

**IN THE EMPLOYMENT COURT  
WELLINGTON REGISTRY**

**[2017] NZEmpC 20  
EMPC 90/2017**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      CLIVE SMITH  
   Plaintiff

AND                              DIRECTOR GENERAL OF THE  
   MINISTRY FOR PRIMARY  
   INDUSTRIES  
   Defendant

Hearing:                      in Wellington, 20 - 21 September 2017

Appearances:              A J McKenzie, counsel for the plaintiff  
   M Berryman and A Scott-Howman, counsel for the defendant

Judgment:                      16 March 2018

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**JUDGMENT OF JUDGE K G SMITH**

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[1]      In the early hours of Friday 11 September 2015 Clive Smith punched a man in a bar in Courtney Place, Wellington. After an interval the other man punched him back. Both men were employed by the Ministry for Primary Industries. Both men had attended an MPI social function earlier in the evening. Both men were off duty. Both men were hurt, although Mr Smith's colleague was more seriously hurt than he was.

[2]      Mr Smith's colleague made a formal complaint to MPI that he had been assaulted. Mr Smith also made a complaint he had been assaulted by his colleague.

[3]      MPI conducted an investigation that concluded both men had engaged in serious misconduct. Both men were disciplined. Before this incident both men had

good work records. Mr Smith was dismissed. His colleague received a warning effective for six months after which it expired.

[4] Arising from this different treatment Mr Smith considered he had been unjustifiably dismissed and issued proceedings in the Employment Relations Authority.<sup>1</sup> The Authority determined he did not have a personal grievance for unjustified dismissal but did have one for an unjustified disadvantage. Mr Smith has challenged the determination that he was not unjustifiably dismissed.

[5] Mr Smith's colleague was not named by the Authority and he was referred to only as Mr X.<sup>2</sup>

### **The build up**

[6] The incident in the Courtney Place bar was preceded by a farewell function held at MPI's Petone office for two staff members who were leaving, one of whom was Katy Martley.

[7] Mr Smith travelled from New Plymouth, where he worked, to attend the function which was incident free. Staff members brought their own alcohol. After he left he was telephoned by Ms Martley and invited to join her, and some colleagues, who were travelling into Wellington to go to a bar. Mr Smith was collected from his motel and they went to the bar in Courtney Place.

### **The incident**

[8] At the bar Mr Smith and Ms Martley were having a conversation. What was said was not ascertained by MPI during its investigation. She told the investigation that she could not recall what was said other than she did not regard it as offensive. However, she did become upset, which she attributed to the emotion of leaving MPI. She left the table where she and other MPI staff had gathered and went to the ladies' toilets.

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<sup>1</sup> *Smith v Director General for Ministry of Primary Industries* [2017] NZERA Wellington 18.

<sup>2</sup> An order for non-publication was not made by the Authority but, in the interests of fairness because he did not give evidence, he will continue to be referred to as Mr X.

[9] Mr X was watching Mr Smith and Ms Martley. He told the subsequent investigation he thought they were having a disagreement and Ms Martley was trying to pull away. Mr X said when Ms Martley left the table he left as well, and headed towards the toilets, to check she was okay.

[10] Mr Smith left the table as well and he and Mr X encountered each other as they were approaching the toilets. Mr Smith told the investigation he was grabbed by Mr X and pushed into a wall. He responded by punching Mr X. Effectively, his statement was that he was defending himself.

[11] Mr X told the investigation he was attacked by Mr Smith without provocation and repeatedly punched. Mr Smith denied initiating the encounter but admitted punching Mr X about a dozen times. This part of the incident happened in an area of the bar separated by a wall from the table where the MPI staff had gathered. There were no witnesses to the beginning of this exchange other than Mr Smith and Mr X.

[12] Craig Wallace, one of the MPI employees at the bar, attempted to intervene and was struck by Mr Smith, receiving a black eye. The tussle ended and Mr Smith left that part of the bar. Several minutes later, although how much time elapsed was not established, he returned. Mr X saw him returning. Without any preamble Mr X punched Mr Smith in the head knocking him to the ground. Mr X then left and went to the toilets.

[13] Eventually Mr Smith and Mr X left the bar separately. At work later that morning Mr Wallace's black eye was noticed and he was asked what had happened. Separately MPI's Investigations Manager received a complaint from Mr X alleging he had been assaulted by Mr Smith. Mr Smith complained about Mr X as well.

