose to proceed without support; the nature of the incident as described by the co-worker was outlined to him; no response was sought and he was asked to provide feedback on the proposal to suspend him.

[24] Ms Kaur recollected that Mr Singh looked stunned and a break was called to allow Ms Kaur to explain the situation in Punjabi using the People and Culture provided notes as an aid. Ms Kaur says Mr Singh appeared to understand why he was being suspended and he said he was going to obtain legal advice. Ms Kerse says Mr Singh affirmed he agreed with the suspension (Mr Singh did not contest this). Ms Kaur says she took no further part in proceedings and her opinion on interactions between Mr Singh and the caregivers' group under scrutiny was not sought.

[25] Mr Singh recalled being shown his co-worker's emailed complaint at the suspension meeting but not being given a copy to retain at the meeting.

[26] After the meeting, Ms Kerse with assistance from the Senior People and Culture Adviser, prepared and emailed a 13 May letter to Mr Singh, confirming the paid suspension and the reasons for such. The main purpose of the suspension was described as to investigate "the allegation of assault on your colleague" (named). Mr Singh was advised once the investigation was complete, he could expect a meeting to disclose the outcome and if it disclosed grounds for potential disciplinary action he would be invited to a disciplinary meeting. The letter assured Mr Singh: "All investigation interviews will be conducted in accordance with best practice and your Employment Agreement". The letter concluded by encouraging Mr

Singh to obtain representation and an employee assistance programme provider, referral was offered.

[27] Next, despite conceding that no investigation interviews took place with either Mr Singh or the co-worker or any other workers, Heritage's Ms Kerse in consult with the Chief People and Culture Officer, provided Mr Singh with a letter of 14 May, inviting him to a: "Formal Investigatory and Potential Disciplinary Meeting" at 10:30 am on 16 May. The letter that did not attach the two emails from the co-worker, set out an allegation that Mr Singh on 10 May, approached the co-worker just outside the care facility and had initiated a heated conversation that escalated into him yelling and screaming in an aggressive manner and then he was alleged to have hit the co-worker on the face and ran away. The letter then suggested the allegations were potentially: "Misconduct and/or Serious Misconduct" and four "Heritage Way/Code of Conduct" extracts were cited. The potential of ultimate dismissal was suggested but the envisaged meeting was described as Mr Singh's opportunity to respond to the allegations and "evidence gathered thus far".

[28] The letter then outlined the meeting would be held "in stages" with the first being to hear Mr Singh's response then they would adjourn the meeting and resume in a disciplinary meeting mode if they had a belief that Mr Singh had engaged in misconduct or serious misconduct. Heritage suggested at the disciplinary stage, Mr Singh could add any further information that would be considered in an adjournment "with the final stage being where an outcome will be provided to you". Attached to the letter was: "The Heritage Way/Code of Conduct" and a: "Workplace Harassment, Bullying and Discrimination Policy".

16 May meeting

[29] Mr Singh attended the meeting voluntarily without support. Ms Kerse and an administration officer attended for Heritage. The latter person took notes, but the Authority was not provided with them and had to rely upon a typed meeting report that was not at the time shared with Mr Singh. Subsequently the notetaker confirmed handwritten notes were used to

provide a typed-up report for Ms Kerse's approval and then believing the notes to be confidential, they were placed in a document destruction bin.

[30] Ms Kerse recalled explaining the purpose of the meeting and asking for Mr Singh's side of the story. Ms Kerse's written evidence and the report, disclosed that Mr Singh (in summary) said:

- He finished work before the complainant co-worker and parked his car up to wait for him as he wanted to discuss further the discourse during the earlier work meeting of the afternoon of 10 May and, what was going on between the two of them.
- They both got out the car at the bus stop and: "Voices were raised".

