**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2015] NZEmpC 198**
**EMPC 288/2014**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | RITCHIES TRANSPORT HOLDINGS LIMITED<br>Plaintiff |
| AND | KEERITHI MERENNAGE<br>Defendant |

**EMPC 287/2014**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND BETWEEN | KEERITHI MERENNAGE<br>Plaintiff |
| AND | RITCHIES TRANSPORT HOLDINGS LIMITED<br>Defendant |

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| Hearing: | 10-13 August 2015<br>(Heard at Auckland) |
| Appearances: | G Mayes and K Amodeo, counsel for Ritchies Transport Holdings Limited<br>H White, counsel for Mr Merennage |
| Judgment: | 13 November 2015 |

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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## Introduction

[1] Ritchies Transport Holdings Limited (Ritchies) is a nationwide passenger transport service. It employs around 130 drivers in Auckland. Mr Merennage worked as a bus driver for Ritchies from September 2009. Prior to that time he had

worked as a caregiver at Creative Abilities, an organisation which provides support (by way of accommodation and other assistance) to young people with physical and other needs. While working at Creative Abilities Mr Merennage met Ms T, a resident there.[1]

[2] Mr Merennage was dismissed from his employment with Ritchies following a passenger complaint of sexual assault. The passenger was Ms T. Mr Merennage claimed that he had been unjustifiably dismissed. He also pursued a claim for lost wages. The Employment Relations Authority (the Authority) upheld his claim. Ritchies has challenged the Authority's substantive and costs determinations.[2]

[3] This judgment cannot and does not decide whether Mr Merennage sexually assaulted Ms T. It is focussed on the actions of Mr Merennage's employer, based on the information reasonably available to it at the time; whether it followed an appropriate process and whether it was justified in dismissing him according to applicable employment laws.

[4] Various issues were raised by Ritchies in support of its challenge. While I deal with each of those issues, resolution of the challenge primarily boils down to a finding that the decision to dismiss was unjustified because of a failure to approach the investigation and decision-making with an open mind, to assess the relevant information in a fair and balanced way, and to make reasonable inquiries. That was essentially the conclusion reached by Member Robinson in the Authority and it is the same conclusion I have reached on the company's de novo challenge.

## Background

[5] Mr Merennage worked for Creative Abilities for a few months prior to his employment with Ritchies. Mr Merennage did some cleaning for Ms T during this time.

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[1] Non-publication orders are in place in relation to Ms T's name and identifying details.
[2] *Merennage v Ritchies Transport Holdings Ltd* [2014] NZERA Auckland 406 (substantive); *Merennage v Ritchies Transport Holdings Ltd* [2015] NZERA Auckland 50 (costs).

[6] On 17 November 2011 Ms Soper, Director of Creative Abilities, went to Ritchies to make a complaint on behalf of Ms T. Ms T had been a passenger on Mr Merennage's bus the previous day (16 November), although her complaint related to events that allegedly occurred on an unspecified day during the course of a previous bus journey. Seeing Mr Merennage on 16 November had, it was said, triggered her recollection of earlier alleged events.

[7] Ms Soper met with Ritchies' Operations Team Leader, Ms Keohane. Ms Soper gave Ms Keohane a copy of a written complaint prepared by Ms T. Ms Soper advised that she would be taking Ms T to the Police immediately after the meeting, which she did. A criminal charge was later laid against Mr Merennage.

[8] Before progressing with the chronology of events in relation to the way in which Ms T's complaint was dealt with, it is necessary to step back in time and make mention of an earlier passenger complaint. In January 2011 a female passenger (whom I shall refer to as Ms B) complained that she had been indecently assaulted by Mr Merennage. He was subsequently charged. The New Zealand Transport Agency (NZTA) was advised and the passenger services ("P") endorsement on Mr Merennage's licence was suspended by it. However, Mr Merennage was not suspended by Ritchies during this time. Rather he was placed on a combination of sick leave, annual leave and anticipated leave throughout this period.

[9] In the event, the Police offered no evidence in support of the charge, the charge was dismissed and Mr Merennage's "P" endorsement was reinstated by NZTA. Ritchies did not investigate the alleged incident involving Ms B and took no further action in relation to it at the time. The alleged incident was however resuscitated in the context of the company's findings of serious misconduct in dealing with the complaint by Ms T. I return to this issue later.

[10] Following her meeting with Ms Soper, Ms Keohane spoke to Mr Harvey, Ritchies' Human Resources and Training Manager. Understandably Mr Harvey and Ms Keohane were concerned about the nature of the complaint. Mr Merennage, who was driving at the time, was contacted and asked to return to the depot. A meeting then took place. Mr Merennage had no warning of what would be discussed at the

meeting and he was not invited to bring a support person or a representative with him. No notes were taken of the meeting at the time it occurred, although Ms Keohane prepared a detailed three-page note later that day.

[11] Mr Harvey advised Mr Merennage that a complaint had been made against him, that it was of a sexual nature and that accordingly the company was required to suspend him from duties pending an investigation. Mr Merennage was not asked to express any views on whether or not he should be suspended.

[12] Mr Merennage asked Mr Harvey to tell him when the alleged incident had occurred and Mr Harvey responded by saying that it was "a while ago". Mr Merennage immediately assumed that Mr Harvey was referring to Ms B's complaint, and said as much to Mr Harvey and Ms Keohane. Ms Keohane confirmed that the complaint did not relate to the earlier alleged incident and Mr Harvey advised that it was a recent complaint. Mr Merennage requested further details but Mr Harvey declined to provide them, saying that an investigation would need to be conducted. Mr Harvey gave evidence that this was because he did not want Mr Merennage to think that he was expected to provide a substantive response to any of the issues raised at the meeting as the meeting was not part of his investigation and he wanted to be fair to Mr Merennage.

[13] Despite this laudable objective, Mr Harvey went on to question Mr Merennage as to whether he had ever worked in a care facility. He asked this question twice. Mr Merennage confirmed that he had, although Mr Harvey considered that his response was evasive (answering with what was described as a drawn out "yes"). Mr Harvey also asked Mr Merennage how long ago he had worked in a care facility, to which Mr Merennage replied "a while ago". Mr Harvey concluded that this response was evasive too.

[14] Mr Merennage left the meeting but returned shortly afterwards saying words to the effect that if it was "the girl from the other day, I know that girl and nothing happened. I asked her where she was going and she said the gym and that was all." He went on to make the point that following on from Ms B's complaint he knew he had to be very careful and so he was, always. Both Mr Harvey and Ms Keohane

considered it significant that Mr Merennage appeared to have linked the complaint to Ms T so quickly. This was a matter, along with the allegedly evasive answers he had given earlier in the meeting as to whether and when he had worked in a care facility, which featured in the allegations of serious misconduct and which ultimately supported the decision to dismiss. I observe that no significance was attached, either at the time or afterwards, to the fact that Mr Merennage's initial reaction was to link the complaint to the earlier one made against him by Ms B, rather than an alleged incident involving Ms T; that Ms T had travelled on the bus the previous day and was known to Mr Merennage from his time at Creative Abilities; and that he had said that he was fully aware of the need for caution following the earlier complaint.

[15] Mr Harvey and Ms Keohane gave evidence that it had been made clear to Mr Merennage at the preliminary meeting that he was not to speak to anyone. It is evident that there was some discussion about confidentiality at the meeting. There was a contrast in evidence between Mr Harvey and Ms Keohane on the one hand, as to the nature and the extent of the discussions about confidentiality, and Mr Merennage's on the other hand. Resolution of the issue is not assisted by the absence of any contemporaneous file note of the meeting as to what was discussed and what was agreed.[3] It is however notable that there is no reference to confidentiality being referred to, or what was said or agreed, in Ms Keohane's extensive note made after the meeting. That is a surprising omission given the company's position that the need for confidentiality was important from its perspective and that it had been made very clear to Mr Merennage and that he expressly agreed to it.

[16] I accept Mr Merennage's evidence that he came away from the meeting confused as to what had gone on and that he genuinely believed that the company had told him not to tell anyone else in the workplace about the complaint.[4] Either the message was not communicated with sufficient clarity given the stressful circumstances in which Mr Merennage found himself, or it was not communicated in

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[3] Indeed, as Mr Harvey confirmed in evidence, no contemporaneous notes were taken at any of the meetings that were convened over the entire period at issue other than one meeting during which Mr Amodeo is said to have taken notes, although they are not before the Court.