### **Decision to investigate**

[14] Punches being exchanged by MPI staff were enough to prompt a preliminary investigation which led to a conclusion that a formal investigation was required. On 14 October 2015, MPI wrote to Mr Smith and Mr X telling them a formal investigation would be conducted. The allegation about Mr Smith to be investigated was that, without provocation, he repeatedly punched and struck Mr X while they

were in the bar. Both men were informed that David Blake had been appointed to investigate the complaints and to report to MPI about them. A copy of his comprehensive terms of reference was provided.

[15] Both men were informed that if there was a finding of serious misconduct any disciplinary action could include dismissal, but such a decision would be made by MPI's Director Compliance.

[16] On 22 October 2015, Mr Smith was placed on special leave by agreement. Mr X remained at work.

### **Terms of reference**

[17] Mr Blake's terms of reference were identical for both investigations. Information previously gathered in the preliminary investigation was provided to him. He was instructed to undertake a thorough, unbiased, and procedurally fair investigation into the facts and to identify:

- (a) what took place, taking into account the information provided and the nature of the injuries sustained;
- (b) whether what occurred constituted serious misconduct in breach of the employee's obligations under their employment agreements and MPI's code of conduct; and
- (c) any other directly relevant factors, including making findings as to whether misconduct or serious misconduct had occurred as supported by the evidence, and whether any mitigating factors applied.

### **Investigation conclusions**

[18] Mr Blake interviewed all the MPI staff members who had been at the bar including Mr Smith and Mr X. He spoke to the bar's duty manager, and a bouncer, but concluded they did not witness what had happened.

[19] Mr Smith cooperated fully in Mr Blake's investigation. He provided two statements about the incident. In the first, Mr Smith disclosed that on 24 August 2015 he had been diagnosed as suffering from depression and was treating his illness with medication, the dosage of which was increased on 14 September 2015 (that is three days after the incident in the bar).

[20] Mr Smith said he may unknowingly have been suffering from depression for a long time, perhaps for the previous 15 to 20 years. He attributed this illness to work pressure exacerbated by an absence of mentoring and a lack of adequate training. He said MPI's New Plymouth office was understaffed and under-resourced.

[21] However, candidly, Mr Smith did not make excuses for his part of the incident. He stated there were reasons behind the incident; a combination of being depressed through work and drinking alcohol while taking medication. At the end of his statement Mr Smith accepted his role in the incident and said: "...the responsibility remains mine and I accept that fully".

[22] His second statement commented on the draft report and the other materials supplied to him such as job sheets completed by MPI staff interviewed by Mr Blake.

### **Final report**

[23] Mr Blake's conclusions were:

- (a) both Mr Smith and Mr X's actions amounted to physical violence against each other and constituted actions which were detrimental to the safety and physical health of MPI staff;
- (b) both Mr Smith and Mr X's actions breached MPI's code of conduct;
- (c) not altered by potential mitigating factors; and
- (d) the actions of both men amounted to serious misconduct but the protagonist was Mr Smith.

[24] Mr Blake was not able to decide if Mr X had initiated the first altercation as had been claimed by Mr Smith (which would, if accepted, have provided an explanation of having punched Mr X in self-defence). Mr Blake did conclude that the injuries sustained by Mr X were the result of excessive force as shown by the injuries he sustained.

[25] While Mr Blake did not conclude how the incident started he had sufficient information to allow him to find that it was more likely than not Mr Smith hit Mr X without provocation. Mr Blake concluded Mr X had his head down, covering up to protect himself from the blows he described as “numerous hay-maker type punches”. He found the assault was serious and deliberate.

[26] In reaching his conclusions Mr Blake considered the terms and conditions of employment for both men and took into account MPI’s code of conduct. Both Mr Smith and Mr X were covered by a collective agreement between MPI and the National Union of Public Employees.<sup>3</sup> Clause 2.3 of that agreement deals with termination of employment recognising that serious misconduct may lead to dismissal without notice.

[27] He summarised MPI’s code as broadly-based statements of principle regulating standards of behaviour. He relied on MPI’s Organisational Guidelines: Discipline – Dealing with Misconduct, the appendices to which provide examples of what will be regarded as serious misconduct. An example is physical violence against another MPI employee at any time.

[28] In his extensive comments to Mr Blake, and subsequently to MPI’s Director Compliance, Stephanie Rowe, Mr Smith did not attempt to say the code was inapplicable. He has not attempted to say that the example of serious misconduct in the guideline does not apply to him.

[29] Mr Blake’s report summarised the mitigation relied on by Mr Smith as:

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<sup>3</sup> Operative from 1 May 2016 to 30 April 2016.