[31] Then the meeting report record's Ms Kerse "read out allegations" from the co-worker's statement (presumably the emails). Ms Kerse recalled she read one of the emails from the complainant co-worker to Mr Singh and he admitted blocking the other worker from leaving with his car. However, Mr Singh specifically denied hitting and threatening to kill the complainant co-worker and he did not know why such allegations had been made. Mr Singh is then reported as saying he had no further contact from the co-worker, but he received a threatening phone call on 10 May at around 10:45 pm, from the co-worker's flatmate. The report records Ms Kerse then said she needed to take a break to talk to the Senior People and Culture advisor. Upon returning from the break, Ms Kerse is reported as telling Mr Singh her advice from People and Culture is there would be a disciplinary outcome but as they needed more time to go through the information a decision would not be communicated that day.

[32] The report details that Ms Kerse then asked why Mr Singh did not initiate the conversation earlier before they both got into their vehicles and Mr Singh responding their cars were some distance away and other unidentified workers were present in the car park. Mr Singh was then told his suspension would continue and Ms Kerse asked when he would be returning from planned overseas leave and, Mr Singh said 24 May. Ms Kerse advised he should keep an

eye on his emails for a further response from Heritage in the following week. Mr Singh is then recorded as saying he stopped his car to talk to the co-worker and “nothing else”.

[33] Mr Singh says including the brief break, the 16 May meeting lasted around 27 minutes.

[34] Ms Kerse says she subsequently met with the co-worker on 16 May, to seek an explanation about his flat-mate’s phone call to Mr Singh and to remind him of confidentiality obligations. Ms Kerse says the co-worker conceded the flat mate did ring Mr Singh shortly after the 10 May incident. No notes were taken of this conversation and when pressed, Ms Kerse could not recall putting Mr Singh’s version of the 10 May incident to the co-worker, either at this meeting or thereafter. Ms Kerse says she chose not to formally interview the co-worker as she felt his emails and the fact that he had immediately reported the matter to the police, was sufficiently persuasive.

[35] On 16 May, the co-worker emailed Ms Kerse elaborating on his flat mate’s call to Mr Singh in which he says he told him about the assault and provided the flat mate with Mr Singh’s telephone number. The co-worker said Mr Singh pressed for a meeting but after initially agreeing to it, they decided not to meet.

[36] Earlier on 16 May, Mr Singh also emailed Ms Kerse stating his friendship with the co-worker had previously been good but then suggested the co-worker had made the accusation of assault as some kind of front to protect a female co-worker from complaints. Mr Singh also reiterated the accusation that the co-worker’s flat mate was threatening him. Ms Kerse says she did not respond to Mr Singh’s email or discuss its content further, believing it to lack relevance. Objectively, I note it added little to Mr Singh’s explanation of the 10 May incident and Mr Singh was very unclear on imputing any genuine motive to the co-worker for making the assault allegation. What it did show is, if there was any likely sharing of information that allegedly breached privacy obligations owed to Mr Singh, the disclosure likely came from the co-worker and not Heritage management.

Preliminary outcome letter and proposed dismissal

[37] Heritage chose to forward a preliminary disciplinary outcome letter to Mr Singh on 21 May. The timing was unfortunate as they knew he was on leave and overseas. Regardless, I find the letter and the gap since the 16 May meeting showed Heritage took time to deliberate on potential outcomes. Evidence from Ms Kerse was she consulted the Chief People and Culture Officer (Ms Crozier) before preparing the preliminary outcome letter and was assisted in its drafting. At this point in time, Ms Kerse says she concluded that the co-worker's account was more credible as it was consistent, detailed and the emails were contemporaneous. The fact the co-worker immediately reported the matter to the Police was also seen as indicative of a credible account.

[38] As background, Ms Kerse says she was also aware that their former friendship had cooled and assessed that Mr Singh initiated the conversation of 10 May, as he was dissatisfied with the co-worker's participation in the earlier meeting. Ms Kerse says further persuasive factors were Mr Singh admitting he had blocked the co-worker from leaving and had admitted a raised voice conversation. In addition, upon assessing Mr Singh's credibility, Ms Kerse says she did take account of the recent instance of Mr Singh's unit standards issue and how he initially tried to explain away this transgression, as raising concern about his "truthfulness generally". Ms Kerse says she concluded with confidence, Mr Singh had hit the co-worker during their 10 May interchange.