[4] Mr Merennage's evidence is consistent with the written statement he provided to Mr Harvey dated 8 December 2011.

the way the company's witnesses suggested. It is clear that Mr Merennage was caught off guard at the meeting. He did not have anyone with him, as a support person or otherwise. His confusion is reflected in the fact that he left the meeting believing that he had been placed on suspension without pay. That was not the case, as Mr Merennage had been advised by Mr Harvey that his suspension would be on pay pending completion of the company's investigation. The lack of clarity about confidentiality had repercussions, as will become evident.

[17] Mr Merennage was very concerned to be told that a serious complaint had been made against him, particularly given the backdrop of the previous complaint which had led to a criminal charge. He decided to visit his previous manager at Creative Abilities to discuss matters. He made his way to the organisation's head office, rather than to the residence where Ms T lived. His previous manager was not available and he spoke to another person. He raised concerns about Ms T's state of mind, saying that she was unstable and could not be believed. Ms Soper alerted Mr Harvey to Mr Merennage's visit.

[18] Mr Harvey considered that Mr Merennage's approach to Creative Abilities was at odds with the confidentiality restrictions that had been put in place at the meeting earlier that day. He was concerned that such an approach, and what had been said, may represent an attempt to thwart the company's investigation. These concerns were raised with Mr Merennage. Mr Merennage unreservedly apologised, acknowledged that what he had done was unwise and made it clear that he had misunderstood the scope of the restrictions that Ritchies had imposed. Mr Harvey did not accept Mr Merennage's explanation. Ultimately breach of confidentiality and an attempt to undermine the company's investigation were amongst the grounds for dismissal.

[19] Ms Keohane took a telephone call from Ms T during the course of the evening on 17 November 2011. The details of the call were set out in an email which she sent to the Depot Manager (Ms Carter) and Mr Harvey. The email referred to Ms T being distraught and repeatedly wanting to know why "the driver" had not taken her money. Ms Keohane told Ms T that she was courageous to speak up about a person who had taken advantage of her and, in relation to an expressed

concern that the driver might lose his job because of her complaint, that she needed to remember that if he lost his job it would be a consequence of his own actions. She went on to say that his actions were what had got him into trouble, rather than anything Ms T had done.

[20] Mr Merennage immediately instructed Mr Clearwater, the criminal lawyer who had represented him in respect of the earlier matter. Mr Clearwater wrote to Mr Harvey on 18 November 2011 requesting full details of the allegations. Mr Harvey responded by providing a copy of Ms T's handwritten complaint, Ms Keohane's note of the meeting on 17 November 2011 and her email referring to the telephone call from Ms T. Mr Harvey requested a response to the allegations in the written complaint within five working days. Mr Clearwater responded saying that he had advised his client that, as the matter was under Police investigation, it would be inappropriate to comment in the interim.

[21] Mr Harvey and Ms Keohane spoke to Ms T about her complaint on 29 November 2011. Ms Soper had advised Mr Harvey in advance of the meeting that it would be preferable not to take a robust approach to questioning Ms T, and he says that he did not do so. No notes were taken during this meeting. Accordingly it is unclear what Ms T was asked or what her responses were. At the meeting Ms T provided a further typed statement and an email that she had written to her mother. The statement made reference to an alleged disclosure by Ms T to another caregiver at the time of the incident complained about. Following the meeting Mr Harvey attempted to contact the caregiver but without success. Although incident reports were required to be made of such matters by Creative Abilities, no such report was requested.

[22] On 30 November 2011 Mr Harvey wrote to Mr Clearwater enclosing Ms T's further statement and requesting that Mr Merennage attend a disciplinary meeting to answer the allegations set out in Ms T's complaint. Mr Harvey identified a number of additional matters, as follows:

- the earlier complaint (by Ms B) of "a similar nature", which was said to be of particular concern to the company;

- Mr Merennage's contact with Creative Abilities following the meeting on 17 November, which might constitute an attempt to obstruct the investigation and which, depending on Mr Merennage's response, would amount to further serious misconduct;

- the concern that Mr Merennage had "on multiple occasions" failed to collect/or record fares from Ms T when she boarded a bus. This too, it was said, would amount to serious misconduct.

[23] A very brief meeting took place on 5 December 2011. At the meeting it was made clear that Mr Merennage would not be providing substantive responses to the allegations of serious misconduct pending the outcome of any criminal proceedings, although he had not (at this stage) been formally charged.

[24] Following the meeting a brief signed written statement was provided. It set out a series of short responses to Mr Harvey's concerns, essentially denying each of the allegations. In the statement Mr Merennage denied any inappropriate conduct towards Ms T, denied offering free rides, said he always checked that passengers had valid passes, said that Ms T had shown him a pass and that she had told him that she was going to the gym, confirmed that he had approached Creative Abilities head office because he thought that there must have been a mistake and he wanted to seek more information about the complaint, said that he had indicated that the complainant was unstable and could not be believed, and confirmed that he had understood that the confidentiality discussed at the meeting related to other people working at Ritchies.

[25] Shortly afterwards Mr Merennage was formally charged and his "P" endorsement was suspended by NZTA. Mr Harvey emailed Mr Clearwater on 16 December 2011 advising that he was proposing to suspend Mr Merennage without pay in these circumstances and seeking a response. No response was forthcoming. Mr Harvey wrote to Mr Clearwater again a week later (on 21 December) confirming that Mr Merennage would be suspended without pay with retrospective effect from 16 December 2011. This is what occurred, despite confirmation from Mr Clearwater

on 22 December 2011 that Mr Merennage intended to liaise with his union to comment on his suspension without pay.

[26] In the event, Mr Merennage remained on suspension without pay for well over a year. Mr Merennage has a wife and young son. He described this period as extremely difficult in terms of meeting the family's financial obligations. He was declared bankrupt in February 2013.

[27] Mr Harvey provided some information to Mr Clearwater during this period for the purposes of Mr Merennage's criminal trial. No contact was otherwise made with Mr Merennage for over a year. Mr Harvey gave candid evidence that he was not really interested in the result of the criminal trial. Ms Keohane's evidence was to similar effect. It appears that Mr Harvey thought it likely that Ritchies had seen the last of Mr Merennage. As it transpired, it had not.

[28] During the period of unpaid suspension Mr Merennage enrolled with Work and Income New Zealand (WINZ). He made significant attempts to find alternative work but discovered that prospective employers were put off once they were advised of his current circumstances. A friend of his recommended him for a packing job at a large supermarket. He applied for, and was offered, employment. Mr Merennage started work at the supermarket on 14 February 2013. He did not advise the supermarket that he was currently employed by Ritchies, although on unpaid suspension, or that he was facing a criminal charge.

[29] The criminal jury trial commenced on 13 May 2013. The complainant gave evidence. Mr Merennage did not. He was acquitted.

[30] On 10 June 2013 Ms White, Mr Merennage's employment representative, wrote to Mr Harvey requesting that he be returned to work and raising issues about his period of unpaid suspension. Ritchie's legal adviser responded, advising that the company's disciplinary process would resume and that it was not appropriate for Mr Merennage to return to work in the meantime. A response to the proposal to keep Mr Merennage on suspension was sought by 14 June 2013 and an invitation was

extended to provide, by 21 June 2013, any further or additional matters that Mr Merennage wished Ritchies to take into consideration.

[31] Ritchies placed Mr Merennage back on suspension on pay (the quantum of which is in dispute) from 10 June 2013 and an extension of time was granted to provide any further response. The extension was at Ms White's request, because of her impending departure overseas. Ritchies reiterated the request for any further or additional response, explanations or material. It advised that it was not actively seeking to put any particular questions to Mr Merennage "at this stage" of the investigation. Mr Harvey concluded by stating that:

> I will look forward to receiving from Mr Clearwater any additional explanations or materials in your absence, following which *the Company would be willing to meet further with Mr Merennage if that is his wish before making its final decision.* (emphasis added)

[32] On 29 July 2013 Ritchies wrote to Mr Merennage again, reiterating that it considered that it was entitled to take into consideration the earlier (Ms B) complaint in deciding whether the allegations of serious misconduct had been made out. The next day Mr Harvey was provided with a copy of part of the transcript of the criminal trial. Ms White had earlier advised the transcript would inform Mr Harvey of the evidence presented and that he should reconsider the earlier statements that had been made. She had also made it clear that all outstanding questions could be answered at a meeting with Mr Merennage once Mr Harvey had had the opportunity to read the material. Mr Harvey read the transcript and, although there were some apparent inconsistencies between evidence given at trial and in the original statements, including about the extent to which Mr Merennage was known to Ms T, no further inquiries were made.