- (a) he was suffering from depression and stress at the time of the incident;
- (b) he had consumed alcohol, while on medication, which could influence his normally rational behaviour; and
- (c) earlier in the evening he identified a need to leave but had made a bad decision by succumbing to peer-pressure to join the party heading into the city.

[30] Mr Blake commented on this mitigation by concluding that, although the matters raised may explain some of the motivation leading up to the physical violence, they did not excuse it.

[31] Finally, Mr Blake commented on the claim of self-defence by Mr X, concluding it was not outside the “bounds of possibility” he felt the need to defend himself. Despite that conclusion Mr Blake came close to accepting Mr X had acted in self-defence because of the ferocity and unprovoked nature of what had occurred. While his conclusion about that defence was equivocal the application of MPI guidelines, prohibiting physical violence at any time, led to the finding that Mr X had engaged in serious misconduct.

[32] That conclusion fell short of vindicating Mr X’s behaviour and formed a significant part of Mr Smith’s claim that an unjustified disparity had been drawn between them.

### **Preliminary disciplinary decision**

[33] On 14 March 2016, Ms Rowe sent the final report to Mr Smith. In her covering letter, Ms Rowe accepted the report and stated her preliminary opinion that he should be dismissed. His response was sought at a meeting to be arranged. In the same letter she acknowledged information supplied by Mr Smith, about his health, but said she was not convinced any health problems excused this conduct.

[34] A similar letter was sent to Mr X who was invited to a separate meeting to discuss a disciplinary outcome. Ms Rowe's preliminary decision was to administer a formal written warning to him.

[35] A meeting between Ms Rowe and Mr Smith was arranged for 6 April 2016. In correspondence between Ms Rowe and NUPE, the parameters of that meeting were established. Ms Rowe made it clear she would not re-open the investigation, although it transpired NUPE did not expect her to do that, but she agreed to consider all of the matters to be raised in mitigation on Mr Smith's behalf. She also agreed not to make an immediate decision, but to adjourn and to consider what step to take.

### **Dismissal**

[36] Mr Smith and Ms Rowe met as planned. Mr Smith was represented by his union and his lawyer, Mr McKenzie. It was a long meeting, lasting approximately six hours. It was wide-ranging. As an example of what was addressed Mr Smith produced a 20-point paper labelled: "Why I should remain employed with MPI". That paper repeated some of what had been said to Mr Blake, such as Mr Smith being placed on medication before the incident. It stated he retained the confidence of his immediate manager and that he had endorsements of support from others.

[37] After hearing from Mr Smith, Ms Rowe confirmed her preliminary decision and he was summarily dismissed for serious misconduct on 15 April 2016. After hearing from Mr X in a separate meeting, Ms Rowe imposed a formal written warning with a six-month duration.

### **The Issues**

[38] Mr Smith believes there is an unexplained, and unjustified, disparity of treatment between him and Mr X given they had both engaged in serious misconduct. He considers he was unjustifiably dismissed and is seeking reinstatement to his former position and compensation.

[39] The parties identified the issues in this litigation as being whether:

- (a) Mr Smith's dismissal was unjustified on the basis of disparity of treatment;
- (b) MPI properly considered mitigation;
- (c) any matters relied on by MPI in its decision to dismiss were not sufficiently raised with Mr Smith for comment and if so whether that caused the dismissal to be unjustified;
- (d) it was open to MPI to accept Mr Smith was honest in his response to the investigation report (and findings) but to decide the dismissal was appropriate;
- (e) MPI's actions when objectively assessed and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred; and
- (f) reinstatement is practicable and reasonable, if the Court finds in favour of Mr Smith.

***Issue (a): Disparity?***

[40] The disparity claim relies on a sense of injustice arising from the different penalties imposed for the same, or essentially the same, poor-quality behaviour. It turns exclusively on what is claimed to be an unjustified distinction drawn between Mr Smith and Mr X, where they were both found to have engaged in serious misconduct. That distinction is said to have set in at an early stage, when Mr Smith was placed on leave but Mr X remained at work.

[41] There is no criticism of Mr Blake's investigation or his report. Instead, reliance is placed on an inconsistency that is said to have emerged because Ms Rowe accepted Mr Blake's report, but imposed different outcomes without an adequate basis for doing so. This criticism is that Mr Blake was unable to make a decision about Mr X's claim of self-defence while her decision, effectively, accepted it.