[39] The preliminary outcome letter of 21 May suggested Mr Singh's actions (the heated and aggressive conversation culminating in him hitting the co-worker "on the face"), amounted to serious misconduct in breach of five identified and previously cited, Heritage policies and "the probable outcome will be Dismissal of your employment at Heritage Lifecare". The letter initially sought a written response by 11 am the following day. There was no offer to meet further but Mr Singh's lawyer in response did not ask to meet.

Mr Singh's response

[40] Mr Singh who was on holiday in Australia, instructed a Christchurch lawyer who responded promptly by email of 5 pm, Tuesday 21 May, noting they needed to take fuller

instructions and would do so the following week and reasonably required more time to respond. In the interim, they reiterated that Mr Singh did not accept the described version of events and he wanted to provide feedback on the proposal to dismiss him. Disclosure of information pertaining to the proposed dismissal was also sought.

[41] In reply, Heritage indicated they would extend the feedback deadline until noon on 24 May (later to 5pm). Given Mr Singh was overseas, and Heritage were aware of his leave situation and, that this was the first time Mr Singh had obtained legal assistance, I find the imposed timeline to be unreasonable.

[42] Nevertheless, by letter of 24 May, Mr Singh's lawyer provided a fuller written submission while reserving concerns about the timeframe. The letter suggested Mr Singh did not "yell at or hit" the co-worker "nor did he say he would kill him". The lawyer proceeded to suggest the allegations were implausible as the two workers had maintained a good friendship. It noted the co-worker had inexplicably to Mr Singh, provided a statement in support of another co-worker who had made a complaint about Mr Singh and "as a friend" Mr Singh had been eager to find out why the supporting statement had been provided. The lawyer then suggested the volubility of the exchange at the bus stop was because the parties spoke in Punjabi and was otherwise a normal conversation in a place they often met after work. It was suggested they left the car park impliedly by mutual consent to avoid being overheard speaking in Punjabi as this practice was actively discouraged by Heritage (a policy directive, Heritage witnesses confirmed to be in place). The lawyer noted the conversation occurred outside the workplace and was not witnessed and the co-worker had no supporting evidence the assault took place suggesting the act of making a police report was self-serving.

[43] Overall, Mr Singh's lawyer asserted there was insufficient factual evidence for the co-worker's version of the incident to be preferred and the sanction of dismissal in all the circumstances was disproportionate "to what was a conversation between friends" outside the workplace. The timing of the Police report was also questioned. In the alternative, the lawyer sought consideration of a lesser disciplinary sanction. Of note was the suggestion in the letter

that Mr Singh “otherwise has an exemplary employment record”. Evidence from Heritage confirmed this was not the case.

[44] In an interim response of 28 May, Heritage provided evidence of the co-worker having called the Police, shortly after the incident. Ms Kerse letter also squarely put that their concern regarding Mr Singh’s “honesty and integrity” had been influenced by the recent unit standards issue and Heritage provided Mr Singh’s lawyer with a copy of the letter of expectations. Heritage also provided additional time for Mr Singh to address the additional information but again the time frame was objectively tight (by noon the next day).

[45] By email of late afternoon 28 May, Mr Singh’s lawyer suggested reliance on the letter of expectations was irrelevant to any consideration of Mr Singh’s integrity and suggested on Mr Singh’s behalf, he had provided a “reasonable explanation about the unit standards matter”. It was further suggested Heritage had pre-determined the dismissal decision. No other submission was made other than Mr Singh reiterating, he denied the co-workers “explanation of events”.

[46] I observe that the evidence provided does not suggest Mr Singh gave a reasonable explanation on the unit standards matter and to the contrary, he was lucky that Heritage gave him a chance to redeem himself without impact on his work visa (which was dependent on him completing minimum qualifications).