[33] It is apparent that the ground had shifted by this stage of the process and that the ball had been placed firmly in Mr Merennage's court to convince Mr Harvey that he was innocent. In evidence Mr Harvey said that:

> So yes I looked very hard at that transcript. I looked very hard at that transcript to find absolutely incontrovertible evidence that [Mr Merennage] did not do what he was accused of doing. I couldn't find it.

[34] A disciplinary meeting was scheduled for 6 August 2013. Due to a mix-up Ms White attended but Mr Merennage and Mr Clearwater did not. Ms White made it clear that Mr Merennage was available to meet with Mr Harvey. Despite this, Mr Harvey wrote to Mr Merennage on 29 August 2013 setting out his conclusions in relation to each of the allegations of serious misconduct. He found that each of the allegations (that Mr Merennage had sexually assaulted Ms T as alleged, that he had attempted to obstruct the company's investigation and that he had failed or omitted to collect and/or record fares from Ms T) had been made out and that each amounted to serious misconduct. He made the point that he had personally interviewed Ms T, had reached a positive view of her credibility and that while the criminal charge (of which Mr Merennage had been acquitted) had to be established beyond reasonable doubt, a lower standard (balance of probabilities) applied in the employment context. Mr Harvey went on to advise that the relationship of trust and confidence had been fundamentally undermined and that summary dismissal was considered the only appropriate disciplinary action. Submissions in relation to penalty were invited by 5 September.

[35] Both Ms White and Mr Clearwater responded separately on 5 September 2013. Ms White reiterated that Mr Harvey was welcome to interview Mr Merennage now that the criminal process had concluded and identified a variety of other perceived problems with the findings of serious misconduct set out in Mr Harvey's earlier letter. Mr Clearwater noted that there was little, if any, corroboration of Ms T's version of events. It was also noted that an incident report was required by Creative Abilities in-house rules but that no report of the alleged disclosure by Ms T to the caregiver had ever been made available and that the caregiver had not given evidence at the trial.

[36] Issues then arose in relation to Mr Merennage's employment at the supermarket. Mr Merennage had suffered a workplace accident on 15 August 2013 and it appears that the following week the Accident Compensation Corporation (ACC) wrote to Ritchies advising that a claim had been approved. It was not until September that Ritchies took any steps in relation to this issue, when Mr Harvey

contacted the manager at the supermarket and made further inquiries.[5] The manager confirmed that Mr Merennage had worked at the supermarket for some time and that he had not disclosed on his job application form that he had been charged with an offence.

[37] Mr Harvey was concerned that it appeared that Mr Merennage had been untruthful in order to acquire work with another employer. He considered that this might amount to a breach of good faith and undermined his credibility. Mr Harvey wrote to Mr Merennage on 4 October requesting an urgent response on these additional concerns.

[38] The parties attended mediation on 9 October 2013. Matters were not resolved. Although issues relating to a potential breach of good faith and lack of truthfulness (in respect of Mr Merennage's work at the supermarket) identified in Mr Harvey's letter of 4 October remained unresolved and no response had yet been received in relation to them, Mr Harvey nevertheless wrote to Mr Merennage on 16 October 2013 confirming his earlier preliminary decision to dismiss.

[39] Mr Harvey gave evidence that the issues relating to working at the supermarket did not comprise part of his reasons for dismissal but this cannot be reconciled with the terms of his email, which stated that:

> I write to confirm the Company's preliminary decision to dismiss Mr Merennage with immediate effect *for the reasons set out in* my previous letter to you of 29 August and *further letters in response to you and Mr Clearwater of 4 October*. (emphasis added)

[40] A personal grievance was raised shortly afterwards.

## Analysis

[41] Section 103A of the Employment Relations Act 2000 (the Act) provides that:

> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be

[5] And it was not until 31 October 2013, after Mr Merennage's dismissal, that details of his employment with the supermarket were provided and relevant documentation obtained.

> determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider:
>
> (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking actions against the employee; and
>
> (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
>
> (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
>
> (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were:
>
> (a) minor; and
>
> (b) did not result in the employee being treated unfairly.

[42] The Court's role is to assess on an objective basis whether the decision and the conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. This involves consideration as to whether the employer had a sufficient and reliable basis for concluding that the employee had been guilty of misconduct.

[43] Relevant too is the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will,

or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[44] The Court is not to substitute its own view for that of the employer.

[45] Mr Harvey's conclusion that serious misconduct had been established was based on a series of unsafe assumptions which he failed to test adequately and/or which he placed undue weight on in the circumstances. In particular he was influenced by the earlier (Ms B) complaint, which had never been investigated by the company or put to Mr Merennage for comment at the time; his perception of Mr Merennage's credibility was adversely affected by erroneous assumptions he made about the fact that Mr Merennage had elected not to give evidence at the criminal trial; he placed significance on comments that Mr Merennage made at the initial meeting on 17 November 2011; and he formed a concluded view that Mr Merennage had committed serious misconduct in the absence of meeting with him once the criminal process was completed and prior to reaching a decision.

[46] It is convenient to deal with each of these matters in turn.

*Reliance on the earlier complaint*

[47] It is clear from the evidence that significant weight was placed on Ms B's complaint and that it was considered as a factor in bolstering the likelihood of the incident in question having occurred as alleged, although Mr Harvey denied this was so. My conclusions as to the weight that Mr Harvey gave to the Ms B complaint in the context of considering Ms T's complaint, are reinforced by extracts from the following correspondence.

[48] First, Ritchies' letter of 20 June 2013 advising that:

> You will appreciate that there are additional matters included in [Ritchies'] investigation which I understand were not made privy to the jury [on the criminal charge arising out of Ms T's complaint], such as the earlier similar complaint concerning Mr Merennage made on 23 January 2011. While that [Ms B's] complaint was also due to go to a criminal jury trial, it was not

> pursued or able to be fully investigated at the time because the complainant had moved overseas.

[49] Second, Ritchies' letter of 29 July 2013 responding to a request as to whether Ms B's complaint was being taken into account:

> The company is entitled to take this previous, similar complaint into consideration (and any further comments Mr Merennage may wish to make about it) when considering all of the relevant information available, on the balance of probabilities.

[50] Third, Ritchies' letter of 30 November 2011 advising that:

> The Company is particularly concerned as the complaint is of a similar nature to an earlier complaint concerning [Mr Merennage] to the Police made on 23rd of January this year by another passenger (in which you also acted as his representative). That complaint (which was immediately alluded to by [Mr Merennage] when we met to discuss his suspension…) was not pursued or able to be fully investigated by us at the relevant time because the complainant moved overseas and the Police were not able to present evidence on the charge.

[51] Fourth, Ritchies' letter of 29 August 2013:

> I have also brought into balance the previous similar complaint which Mr Merennage immediately referred to … as supporting that the behaviour subject to the present allegations did occur. I do not agree that the prejudicial nature of this previous complaint outweighs its real probative value in the overall investigation….

[52] Fifth, Ritchies' letter of 4 October 2013, which came shortly before confirmation of Mr Merennage's dismissal, advising that Mr Merennage had:

> … a *history of sexual complaints against him.* The complainant does not apparently have a history of making false complaints to the police of sexual assault. (emphasis added)

[53] Finally, the company's statement in reply filed in the Authority makes a similar point, noting an assumption that "the jury … on the present matter was unaware of this previous complaint/charge" in acquitting him.

[54] I am satisfied that Mr Harvey formed the view that Ms B's complaint was well founded (as he effectively accepted in cross-examination) and that he relied on this fact to support a finding that the assault against Ms T had occurred as alleged. This was problematic for obvious reasons. Mr Harvey had not been involved in

dealing with the complaint and the company had not undertaken any investigation into it. Mr Merennage denied the complaint at the time and denied it when it was revived in the context of Ms T's complaint. A fair and reasonable employer could not have placed the weight it did on Ms B's complaint in the circumstances, particularly having regard to the paucity of information relating to it and lack of investigation into it.

[55] I pause to note that Mr Clearwater had advised Mr Harvey that he had seen video footage which told against Ms B's version of events. Mr Harvey's response at the time was dismissive, advising that Mr Clearwater was not in a position to "give evidence" as he was acting as counsel. There were attempts to obtain the Police file prior to the hearing in this Court to enable the footage to be viewed. However, as Ms White pointed out, the relevant point was whether Ritchies sufficiently investigated its concerns at the time of the alleged incident or when it sought to revive it.