[42] In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*<sup>4</sup> the Court of Appeal accepted a prima face case of disparity of treatment, leading to a dismissal, may be unjustifiable in the absence of an adequate explanation by the employer. Two Air New Zealand stewards were charged jointly with smuggling a video cassette recorder. One of the stewards was acquitted but the other was convicted. The steward who was acquitted was subsequently convicted on a guilty plea of being in possession of uncustomed goods.<sup>5</sup>

[43] The case never reached the stage where the employer was required to explain, because the circumstances of each employee were different. One was not a party to smuggling whereas the other was convicted of it. The Court held that the more serious breach was committed by the steward convicted of smuggling and that the employer could have laid itself open to criticism if both men had been dealt with in the same way. On the face of the evidence there was nothing that could properly be called a disparity.<sup>6</sup>

[44] *Airline Stewards* was considered in *Samu v Air New Zealand Limited*.<sup>7</sup> A flight attendant had been dismissed because she failed the airline's safety standard examinations<sup>8</sup> in breach of a policy where three failures in five years would prevent an attendant from flying. Ultimately the attendant was dismissed because she could not fly. In the Employment Tribunal the former employee was successful and she was reinstated on the proviso she pass the examination and then pass it again three months later.<sup>9</sup>

[45] Comparisons were sought to be drawn with an earlier example, of another flight attendant, who had failed the examination four times in five years but had not been dismissed. He was not dismissed because of doubt about whether he had been

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<sup>4</sup> *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1985] ACJ 952 (CA).

<sup>5</sup> At 954.

<sup>6</sup> At 954 - 955.

<sup>7</sup> *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA).

<sup>8</sup> At 637.

<sup>9</sup> At 637.

told about the policy.<sup>10</sup> What was in issue, therefore, was the apparent inconsistency in the application of this policy by the airline.

[46] *Samu* considered, and adopted, *Airline Stewards* explaining:<sup>11</sup>

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by mistaken or overgenerous treatment of a particular employee on a particular occasion.

[47] The disparity was explained because the other flight attendant was not informed of the policy and his dismissal was justified.

[48] Subsequently, in *Chief Executive of the Department of Inland Revenue v Buchanan* the Court of Appeal drew together these themes to describe disparity of treatment as follows:<sup>12</sup>

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[49] In *Buchanan* three employees of the Inland Revenue Department had breached its code of conduct prohibiting them from accessing tax information relating to their families, friends or acquaintances. There was no suggestion of any impropriety and the conduct was discovered when an audit was undertaken. They were dismissed. There were 35 investigations arising from the audit and three cases where other employees, who had also breached the code, were given final warnings instead of being dismissed.

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<sup>10</sup> At 638.

<sup>11</sup> At 639.

<sup>12</sup> *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [45].

[50] The case turned on the third limb in para [49]; whether there was an adequate explanation for treating the employees concerned differently. The Court said it was satisfied that:<sup>13</sup>

...the disparity in this case was not of such magnitude as to call into question an otherwise justified dismissal of the respondents. In our view, Mr Lavin was entitled to come to the view, notwithstanding the treatment of other employees, that the conduct of these respondents was of such gravity as to deeply impair the employment relationship and call into question the Department's trust in them, thus justifying their dismissal. Another employer may have reached a different view, but the conclusion reached by Mr Lavin was open to him. The different outcomes in this case of employees ... involve different judgment calls being made by different managers in relation to different circumstances, but do not indicate an unreasonable decision on Mr Lavin's part. There were, of course, a number of other cases where the employee was dismissed, as a result of a judgment call by the relevant manager, in relation to different circumstances.

[51] With that background, two forms of disparity were said to have arisen in the decision to dismiss Mr Smith; about the process used and the outcome. They were further divided and described as follows:

- (a) disparity of process;
- (b) disparity of outcome;
- (c) disparity with an interconnected case; and
- (d) disparity with an unconnected case.

[52] Disparity of process refers to Mr X not being suspended during the investigation while Mr Smith was not at work (Mr Smith was on agreed leave but the difference is immaterial, the point is Mr X stayed at work). Disparity of outcome refers to the different disciplinary action taken against each person.

[53] Disparity with an interconnected case refers to an earlier incident of poor-quality behaviour by Mr Smith at another MPI social function in 2014. In that incident Mr Smith's disapproval of the music being played degenerated into him throwing sausages at another MPI employee. It ended with him swinging a chair at

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<sup>13</sup> At [70].

that person. Despite the presence of senior MPI staff members he was not investigated or disciplined for what happened.

[54] Finally, disparity with unconnected cases refers to incidents where Mr Smith alleged assaults by other MPI staff did not result in disciplinary action being taken against them.