The dismissal

[47] Ms Kerse as the decision maker, says she first weighed several factors but having concluded Mr Singh did hit and abuse the co-worker, she felt the assault was too serious and although after work, it had a significant connection to workplace relationships and the safety of other workers. Ms Kerse says she was aware of the impact on Mr Singh’s work visa if she dismissed him. Ms Kerse recalled as she had resolved dismissal was likely, she met with four senior managers on 31 May to test her assessment of the factors making up her decision. From the evidence, it was clear Ms Kerse as the facility manager, was the ultimate decision-maker but she carefully canvassed the reasons for her decision and alternative options with others.

[48] By letter of 31 May 2024, Ms Kerse affirmed that the conduct of Mr Singh amounted to serious misconduct, and she had decided summary dismissal was the appropriate outcome. In citing the reasons for dismissal, Ms Kerse highlighted her belief that Mr Singh had breached three elements of the Heritage code of conduct by in summary, engaging in:

- Offensive or intimidating behaviour.
- Conduct outside the workplace that seriously harmed the trust and confidence Heritage placed in him
- Physical, mental or verbal abuse of a co-worker.

The aftermath

[49] By way of an email from an advocate of 3 July 2024, Mr Singh raised a personal grievance citing a belief his dismissal had been effected in an unfair and unreasonable manner and that Heritage had not maintained confidentiality of the process leading up to the dismissal. Compensation and lost wages were sought. Heritage responded by letter of 23 July, denying the dismissal's procedural deficiencies and denied any privacy breaches.

[50] A further matter arose in early August 2025, when Mr Singh posted derogatory comments about Heritage management on their Facebook page and made unsubstantiated allegations about resident care standards. Mr Singh obliquely referenced his current personal grievance. Heritage did not engage with Mr Singh, but they deleted the comments. Mr Singh then made a self-represented application to the Authority on 14 August 2024, to resolve his employment relationship problem. The parties attended a directed mediation on 4 February 2025, but the matter remained unresolved. Mr Singh made no further contact with the Authority seeking to advance the matter, until 29 April 2025. A teleconference was held on 1 October 2025, evidence exchanges were timetabled and the matter was set down for an investigation meeting.

[51] Mr Singh commenced alternative employment on 30 September 2024 and has subsequently resolved his work visa status.

Issue 1 – was the Heritage investigation conducted in a full and fair manner?

[52] Given the size of the organisation and resources available in applying s 103A(3)(a) of the Act, I approach this by holding Heritage to a reasonably high standard when assessing if they “sufficiently investigated the allegations against the employee” before dismissal.¹ Ms Crozier who was involved at the decision-making stage, conceded that the investigation undertaken did not strictly comply with Heritage policy despite being assured by her now former Chief People Officer that it had done so. This is contrary to the assurances made to Mr Singh in Heritage’s letter of 13 May 2004 that all investigation interviews will be conducted in accordance with best practice in Mr Singh’s Employment Agreement. I was subsequently provided with a copy of investigation guidelines Heritage managers utilised to conduct investigations – Ms Kerse indicating she was aware of this document.

[53] The first problematic issue is Heritage’s decision to appoint Ms Kerse as both the investigator and decision-maker. While this is not necessarily fatal to an outcome it is not best practice. Ms Crozier agreed best practice was to separate out investigation and decision-making functions. Ms Crozier could only offer a suggestion that because of the geographical spread and size of the business this is not always possible. I noted Christchurch is not an isolated region. In assessing evidence however, I was impressed by the diligent approach Ms Kerse took to her ultimate decision-making task and she was supported by Heritage’s People and Culture advisors throughout. Despite being Mr Singh’s appraiser and direct manager there was no suggestion that Ms Kerse approached the dismissal decision in an openly biased manner.