[56] It is clear that Mr Harvey placed significant weight on the fact that the Police had seen fit to lay a criminal charge. There are dangers in such an approach for an employer. In the present case it meant that Mr Harvey made a number of assumptions. He explained his position in the following way:

> I guess I would have to admit that *I took the fact that the complaint was credible from the fact that it had been approved by the police for prosecution;* a charge had been laid in the North Shore District Court. A policeman doesn't just decide he's going to charge somebody. (emphasis added)

[57] Further, in his letter of 4 October Mr Harvey advised:

> The company is not obliged to conduct its own mini trial of this complaint. The fact remains that the Police did formally charge Mr Merennage, he appeared in court to defend the charge and was only discharged, (as I understand it) because the Police were unable to offer [any] evidence due to the complainant leaving the country.

[58] The following interchange is also reflective of the approach that was adopted:

> Ms White: … so when somebody is charged they are guilty?
>
> Mr Harvey: No not necessarily.

> Ms White: You don't know enough about the situation to make the judgment that you have made do you?
>
> Mr Harvey: I guess if I can explain and possibly some of it has to do with my age *there is a perception that if the police have gone through due process and they have charged somebody then I will come back to the old saying of where there is smoke there is fire.* (emphasis added)

[59] An employer is not required to approach an investigative and disciplinary process with a completely blank mind – that may not be possible given the realities of many workplaces. Nor is it objectionable to form a tentative view during the course of the process. However, an employer must keep a sufficiently open mind to enable genuine consideration to be given to the issues and must remain amenable to persuasion. Merely going through the procedural motions does not suffice. Commencing a disciplinary process from a starting point that "where there is smoke there is fire" is not consistent with the requirements of s 103 of the Act. The implication of the approach in the present case was that adverse views were cemented into place from the outset.

[60] I am satisfied that Mr Harvey had a predetermined view of whether Mr Merennage had committed serious misconduct at an early stage of the process, after interviewing the complainant (a point I return to), and that this fatally undermined his ability to consider all relevant matters with an open mind.

[61] In reaching the conclusion that the disciplinary process was fundamentally flawed for predetermination, I have not lost sight of the fact that Mr Harvey resisted an early suggestion by a member of senior management to "flick" Mr Merennage, that Mr Merennage was paid for his first month on suspension (to 16 December 2011) and another four months in 2013 after the trial concluded, and that Mr Harvey was prepared to wait until Ms White had returned from an overseas holiday before forging ahead with the disciplinary process and that some documentation was made available to Mr Merennage's defence team during the criminal process.

*Inferences from election not to give evidence at criminal trial*

[62] A related issue emerges in respect of the significance Mr Harvey placed on the fact that Mr Merennage had elected not to give evidence at the criminal trial. Mr

Harvey considered that Mr Merennage was hiding behind his rights and was in a state of denial. The company's statement in reply in the Authority, which Mr Harvey approved, sets out the position:

> *[Mr Merennage] could still have given evidence at his [criminal] trial if he genuinely believed he was innocent of sexually/indecently assaulting [Ms T]* or in any way prejudiced in his defence, *but he elected not to do so*. Whilst Ritchies is aware that he was acquitted of the criminal charges that does not mean that he was in fact not guilty of committing them. (emphasis added)

[63] The approach reflects a fundamental misunderstanding of an accused person's rights which impacted unfairly on the way in which the disciplinary process unfolded. I was not drawn to the characterisation of such statements and observations as simply retrospective reflections.

*Reliance on comments made at 17 November meeting*

[64] I have already referred to the meeting of 17 November 2011. Mr Harvey attached significance to Mr Merennage's "evasive" response to the question (asked twice) as to whether he had worked in a care facility before and to his comment, when he came back into the meeting room, that it might be Ms T.

[65] The linkage that Mr Merennage drew at the initial meeting which carried adverse weight with Mr Harvey was hardly damning given Mr Merennage had transported Ms T the previous day and he knew she lived in a care facility, as he had previously worked there. This was drawn to Mr Harvey's attention by Mr Clearwater in his letter of 5 September 2013 and had earlier been made clear in Mr Merennage's written statement provided after the meeting of 5 December 2011. As I have already observed, Mr Merennage had initially thought that Mr Harvey was referring back to Ms B, rather than Ms T. This was a matter that Mr Harvey failed to take into account. Effectively he put the worst possible interpretation on comments and slow and drawn-out responses made during a meeting at which Mr Merennage was unsupported and unrepresented, in circumstances where Mr Merennage had been taken by surprise and where it would have been appropriate to make it very clear that no response was being sought.

*Assessing credibility*

[66] Mr Harvey accepted in evidence that as decision-maker he was essentially confronted with a "she says/he says" scenario and that credibility was the key issue for him. Mr Harvey said that he was well versed in assessing credibility, and that his assessments are based on such factors as looking someone in the eye and observing their body language. As an aside, I note that there is now a considerable amount of empirical evidence to undermine the notion that demeanour betrays lying. As has recently been pointed out, research shows (amongst other things) that:[6]

- Behavioural cues popularly thought to be associated with lying – posture, head movements, shifty eyes, gaze aversion, fidgeting, and gesturing – have no correlation with dishonesty or lack of credibility;

- Those who exhibit nervousness and hesitancy are less likely to be believed, especially if they appear unsavoury and unattractive;

- Suspicious interviewers tend to view responses as deceptive because a suspicious interrogation distorts observers' perceptions;

- Due to the so-called "halo" effect, a perceived good or bad quality in a person will tend to colour all judgements pertaining to that person. Consequently, once a positive or negative impression is formed, this is likely to attach to all the evidence of that person.

[67] Mr Harvey was acting as the employer, not a judge. He was not required to bring a judicial approach to bear on his investigation and decision-making, nor to weigh the information before him by adopting the sort of approach that would apply in court proceedings. He was entitled to prefer the complainant's version of events provided he approached his fact-finding with an open mind and dealt on a reasonable basis with the conflicting accounts with which he was presented. I have already

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[6] Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575 at 578-579. See too *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57, at [52], where a full Court of the High Court observed that there was force in the submission that there is unfairness in drawing large conclusions from small indicia, such as a witness's hesitation in answering a cross-examiner.

dealt with issues relating to the extent to which Mr Harvey approached the investigative and decision-making task with an open mind. There were other difficulties with the approach that was adopted, including the failure to meet personally with Mr Merennage following his acquittal and when concerns relating to self-incrimination were no longer engaged.

[68] There may be situations where an employer is not required to personally meet with an employee as part of the investigative and decision-making process. This is not one of them. Resolution of the company's concerns squarely turned on issues of relative credibility and two conflicting versions of events. Fairness required that Mr Merennage be provided with an opportunity to meet with Mr Harvey to enable him to hear his account personally, to deal with the factual allegations that had been made against him and to put forward anything in extenuation. The failure to meet with Mr Merennage following his acquittal and before reaching a concluded view on whether serious misconduct had been established and the ensuing disciplinary outcome, was inconsistent with a fair process. Effectively Mr Harvey deprived himself of the opportunity to adequately explore the facts and to reach an informed view of which conflicting version of events he preferred and why.

[69] As was observed in *Tawhiwhirangi v Chief Executive of the Department of Corrections*:[7]

> … it is well established employment law that an employee accused of serious misconduct as Mr Tawhiwhirangi has been, is entitled to be heard by the decision-maker. If Mr Tawhiwhirangi's account of an event or events is in conflict with that of another or others, he is entitled to attempt to persuade the decision maker that his account should be accepted or at least that the other account or accounts should not. If the decision maker's finding whether there was or was not misconduct or serious misconduct turns on such a conflict, the responsibility for making that credibility determination will not be the investigator's but the decision maker's in each case. That principle was established in cases including *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424 and *Ioane v Waitakere CC* [2003] 1 ERNZ 104.