[55] Despite developing these four categories to describe the alleged disparity, the nub of Mr Smith's challenge is that, however expressed, MPI has not explained why it drew a distinction between him and Mr X when its independent investigator had been unable to do so.

[56] There was a disparity of treatment which MPI accepts. The real issues are about the second and third limbs of the test in *Buchanan*. The difficulty for Mr Smith's case is that he accepted Mr Blake's report and its conclusions. In doing so he accepted the conclusion that he was the protagonist and inflicted severe injuries while engaging in serious misconduct.

#### *Process and outcome*

[57] In Mr McKenzie's submissions criticising the process, Ms Rowe's preliminary decision to dismiss was said to be unfair for three reasons. First, because she concluded Mr X was acting in self-defence, when Mr Blake's report had not reached that conclusion.

[58] Second, implicit in telling Mr Smith he faced dismissal, and telling Mr X he faced being warned, was that Ms Rowe had already made up her mind Mr X was a victim. The third reason was connected to the first one; that Ms Rowe, effectively, changed the conclusions in the report by accepting Mr X acted in self-defence.

[59] A lot was made about an apparent shift between the report, Ms Rowe's preliminary decision and her final decision. Amplifying that shift is a puzzling conundrum. If Mr X was acting in self-defence there would seem to be no basis to treat his behaviour as serious misconduct or to discipline him. However, this case is not concerned with the fairness of Mr X's treatment.

[60] A comparison between Mr Smith and Mr X does not exist beyond a shared label of serious misconduct. The report concluded Mr Smith was the protagonist and acted without provocation. That was an important distinction and it was enough to justify Ms Rowe's preliminary opinions about disciplinary action she proposed to take.

[61] Furthermore, it was inevitable a discussion with Mr X about the outcome of her decision-making for him would encompass his claim of self-defence because, if accepted, it would be relevant. From that discussion Ms Rowe was able to make a decision and she accepted it was more likely than not Mr X acted in self-defence. That is an adequate explanation for treating Mr Smith and Mr X differently. Mr McKenzie made the point that Mr Blake interviewed two witnesses who both said they thought that Mr X's punch appeared to be in retaliation. What that overlooks is Mr Blake and Ms Rowe were considering the subjective concern of Mr X, after having received a dozen punches to his head, that he was fearful of being beaten again.

[62] Ms Rowe did not re-interview those witnesses but that was not detrimental to her decision-making. She assessed what she thought of Mr X's subjective opinion that the beating he had just taken was about to be continued. That was a conclusion open to Ms Rowe, especially bearing in mind she was considering MPI's code of conduct, not applying any legal test for self-defence.

[63] Mr Smith was not disadvantaged by that turn of events. He met with Ms Rowe for six hours, to fully consider an outcome for him during which the full ambit of arguments capable of assisting him was explored.

[64] These aspects of the alleged disparity (the first two referred to at [51](a) and (b)) have been adequately explained by MPI. That leaves the third and fourth disparity claims relied on, interconnected cases and unconnected cases.

### *Interconnected cases*

[65] The earlier incident of poor quality behaviour, involving throwing sausages and swinging a chair, did not end up in any disciplinary action. Mr Smith had the good fortune not to be investigated on that occasion, but that leniency did not commit his employer to treat his subsequent behaviour leniently, or indicate he could reasonably believe any subsequent incident would be ignored.

[66] As was held in *Samu* an employer's previous leniency does not mean it is bound to treat subsequent breaches leniently as well. Mr Smith was fortunate his behaviour in 2014 was not investigated but that does not render his dismissal unjustified.

### *Unconnected cases*

[67] In a brief section of his evidence Mr Smith said he was aware of other examples where over consumption of alcohol had occurred. This evidence was given in the context of describing social functions that, he said, invariably continued late into the night and where alcohol was provided by MPI. These incidents are not comparable, because while alcohol was consumed at the farewell function what was being investigated was violence between MPI staff members.

[68] Mr Smith also sought to show that there were other cases where assaults had gone unpunished. He said those incidents involved an assault on a named person by an unnamed manager in Auckland, an assault on another named person during an operation in Napier and a further incident where an unnamed staff member in Gisborne, while on duty and in uniform, was said to have assaulted a member of the public over a personal matter between them.

[69] Mr Smith's evidence provided little detail to allow a full comparison to be made or to place MPI under an obligation to explain.