[54] There, however, were some procedural deficiencies in the investigation stage prior to the dismissal decision, these included:

- A failure to formally interview the co-worker complainant – best practice would have been to interview him first, to gather and document information. This could crucially have included the exact nature of the assault, its personal impact on him and a probing of

¹ Employment Relations Act, 2000, s 103A(3)(a) Test of Justification.

the breakdown in the relationship with Mr Singh. It would have also enabled the decision-maker to better assess the co-worker's credibility and demeanour.

- An informal discussion between Ms Kerse and the co-worker did take place on the day after the incident but it was not documented. Heritage's own guidelines encouraged statement gathering and ensuring those interviewed signed and agreed to their statements and were aware they would be provided to the person under investigation. ²
- No other workers or managers were interviewed to gain context on what may have led to the incident on 10 May. However, I accept Ms Kerse and Ms Kaur attended the meeting just prior to the incident and both had ongoing knowledge about the relationships in question.
- Mr Singh's version of events was not put to the co-worker for comment.
- There was poor documentation of all crucial meetings with Mr Singh, including not getting back to Mr Singh to check the accuracy of note-taking and secure an agreed record of what had been admitted. Audio recording of the 16 May meeting with Mr Singh was an available option.
- An unreasonable haste to obtain Mr Singh's response to the preliminary findings and proposal to dismiss him. Once Mr Singh obtained representation a meeting should ideally have been offered to listen to any further mitigating submissions prior to finalising the dismissal decision.

² Heritage, "Gathering Statements," People Manager's Guide – Disciplinary Management.

- It was not clearly documented when the co-worker's two emails were provided to Mr Singh.

[55] I find overall the investigation was not necessarily conducted in a thorough manner and was poorly documented. However, this is mitigated by the lack of complexity of the issue involved and the fact that Mr Singh was provided a reasonable opportunity, to explain his conduct. Notwithstanding, I must apply s 103A (5) of the Act's consideration. This obliges the Authority not to determine whether a dismissal is unjustified "solely because of defects in the process followed by the employer" or subject a party to pedantic or unnecessary procedural scrutiny, provided the defects in process (that here are not minor) and "did not result in the employee being treated unfairly".³ I find despite the identified defects, it is difficult to conclude that had the investigation been more thorough, the outcome would have been different.

[56] Set against the above procedural defects, I find Heritage got the 'essential basics' right by sufficiently detailing their concerns to Mr Singh in a timely manner; the suspension was justified and, Mr Singh had a reasonable opportunity to respond to identified concerns that were objectively of a serious nature and not difficult to understand. I was also convinced Heritage genuinely considered and deliberated for some time on Mr Singh's explanations, that objectively changed in emphasis over time and raised genuine credibility issues.⁴

[57] Without condoning 'sloppy' elements of the investigation process, I do not find in all the circumstances, that Mr Singh was treated unfairly because of a what I would categorise as a 'less than ideal' investigation.

[58] I find that Heritage taking all matters into account, adequately satisfied the requirements of fairness and reasonableness as set out in s 103A(3)(a) – (d) of the Ac

³ Employment Relations Act 2000, s 103A(5)

⁴ All factors the Authority must assess under the Employment Relations Act 2000, s 103A (3) (b) –(d).

Issue 2 – the decision to dismiss – was it justified?

[59] Although the Authority does not have unbridled licence to substitute its decision for that of the employer⁵ it may reach a different conclusion, provided the conclusion is reached objectively and regarding all the circumstances at the time the dismissal occurred.⁶ The Authority is essentially deciding “whether the decision and conduct of the employer fell within the range of what a fair and reasonable employer could have done in all the circumstances”.⁷

[60] Considering the available evidence and contextual factors, I find the decision maker was reasonably entitled to rely on their assessment of credibility issues that it was more likely than not, that the co-worker’s documented recollection of the 10 May incident was accurate as it was contemporaneous (related the day of the incident) and immediately reported to the Police. In addition, the evidence disclosed a significant and developing animus between Mr Singh and the co-worker that Mr Singh unconvincingly tried to downplay. Mr Singh was clearly on his own admission during the Authority investigation meeting, dissatisfied and agitated by the co-worker’s conduct during the earlier 10 May meeting.