[70] Prior to the criminal trial Mr Merennage had provided a written statement denying the allegations and had made it clear through his criminal lawyer that he would not be providing further comment to Mr Harvey pending the conclusion of the

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[7] *Tawhiwhirangi v Chief Executive of the Department of Corrections* [2007] ERNZ 652 (EmpC) at [56].

prosecution. It is evident that the company was prepared to defer completion of its investigation and decision-making until after the criminal process had been brought to an end, because that is what occurred. Mr Harvey did not subsequently request a meeting with Mr Merennage. I am driven to the conclusion that this is because Mr Harvey had formed a very firm view of Ms T's credibility at an early stage and saw no merit in a meeting with Mr Merennage. I am reinforced in this view by evidence that emerged at the hearing that Mr Harvey had had a discussion with an official from NZTA shortly before Mr Merennage's "P" endorsement was suspended by that organisation. The NZTA lognote of one of the discussions recorded for 6 December 2011 states that:

> *[Mr Harvey] said [Ms T] was 100 per cent convincing* and that for employment related matters he could act on the balance of probability that the incident had taken place, he did not have to prove it beyond reasonable doubt. (emphasis added)

[71] Mr Harvey made the point that there were numerous requests for any further or additional explanations or material on the allegations that he was considering and that he had made it clear that he was *willing* to meet with Mr Merennage, if he (Mr Merennage) so wished. An email of 23 July 2013 from the company's counsel encapsulates the approach that was adopted:

> The company's position quite simply remains as set out in the letter of 20 June in particular it is waiting on any additional explanations or materials that Mr Merennage wishes to be taken into account before reaching a final decision in this matter. The company will allow Mr Merennage a final extension until 12 noon this Friday to supply any such information, following which *it is willing to meet with Mr Merennage (if he so wishes) before reaching a final decision. Otherwise the company intends proceeding with a decision based on the information currently at hand*. (emphasis added)

[72] Mr Merennage, through his lawyer, had earlier advised that he very much wished to meet. A meeting with Mr Merennage was scheduled for 6 August but, due to the mix-up I have already referred to and which Mr Harvey accepted was not Mr Merennage's fault, went ahead in Mr Merennage's absence. Mr Harvey said that he made it clear that he was happy to meet with Mr Merennage after the meeting of 6 August. Such a meeting never took place. The reality is that although Mr Harvey was satisfied that Mr Merennage was unaware of the meeting on 6 August, and although he had been advised that Mr Merennage wished to meet with him, he took

no steps to reconvene the meeting to secure his attendance. Rather, he sent a letter dated 29 August confirming that he was satisfied that serious misconduct had occurred and proposing dismissal. This was precipitous and denied Mr Merennage an adequate opportunity to be heard.[8]

[73] As late as 5 September, counsel for Mr Merennage was still making it clear to Mr Harvey that Mr Merennage was available for a meeting, advising by way of letter that:

> … you are welcome to interview [Mr Merennage] now the criminal matter has been finalised.

[74] Ms Mayes, joint counsel for the company, submitted that Mr Merennage's representatives could have made it clear that Mr Harvey should personally interview Mr Merennage following the criminal trial if such a step was perceived to be necessary to ensure a fair process. The obligation to conduct a disciplinary process which complies with the relevant minimum standards lies with the employer, not the employee. It is the employer's process and ultimately it is the employer who must justify the process it chooses to follow and decisions reached as to disciplinary outcome.

[75] Mr Harvey said in evidence that he did not personally consider it important to meet with Mr Merennage; rather he considered that Mr Merennage should consider it important to meet with him. Ms White criticised the approach as being marred by passivity. I agree, and would add that it is also marred by circularity. It was not consistent with an employer's proactive (rather than reactive) obligations to conduct a full and fair disciplinary process.

[76] Indeed it is clear that Mr Harvey regarded the prospect of meeting with Mr Merennage as an exercise in futility. This is made clear in his letter of 4 October 2013, in which Mr Harvey advised that:

> There is no point in interviewing [Mr Merennage] at this late stage, given his consistent denials and that he did not even attend the meeting arranged at

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[8] *Angus v Ports of Auckland* [2011] NZEmpC 160, [2011] ERNZ 466 at [47] citing the principles set out in *New Zealand (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582 (LC).

> your request on 6 August. We know Mr Merennage from his employment with us and already met him at the time the complaint was received.

[77] Ms White put it to Mr Harvey that there were matters in the material he had available to him, including the transcript from the criminal trial, which should reasonably have prompted further inquiry, including evidence that Ms T had given Mr Merennage her cell phone number. This was of potential significance because Ms T had advised Mr Harvey during their meeting that she barely knew Mr Merennage. The complaints lacked specificity, including as to possible time and date. And, as Mr Harvey accepted, the allegations relating to a failure to collect and/or record bus fares were also vague and could not be verified by any other means.

[78] An employer must satisfy the Court on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. That decision must be made out not only on the evidence known to the employer at the time but that which would have been available after proper inquiry by it. An employer must base the decision to dismiss on a reasonably founded belief, honestly held, that serious misconduct has occurred. While there is no doubt that Mr Harvey genuinely believed that Mr Merennage had committed serious misconduct and that dismissal was the only appropriate outcome, his belief was not reasonably founded because of deficiencies in the investigative and decision-making processes.

*Alleged breach of confidentiality/obstruction of investigation*

[79] Mr Harvey concluded that Mr Merennage had attempted to obstruct the company's investigation by contacting Creative Abilities on 17 November and stating that Ms T was unstable and could not be believed, after having been expressly told not to discuss matters with anyone. I have already referred to the circumstances surrounding this aspect of the discussion at the meeting of 17 November and my findings as to the extent of the discussions about confidentiality that took place.

[80] In evidence Mr Harvey explained that the discussion was focussed on a need to protect Mr Merennage's reputation from gossip within the workplace. As Mr

Harvey accepted in cross-examination, this concern was not affected by Mr Merennage's subsequent visit to Creative Abilities. Mr Harvey concluded that Mr Merennage's statement that Ms T was unstable and could not be believed amounted to a deliberate attempt to undermine Ms T's credibility (which he appears to have found offensive) and an attempt to obstruct the company's investigation. However, it is difficult to see how such a statement could reasonably be viewed in this way. Mr Merennage believed that Ms T was unstable and that her account of events was not consistent with what had occurred. He was entitled to draw these points to Mr Harvey's attention as he considered them to be relevant to the employment investigation and he wanted Mr Harvey to take them into account.

[81] While plainly unwise, as Mr Merennage immediately accepted, his approach to Creative Abilities needed to be viewed in context. Mr Harvey had declined Mr Merennage's repeated requests for details of the allegation. Mr Harvey was aware at the time that Mr Merennage had approached Creative Abilities' head office, not the residential premises where Ms T lived. He accepted that at the time of the visit Mr Merennage had more pressing concerns than Ritchies' employment investigation, given that he faced the prospect of criminal charges and was fearful of a repeat of the earlier complaint to the Police and all that had ensued. The focus of Mr Merennage's concerns is reflected in the fact that he immediately instructed a criminal, rather than an employment, lawyer.

[82] In the circumstances I do not accept that a fair and reasonable employer could have been satisfied that Mr Merennage had committed serious misconduct by contacting Creative Abilities, or that dismissal was warranted on that basis, even putting the other issues I have referred to to one side.

*Suspension*

[83] Mr Harvey did not seek any input from Mr Merennage prior to suspending him on 17 November 2011. He said in evidence that he told Mr Merennage he was going to be suspended, explained that suspension was necessary for Mr Merennage's safety and the safety of the company, and that Mr Merennage said "I understand". Mr Harvey took this as agreement to the suspension.

[84] There are difficulties with this. It was unclear what Mr Merennage's expressed understanding related to, and Mr Harvey did not take any steps to clarify the point with him in the context of a meeting where he was clearly caught off guard. Further, it was evident that Mr Merennage believed that he had no choice but to agree with what Mr Harvey was saying, as he was concerned that if he took issue with what was being said he would likely lose his job. As it transpired this concern had some basis. It emerged in cross-examination that Mr Harvey had been advised by two members of senior management to terminate Mr Merennage's employment at an early stage of the process.

[85] More fundamentally, there was no provision in the collective agreement to suspend. There was provision in the company's House Rules for suspension, but following a prescribed process. The relevant part of the House Rules provides that:

> An employee may be dismissed summarily … for serious misconduct in accordance with the following procedures:
>
> A meeting shall be held where *the employee shall be given the opportunity of having a witness present* and also an opportunity to explain the alleged serious misconduct
>
> The employer shall consider any explanation given by the employee *and may suspend the employee on pay pending investigation of the alleged events.* (emphasis added)

[86] The company did not accept that the House Rules applied in the circumstances of the present case, as the meeting on 17 November 2011 was said not to be a suspension meeting. I do not consider that such an argument is tenable. The purpose of requiring Mr Merennage to return to the depot and meet with Mr Harvey and Ms Keohane was to suspend him, and this is precisely what occurred at the meeting.

[87] Mr Merennage was placed on unpaid suspension following the suspension of the "P" endorsement on his licence by NZTA. It appeared that Mr Harvey had initiated contact with NZTA to advise them of the complaint. Suspension of Mr Merennage's "P" licence followed shortly after that.

[88] Mr Harvey said that it was a well accepted policy that if a driver did not have a "P" licence they would not get paid. I am not satisfied, on the evidence before the Court, that there was a well accepted (unwritten) policy of the sort referred to. Certainly Mr Merennage was not aware of it. Further, it emerged in evidence that other drivers who have lost their "P" licences have been dismissed, rather than being suspended without pay. And inconsistently with the existence of such a policy, Mr Merennage had not been placed on unpaid suspension following the first complaint and while his "P" licence had been suspended.

[89] Mr Harvey said that he was being fair to Mr Merennage in not dismissing him at this point, but the fact remains that the company did not attempt to take this step and rather decided to keep Mr Merennage on suspension pending the outcome of the criminal process and its employment processes. The issue is whether, having decided to suspend (rather than attempt to terminate), the company was entitled to do so without pay. I do not accept that it was.

[90] The plaintiff sought to rely on *Rack v Salters Cartage Ltd.*[9] Mr Rack was unable to work because he did not have a heavy vehicle licence. His licence would have been restored on completion of a course. He refused to complete the course because of short notice and was dismissed. A further course was available three weeks' hence. The Court observed that a "sensible and fair alternative" to dismissal would have been to place Mr Rack on unpaid leave until he was qualified to work again.

[91] The present case is distinguishable on its facts and the Court's observations in *Rack* as to the possible alternative options available to the employer in the circumstances were obiter. Further, the House Rules in the present case expressly referred to suspension pending completion of an investigation into alleged serious misconduct, making it plain that any such suspension was to be on pay. Consistently with the House Rules, Mr Harvey said he advised Mr Merennage at the outset that he would be suspended on pay pending the outcome of the investigation. The investigative process did not conclude until October 2013. Mr Merennage was not paid for the entirety of this period.

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[9] *Rack v Salters Cartage Ltd* AC7/02, 20 February 2002 (EmpC).

[92] It was submitted that Mr Merennage had impliedly consented to suspension without pay. Reference is made to various communications from the company placing Mr Merennage, through his counsel, on notice that the proposal was to take this step. There was a notable absence of substantive engagement by or on Mr Merennage's behalf on the issue. I agree with the Authority that consent cannot be implied in the overall circumstances, including having regard to Mr Merennage's apparently well-placed apprehension that he would get dismissed if he raised a concern at the time about the way in which the company was dealing with the suspension issue.

*Conduct of initial meeting*

[93] The way the initial meeting was conducted was problematic, for reasons which will already be apparent. Mr Merennage was not given advance notice of the meeting and was not invited to bring someone with him. As I have said, the House Rules provided that Mr Merennage ought to been provided with an opportunity to have a witness present. Mr Harvey suggested that Ms Keohane might fall within the descriptor of "witness" contained within the House Rules, but that cannot be correct. The provision refers to the employee being given the opportunity to have a witness present. That is plainly for the employee's, rather than the company's, benefit.

[94] In evidence Mr Harvey appeared to accept that Mr Merennage had been at a disadvantage as a result of the way in which the first meeting was conducted, as the following exchange during cross-examination reflects:

> Ms White: So he goes into a meeting, he doesn't know what it is about, he says some things in that meeting that you take extremely seriously. They form the basis for the way that you view things from then on. All he has got is the notes from your witness to rely on. Agreed?
>
> Mr Harvey: There is nothing to stop [Mr Merennage] from making notes of the meeting.
>
> Ms White: Except that he doesn't actually speak very good English and he didn't have any knowledge of what that meeting was about. Wouldn't he have been much better off with a witness present?
>
> Mr Harvey: He may well have.

[95] Mr Harvey gave evidence that he was concerned to ensure that Mr Merennage did not feel that he needed to provide a substantive response at the meeting. He explained that this was to ensure a fair process, particularly as Mr Merennage had not been given advance notice of the complaint and had not had the opportunity to organise a support person or representation at the meeting. That is inconsistent with the repeated question that Mr Harvey directed at Mr Merennage towards the end of the meeting as to whether Mr Merennage had ever worked at a care facility and the adverse significance he placed on Mr Merennage's responses. He also placed adverse significance on further statements made by Mr Merennage at the meeting, as I have already held.

*Failure to advise Ritchies of employment elsewhere*

[96] One of the company's concerns related to Mr Merennage's failure to advise Ritchies that he was in employment elsewhere. This, it was said, amounted to a potential breach of good faith and went to credibility. While Mr Harvey put these allegations to Mr Merennage and requested a response, he proceeded to make a decision to dismiss (relying in part on the allegations) before a response was forthcoming. There is no evidence that he foreshadowed this pre-emptive step in any way. Concluding a disciplinary process without warning, while ostensibly awaiting a response from the employee on issues of concern and which impact on the final decision, is not an action that a fair and reasonable employer could take, and it further undermined the justification for the dismissal.

[97] In any event, the company's concerns must be seen in context. Mr Merennage was on suspension, facing allegations of serious misconduct for which dismissal was a potential outcome. It had taken him a considerable amount of time to find alternative work and he was facing significant financial difficulties. Mr Merennage was not required for work by Ritchies during this period and Ritchies had taken no active steps to engage with him. Rather, Mr Merennage had been advised that the company would be in touch with him, although it did not do so. He did not tell Ritchies that he had secured work but he did tell the Official Assignee and his lawyer. Mr Merennage had not been told that he was unable to undertake additional employment during this, or any other, period and the collective agreement

contained no prohibition on it. Mr Harvey's concern, as it was explained in evidence, was that Mr Merennage needed to be available to the company. When asked why that was so, Mr Harvey said that he might have wanted to ask Mr Merennage a question. I did not find this response compelling.

*Must an employer apply a sliding scale of proof depending on the seriousness of the allegations?*

[98] Ms White submitted that a higher standard of proof is required on the part of an employer in undertaking an investigation and decision-making where serious and criminal misconduct is alleged. Support for this submission is found in various judgments of this Court, including *Alatipi v Chief Executive of the Department of Corrections*;[10] *Edwards v Board of Trustees*[11] and *Lawless v Comvita New Zealand.*[12] The proposition appears to have its genesis in the Court of Appeal's judgment in *Honda New Zealand Ltd v New Zealand Boilermakers Union*, where it was held that:[13]

> … where a serious charge is the basis of the justification for the dismissal then the evidence in support of it must be as convincing in its nature as the charge is grave.

[99] I doubt that the observations in *Honda* can be extrapolated to the proposition contended for. The first point is that *Honda* related to the way in which a grievance committee (not the employer) should approach *its* task of decision-making. The second point is that the Court of Appeal has since clarified that an employer is not required to apply a standard of proof in determining allegations against an employee.[14] Further, the concept of a flexible application of the civil standard of proof has been subject to criticism - as being unhelpful and erroneous - and (in any event) the Supreme Court has made it clear that flexibility in terms of the notion of requiring stronger evidence in relation to serious allegations should not be regarded as a legal proposition.[15]

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[10] *Alatipi v Chief Executive of the Department of Corrections* [2015] NZEmpC 7 at [81], [121].
[11] *Edwards v Board of Trustees* [2015] NZEmpC 6 at [8]-[11].
[12] *Lawless v Comvita New Zealand Ltd* [2005] ERNZ 861 at [14].
[13] *Honda New Zealand Ltd v New Zealand Boilermakers Union* [1991] 1 NZLR 392, (1990) 4 PRNZ 330 (CA) at 333.
[14] *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [19].
[15] *Z v Dental Complaints Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105] per Blanchard J.

[100] Assuming that an employer is obliged to apply a standard of proof commensurate with the gravity of the allegation, as submitted, and that the strength of evidence required increases proportionately with the seriousness of the allegation, a number of issues arise in terms of practical application. Applying it to the present case, does it follow that the evidence in support of the bus fare allegation could be less compelling than the evidence in support of the sexual assault allegation, although still potentially justifying the same serious disciplinary outcome, namely dismissal? And if more compelling evidence is required to support an allegation of sexual assault, how does that fit with an employer (such as Ritchies) operating in a safety-sensitive industry transporting vulnerable passengers?

[101] In *Whanganui College Board of Trustees v Lewis*[16] the Court of Appeal made the point that the employer's process is distinct from the enquiry that the Court must subsequently undertake. No standard of proof (flexible or otherwise) applies in the context of the former. It does in the latter. The point may be seen as subtle, but it is important.