[61] In *Whanganui College Board of Trustees v Lewis*, the Court of Appeal has observed:

The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof. Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.⁸

⁵ *X v Auckland District Health Board* [2007] 1 ERNZ 66.

⁶ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

⁷ *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

⁸ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

[62] The above guidance allows an employer when wrestling with conflicting accounts, to make a finding of credibility provided the process adopted in getting to this point is subject to a standard of reasonableness.

[63] Heritage did then engage in a 'two step' disciplinary process of first identifying potential serious misconduct and seeking comment before reaching a dismissal decision. The overall decision-making process was not rushed and Mr Singh had ample opportunity for input and to explain his conduct and any mitigating circumstances prior to the dismissal being finalised, which he did so through his lawyer.

[64] I could criticise Ms Kerse for not diligently apprising herself of Heritage's investigation process, but the fault essentially lay with the People and Culture advisor who was providing ongoing guidance. Ideally, at the final stage of the process, Mr Singh could have been invited to meet with Ms Kerse but had Mr Singh sought a meeting, there is no suggestion that it would have been declined. In the event, Mr Singh chose not to seek a meeting and forwent an opportunity to expand upon mitigating factors his lawyer had set out in writing.

[65] A key to the decision as Ms Kerse emphasised in evidence, was Mr Singh's bare denial of the threatening behaviour and assault which he maintained in evidence during the Authority investigation meeting and, his inconsistent and changing explanations of why he chose to stop and interact with the co-worker on the night of the incident. I add, that in assessing the oral evidence of Mr Singh as to the reason for the conversation occurring, he was less than convincing of its innocent nature. I conclude it was more likely than not, that Mr Singh deliberately confronted the co-worker as he was angry and felt slighted by the co-worker's approach at the earlier meeting. In these circumstances, I consider that Heritage was not acting unreasonably in preferring the co-worker's overall account of the incident including the allegation that Mr Singh engaged in threatening verbal abuse of the co-worker and that a minor unprovoked, physical assault occurred.

[66] The key issue is whether, after accepting the conclusions of their own limited investigation, could Heritage conclude that the threatening behaviour and physical assault they

accepted had occurred, amount to serious misconduct sufficient to destroy the ongoing relationship of trust and confidence they were entitled to place in Mr Singh. Was this a fair and reasonable conclusion that Heritage could have reached in all the circumstances.

[67] Objectively considered, unprovoked threatening behaviour and physical assault is capable of being considered serious misconduct depending upon the contextual circumstances. Heritage was also entitled to consider the ongoing impact of the threat on the complainant co-worker and others. Ms Kerse who was a credible witness, had observed the co-worker was shaken by the incident. It is not trite to observe, that no employer or employee should be expected to put up with threatening behaviour connected to the workplace.⁹

[68] Having considered in all the circumstances that Heritage has not acted in an unjustified procedural manner, I must apply s 103A (4) of the Act that allows the Authority in considering whether Heritage acted fair and reasonably in concluding the conduct of Mr Singh was serious misconduct, sufficient to warrant summary dismissal.

[69] In submissions from Mr Singh, he highlighted a view that:

- The investigation was superficial and incomplete.
- The complainant's allegation was not properly tested, and no independent witnesses were sought.
- I was given unreasonably short timeframe to respond, and my explanations and denial were not genuinely considered.
- The decision appeared predetermined, and the other party was not interviewed.

[70] As outlined, I have dealt with the issues above and found contrary to Mr Singh's submissions that the investigation was sufficiently fair in the circumstances but not ideally perfect. The co-worker's allegations were tested by consideration of Mr Singh's responses to them. No independent witnesses were present or identified by either participant in the 10 May incident. The timeframe for response was adequate, and Mr Singh was legally advised. The evidence showed Ms Kerse carefully considered Mr Singh's explanations but reasonably chose

⁹ *O'Connor v Dry Dock Co Ltd* [2014] NZERA Auckland 2888 at [37].

to prefer the co-worker's account of the incident. I had no evidence to show the decision was pre-determined and have made comment on the failure to interview the co-worker that I have found was not fatal to the conclusion heritage reached.