[102] Notably, while the Court of Appeal upheld the Employment Court's decision it felt constrained to deal with the standard of proof issue having regard to the way in which it had been dealt with below. It said:[17]

> The test for unjustifiable dismissal is whether the decision to dismiss was a reasonable and fair one: was dismissal a course reasonably open to the employer in the circumstances? When applying to that the civil standard of proof *it is necessary to keep in mind the distinction between the inquiry the employer makes and the inquiry the Tribunal or Court subsequently may be called upon to make. To fail to do this may result in the view of the employer, reasonably formed, being overridden by views of the Court*, formed perhaps with the benefit of hindsight *(Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483; (1992) 4 NZELC 95,601 (CA) at p 488; p 95,604).
>
> *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.*

[16] *Whanganui College Board of Trustees v Lewis*, above n 14.
[17] At [19].

> *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*. (emphasis added)

[103] The Court of Appeal indicated "some of the remarks in previous judgments including *Airline Hostesses of NZ IUOW v Air NZ Ltd* and *Managh*" may need to be revisited.[18] It has not yet had the opportunity to do so.

[104] Ms White drew my attention to *Z v Dental Complaints Assessment Committee*.[19] The issue for the Supreme Court was whether a disciplinary tribunal could find a charge of indecent assault despite an acquittal on the same charge in criminal proceedings. A related issue was the standard of proof to be applied by the disciplinary body. The case is not of direct relevance to the employment setting. It does, however, deal with the concept of flexibility. This concept is not without difficulty.

[105] The Chief Justice, in a dissenting judgment, expressed the view that "the notion of flexibility in application of the civil standard is confusing and disputed even among judges of high standing."[20] She described suggestions that the civil standard is "flexible" as "unfortunate and inaccurate". In this regard she observed that:[21]

> The point is explained by the judgments of Lord Nicholls in *Re H* and Lord Hoffmann in *Secretary of State for the Home Department v Rehman*. *It is often said that more grave allegations are less likely to be true and require more in the way of evidence before the trier of fact will be satisfied. I have some doubts as to the extent to which experience bears out the proposition*, but in any event it is clear that its application turns on human experience and the particular context, as Lord Nicholls made clear in *Re H*. Statements such as these have however caused confusion when applied, not to the inherent probabilities which any decision-maker necessarily weighs, but to the standard of proof. The confusion has led to judicial statements which suggest that the standard of proof is itself "flexible", an unfortunate and inaccurate notion. Nor do I think matters are improved by the suggestion

[18] At [21], also noting in relation to *Honda* (above n 13) that it involved an appeal from a decision of the chairman of a grievance committee.
[19] *Z v Dental Complaints Assessment Committee*, above n 15.
[20] At [4].
[21] At [28] (footnotes omitted).

> that it is not the *standard* but its *application* that is “flexible”. Flexibility” is a term I think best avoided in the context of proof, despite its impressive pedigree. *Proof is made out whenever a decision-maker is carried beyond indecision to the point of acceptance either that a fact is more probable than not (if the standard is on the balance of probabilities)* or that he has no reasonable doubt about it (if the standard is proof beyond reasonable doubt). (emphasis added)

[106] The majority took a different approach, but made it clear that:[22]

> Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[107] The majority went on to confirm that:[23]

> The *natural tendency to require stronger evidence is not a legal proposition and should not be elevated into one*. It simply reflects the reality of what judges do when considering the nature and quality of the evidence and deciding whether an issue has been proved to “the reasonable satisfaction of the tribunal”. (emphasis added)

[108] What appears to emerge from the foregoing is that an employer is not required to apply a standard of proof to its consideration of whether serious misconduct has occurred or whether dismissal is the appropriate disciplinary outcome. An employer is entitled to resolve conflicting versions of events, and prefer one over the other, but must do so on a reasonable basis.[24] A standard of proof (balance of probabilities) applies when the Authority/Court is assessing the justification for the employer’s actions and decisions. In undertaking this task consideration will be given to the nature and quality of the evidence, and whether the employer had a sufficient and reliable evidential basis for concluding that the employee was guilty of serious misconduct.

[109] In the present case, arguments about sliding scales have no material bearing on the outcome for the reasons I have already referred to.

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[22] At [102].

[23] At [105]. See too *Lewis*, above n 14 at [15], where the Court of Appeal observed that the more serious the misconduct, the more inherently unlikely it is to have occurred, citing *Glovers Food Processors Ltd v Leaosavai* [1999] 1 ERNZ 478 (CA) in support.

[24] See also *Timu v Waitemata District Health Board* [2007] ERNZ 419 (EmpC) at [102]-[103], applying *Lewis*. The Court of Appeal declined leave to appeal in *Waitemata District Health Board v Timu* [2007] NZCA 413, [2007] ERNZ 673.

## Summary

[110] The company's actions were not actions that a fair and reasonable employer could have taken in all of the circumstances, including having regard to the resources available to it. The procedural failings were not minor and did result in Mr Merennage being treated unfairly. The decision to dismiss was not one that a fair and reasonable employer could have arrived at in all of the circumstances.

[111] The company breached Mr Merennage's employment agreement by failing to pay him during the period on which he was on unpaid suspension. I deal below with the claim that the company breached Mr Merennage's employment agreement by underpaying him during the period on which he was on purported paid suspension.

## Remedies

[112] I record that an application to amend Mr Merennage's statement of claim to further particularise the remedies sought by way of lost wages was advanced shortly before the hearing. This was opposed by Ritchies. In the circumstances it was agreed that determination of the application would be deferred, to enable Mr Merennage to give evidence in support of it and for counsel to advance submissions.

[113] I am satisfied that it is in the overall interests of justice that the application be granted. It is true that the application came at a relatively late stage but Mr Merennage lives in Australia and access to the documentation presented some difficulties. There is no identifiable prejudice for the plaintiff, other than exposure to a higher potential award. It is desirable, as Mr Amodeo (joint counsel for Ritchies) accepted, that the Court be able to assess the real merits of the claim and make a just award, reflective of actual loss.

[114] There were also issues raised in relation to a cross-challenge as to the way in which remedies had been dealt with in the Authority. In particular, a concern to ensure that the possibility of WINZ seeking to recover an overpayment for the period during which Mr Merennage was in paid employment, but in receipt of a benefit, was adequately addressed. WINZ has since confirmed in writing that it will seek to

recover an overpayment from Mr Merennage in the event that he succeeds in defending the challenge and remedies are awarded in his favour. Mr Amodeo confirmed that any order for relief can be dealt with on this basis, and that Ritchies' earlier objections can accordingly be put to one side.

*Compensation under s 123(1)(c)(i)*

[115] Mr Merennage seeks a compensatory award of $20,000 under s 123(1)(c)(i) of the Act. Counsel for the company accepted that awards of this magnitude have been made in recent cases, reflecting something of an uplift from the previous range of awards, but submitted that because Mr Merennage's grievance related to events in 2013, guidance should be found in cases determined at that time. No authority was cited for this proposition and I am not persuaded by the logic of it. In any event, an analysis of the more recent cases (namely *Hall v Dionex*,[25] *Booth v Big Kahuna*[26] and *Alatipi*[27]) reflects that they too involved events in and around 2013, if not before, so the point is irrelevant. Ultimately each case must be assessed having regard to its own facts, while being mindful of the desirability of a degree of consistency in award.

[116] In relation to consistency, counsel for the company referred me to a number of determinations of the Authority, in which awards of compensation of significantly less than the quantum sought in this case were made. I do not draw much assistance from these cases. This Court has recently made the point that there is a need not to keep awards at an artificially low level.[28]

[117] The claim for compensation under s 123(1)(c)(i) is directed at the unjustified dismissal. Mr Merennage gave evidence as to the impact of the dismissal on him. As the company pointed out, this evidence was not independently corroborated. However, the emotional toll Mr Merennage suffered as a result of his unjustified dismissal infused his evidence. He felt unsupported and branded by an employer who formed an adverse view from an early stage of the process, and who failed to

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[25] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [104].
[26] *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134, [2014] ERNZ 295 at [84].
[27] *Alatipi*, above at n 10 at [139].
[28] *Hall v Dionex* at [90].

adequately engage with him. While the dismissal itself was not a significant shock, the surrounding circumstances and the impact of the company's failings to treat him fairly in reaching a conclusion that he had committed serious misconduct justifying summary dismissal did have a major effect. It is clear that the impact on his family, both financially and emotionally, weighed heavily on Mr Merennage's shoulders. In the circumstances I consider that an award of $15,500 is appropriate.

*Reimbursement of lost wages*

[118] Six months lost wages are sought for the period following the dismissal.

[119] Where the Court is satisfied that an employee has lost remuneration as a result of a personal grievance, it must (whether or not it provides for any of the other remedies provided for in s 123 of the Act) order the employer to reimburse the employee for the remuneration lost as a result of the personal grievance. Under s 128(2) the amount of the reimbursement must be whichever is the lesser amount of the lost remuneration or three months' ordinary time remuneration. However, pursuant to s 128(3) of the Act, the Court may, in its discretion, order an employer to pay the employee a greater sum for lost remuneration.

[120] The principles applicable to determining an appropriate sum by way of lost remuneration are well established.[29] There is no automatic entitlement to "full" compensation. The employee's actual loss sets an upper ceiling on any award. The individual circumstances of the case must be considered, allowing for all contingencies which might, but for the unjustified dismissal, have resulted in the termination of the employee's employment. Moderation in setting awards for lost remuneration is appropriate, as the Court of Appeal has made plain.[30] The period during which Mr Merennage was unemployed sets an upper limit.

[121] Given the particular circumstances of the case, I do not accept that Mr Merennage's dismissal would have been justified but for the procedural deficiencies

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[29] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [70]-[83].
[30] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [25], *Telecom New Zealand v Nutter* at [78].

I have identified.[31] Accordingly I make no allowance for this contingency. Two complaints had been made against him within a relatively brief period of time. That may, as Ms White submitted, simply reflect bad luck; however it is relevant to the counter-factual enquiry that is required (but which is difficult to undertake). In *Zhang*, the respondent employee had a chequered (and short) work history with the company, which told against the likelihood of an extended period of ongoing employment.[32] In making the assessment in this case I have also had regard to the fact that it appears that Mr Merennage harboured plans to move to Australia, and that he had not been with the company for long.

[122] I am satisfied that an order of three months' ordinary time remuneration is appropriate in the particular circumstances of this case.

*Mitigation*

[123] It is well established that a dismissed employee is under an obligation to mitigate their loss, and to provide evidence that they have taken concrete steps to do so.[33] The company submitted that such evidence was lacking in the present case. It is true that there was no documentary evidence in support of the steps Mr Merennage said he took to find alternative work following his dismissal. However, I am satisfied on the basis of the evidence that was before the Court that Mr Merennage took adequate steps to mitigate his loss following his dismissal. It is clear that he was keen to find work, as he had a family and a young son to support. He was able to give evidence as to his attempts to obtain work at several named supermarkets and bus companies. Mr Merennage gave evidence, which he was not pressed on and which I accept, that the documentation relating to his attempts to find work had been discarded during the move to Australia.

[124] The company further submitted that Mr Merennage had failed to take adequate steps to find work during his unpaid suspension, in order to mitigate his losses. Assuming that there was a duty to do so, I accept Mr Merennage's evidence as to the extensive steps he took to find alternative work at this time. Money was

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[31] See *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA) at [22]-[26] per William Young J.
[32] *Sam's Fukuyama Food Services Ltd*, above at n 30 at [38]-[39].
[33] *Radius Residential Care v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371 at [50]-[51].

plainly an issue for him and his family throughout this period, and ultimately resulted in him applying for supermarket work in circumstances I have already traversed.

*Contribution*

[125] I must consider whether Mr Merennage contributed to the situation that gave rise to the personal grievance, applying s 124 of the Act. That provision states that:

> **Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[126] There must be a causal connection between the employee's actions and the grievance and, if such a connection exists, consideration must be given to whether the plaintiff's conduct was sufficiently blameworthy to require a reduction. While the grievance would not have arisen in the absence of a complaint against Mr Merennage by Ms T, and the subsequent police charge he faced, that (of itself) does not suffice. Nor does the mere fact that he lost his "P" endorsement as a result of the complaint and was unable to work, or that he was the subject of an earlier complaint. As I have said that complaint was never investigated and was not made out.

[127] It was further submitted that contributory conduct arose from the alleged breach of confidentiality in visiting Creative Abilities and in attempting to discredit Ms T and frustrate the company's investigation; in lying to a third party (the supermarket) thereby bringing his credibility into further doubt; by failing to advise that he had secondary employment, particularly when he was returned to paid suspension; and in resigning from employment with the supermarket after receiving advice of the proposal to dismiss him.

[128] Many of these matters have little, if any, causal connection to the situation giving rise to the grievance. Issues relating to the circumstances surrounding his employment at the supermarket did not come to light until after the finding of serious misconduct had been made against him. I do not accept that these actions materially contributed to the situation he found himself in. Mr Merennage gave evidence, which I accept, that he resigned from his position with the supermarket because he did not feel up to the physical nature of the job. Mr Merennage was unwise, as he immediately accepted, to have visited Creative Abilities and he did not raise an objection to being placed on suspension without pay at the time. He candidly acknowledged that he had been untruthful in his job application for the supermarket job, and it was common ground that he had failed to tell Ritchies about his job when he was returned to paid suspension. I have already traversed these matters, and the reasons why Mr Merennage took the steps that he took. Even assuming the necessary causal connection, the alleged contributory conduct must be viewed in context. I am not satisfied that it was sufficiently blameworthy, having regard to the particular circumstances, to warrant a reduction in remedies and I decline to do so.

*Underpayment of wages*

[129] Mr Merennage claims that he was underpaid the sum during the period he was on purported paid suspension of $2,819.88 gross, plus holiday pay, for the period of 10 June 2013 to 16 October 2013 and an order for lost wages for the period of unpaid suspension from 16 December 2011 to 10 June 2013 being 81 weeks at an average wage of $899.46 gross per week, amounting to a total sum of $72,856.26. As Ms White accepts, the amount earned by Mr Merennage during this period must be deducted (amounting to $20,860.84).

[130] I have already found that Mr Merennage ought to have been paid throughout his suspension. The question is how much ought he to be reimbursed?

[131] Mr Merennage had been employed by Ritchies as a driver. He took on relief (known as “floater”) duties. He had a guaranteed 40 hours of work per week in this role. On occasion he worked the night shift, and was paid an allowance when he did

so. Mr Harvey accepted in evidence that some floater drivers (including Mr Merennage) work over and above the base 40 hours per week, taking on shifts when other drivers are unavailable.

[132] Mr Merennage had a history of working on average more than 40 hours a week, as reflected in his records for the 53½ weeks preceding his suspension. When he was placed on paid suspension his pay was calculated at a base rate of 40 hours. Ms Keohane said that this was consistent with usual practice. Mr Merennage disputed this and submitted that he ought to have been paid an average of his earnings over a period of time (namely 53½ weeks).

[133] Under s 123(1)(b) the Court may order reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. While no authority was drawn to my attention in relation to how this provision might be applied in the circumstances of this case, namely whether Mr Merennage ought to be reimbursed according to his "base rate" or on the basis of his average earnings over time, logically the latter more accurately reflects the extent of his loss. Reimbursement under s 123(1)(b) is to be calculated accordingly. I did not understand Ritchies to be challenging the amounts sought if the Court agreed with the approach to liability and calculation advanced on behalf of Mr Merennage. If the position is otherwise, leave is reserved for the parties to refer the issue back to the Court.

[134] I note for completeness that Mr Merennage accepted that he had not queried the amount he was being paid during the time he was on paid suspension. I accept his explanation that he never received the payslips because they were delivered to work and he was not there to get them. The money simply arrived in his account without explanation and the first time he became aware that he was being paid based on his base rate was in the Authority.

## Summary of orders

[135] The plaintiff is ordered to pay the defendant:

- The sum of $15,500 pursuant to s 123(1)(c)(i) of the Act;

- The equivalent of three months' lost remuneration under s 128;

- The sum of $2,819.88 gross, plus holiday pay, by way of unpaid wages for the period 10 June 2013 to 16 October 2013;

- The sum of $72,856.26 gross, plus holiday pay, by way of unpaid wages for the period 16 December 2011 to 10 June 2013;

- Minus the sum of $20,860.84 (as referred to in [129] above).

[136] The consequence of this judgment is that the Authority's determination is set aside and this judgment stands in its place.

[137] The company also challenged the Authority's costs determination. I apprehend that the result of its substantive challenge effectively resolves the costs challenge. If that is not the case leave is reserved for the parties to apply further to the Court.

[138] Costs are reserved at the request of the parties. If they cannot be agreed the defendant may file and serve a memorandum and supporting material within 30 days of the date of this judgment, the company filing and serving a response within a further 20 days and anything strictly in reply within a further 10 days.

Christina Inglis
Judge

Judgment signed at 3.30 pm on 13 November 2015