[71] I accept the previous misconduct of Mr Singh relating to his academic malpractice in the unit standards matter was not misconduct that demonstrates a similar pattern of behaviour akin to what was alleged happened on 10 May, but I find Ms Kerse was entitled to consider, among other factors, that Mr Singh's overall credibility was at issue. In submissions, Mr Singh manifestly failed to appreciate the significance of the unit standards issue by suggesting he had no history of misconduct. Mr Singh also highlighted inconsistencies in the police report concerning the location of the bus stop the 10 May incident occurred at, yet he did not highlight this at the time in his evidence. I find it lacks relevance.

[72] Mr Singh also submitted that a failure of the police to investigate the matter somehow absolved his conduct. Heritage's counsel asserted the Authority and courts in the employment jurisdiction have consistently held that the absence of a police investigation or conviction does not necessarily prevent an employer from dismissing someone provided a standard of reasonableness is achieved.¹⁰ I agree with this submission the legal tests to apply differ and an employer is not expected to apply a criminal standard of proof.

[73] There were no immediate mitigating circumstances offered by Mr Singh, other than a perceived slight by the co-worker made in a conversation earlier justified the confrontational approach taken. Mr Singh did not acknowledge the impact of his approach on the co-worker and continued to deny the physical assault.

Alternatives to dismissal

[74] While I observe some concern about Ms Kerse's lack of knowledge of her own former employer's investigation process, she says she did consider a final warning and took advice

¹⁰ Citing as an example *Tawhiwhirangi v Chief Executive of the Department of Corrections* [2007] ERNZ 652, at [52].

throughout the process; including on the parameters of her decision-making and articulated this well, including the matters she considered in arriving at a decision.

[75] There is not a specifically defined ‘obligation’ to exhaustively consider alternatives to dismissal in s 103A of the Act and the employment agreement only posits alternatives as possible outcomes. In the event, I am satisfied that in making the decision, Ms Kerse took a measured and careful approach and objectively was entitled to conclude that threatening behaviour and physical violence had been established sufficient to warrant summary dismissal.

[76] In the final analysis, this is not a case where the Authority, having affirmed the subsequent categorisation of Mr Singh’s conduct was capable of being deemed serious misconduct, can substitute a lesser sanction to the one that was fair and reasonably open to Heritage, in all the circumstances at the time. In *X v Chief Executive of the Department of Corrections* the Employment Court referred to:

A comment by the full Court in *Angus* illustrates the point; the Act contemplates there may be more than one fair and reasonable response or other outcome that might justifiably be open to a fair and reasonable employer in the circumstances. If the employer’s decision to dismiss the employee is one of those responses the dismissal must be found to be justified. It follows that, if dismissal was one option open to the Department after conducting a proper investigation into the circumstances of the complaint, its decision ought not to be interfered with merely because the Court might, possibly, think some lesser penalty could have been imposed.¹¹

Finding

[77] Despite some procedural defects that I have identified, I find the decision by Heritage Lifecare Limited to summarily dismiss Milkha Singh, was one that a fair and reasonable employer could have reached in all the prevailing circumstances.

[78] I have also found that Milkha Singh has not established with sufficient evidence, his privacy was breached by Heritage Lifecare Limited.

¹¹ *X v Chief Executive of the Department of Corrections* [2018] NZEmpC 106 at [71]

[79] Milkha Singh was justifiably dismissed and is not entitled to consideration of the remedies he seeks.

Costs

[80] Costs are reserved.

[81] The parties are encouraged to resolve any issue of costs between themselves.

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Heritage Lifecare Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Milkha Singh will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[83] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

David G Beck
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1