[70] These examples were raised with Ms Rowe on 6 April 2016. She concluded the Gisborne matter took place between 8 and 10 years ago and the information

available to her was inconclusive. In the remaining cases, the complainant did not wish to take matters further hampering any inquiry. That inconclusive state of affairs meant Ms Rowe could not substantiate the claims made to her.

[71] The ephemeral way in which these comparisons were presented makes it difficult to reach any conclusions about them which are adverse to MPI. I am satisfied there were no prior cases, falling within this class of “unconnected cases”, showing that MPI unfairly treated Mr Smith by comparison.

[72] MPI has explained the apparent disparity between its treatment of Mr Smith and Mr X.

#### *Third limb of Buchanan*

[73] The third limb in *Buchanan* is also satisfied in MPI’s favour. It was inevitable that Mr Smith faced dismissal once he accepted his role in the incident was serious misconduct. The conclusions reached by Mr Blake were unassailable. Mr Smith participated fully in that inquiry. He knew at all times what was being investigated and why. He was represented and had ample opportunity to participate and respond to the allegation about him. When it came to the disciplinary stage of MPI’s investigation he knew what was being considered and again participated fully.

[74] An employer in MPI’s position, faced with a thorough inquiry and an admitted act of serious misconduct, must be entitled to dismiss the employee concerned. Mr Smith cannot have been in any doubt that, once it was established he had punched a colleague about a dozen times inflicting serious injuries, he was at risk of being dismissed.

[75] Even if MPI had been unable to explain the disparity it would still have been able to justifiably dismiss Mr Smith for serious misconduct.

#### *The nexus*

[76] Before leaving this discussion a brief comment needs to be made about the nexus between the incident in the bar and MPI’s right to investigate. The events on

Courtney Place occurred outside work time. Mr McKenzie raised the adequacy of the nexus between the incident and Mr Smith's employment in his submissions but Ms Berryman objected because it was not in the pleadings or identified in the issues for consideration previously described to the Court. I agree. The statement of claim did not raise this issue and it was not open to Mr Smith to dispute MPI's entitlement to investigate.

[77] However, in case that conclusion is wrong, there was an adequate nexus justifying an investigation, provided by the conduct being incompatible with Mr Smith's duties and MPI's code.<sup>14</sup>

***Issue (b): Mitigation***

[78] The second issue is whether MPI properly considered Mr Smith's mitigation. This issue turns on claims he was overworked and had been diagnosed as suffering from depression.

[79] It was said MPI should have taken into account (or perhaps taken more account of) the effect of this illness on his behaviour especially when it was adversely affected by alcohol while taking medication. He said he was unaware that drinking alcohol while on medication might affect his behaviour. There was no medical evidence about the possible impacts on behaviour of drinking alcohol while on medication.

[80] Mr Smith attributed, at least partly, an excessive workload for his health problem. When this claim was put to Mr Blake, and repeated to Ms Rowe, the intended effect was to persuade them his behaviour was aberrant for reasons that fell outside of his control and was something for which MPI needed to acknowledge its part in creating. In large measure he sought to link his behaviour in the bar to a deterioration in his health either caused, or contributed to, by overwork.

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<sup>14</sup> *Smith v Christchurch Press Co* [2000] 1 ERNZ 624 (CA).

[81] Mr Smith described a working environment where he was pressed for time because of the inflow of compliance work to the New Plymouth office, which he had to attend to, without adequate support or assistance.

[82] MPI called two witnesses to address Mr Smith's workload; Michael Green who is the District Compliance Manager, to whom Mr Smith reported, and Jeffrey Dunlop the Chief Compliance Officer. Mr Dunlop was the Team Leader for the Petone office and the New Plymouth office.

[83] Both Mr Green and Mr Dunlop described the work expected of a compliance officer and the tasks undertaken by Mr Smith. They described his statements of overwork as surprising. The evidence about Mr Smith's work, and how he relayed that to Mr Green and Mr Dunlop, does not support his contention of overwork. While no doubt Mr Smith accurately described the tasks required of a compliance officer, I find he overstated the extent of his work and the pressure he was under. There was no evidence Mr Smith was expected to undertake more work than any other compliance officer, or that his workplace created pressure beyond what was usually expected of a compliance officer. I do not accept Mr Smith was overworked.

[84] Before this incident Mr Smith did not place his employers on notice that he was ill. He had one email exchange with Mr Green about his workload. Nothing in that email, or Mr Green's response to it, put MPI on notice the workload was beyond what it should have been. That exchange did not alert MPI to an illness no matter how it was caused.

[85] The earliest time MPI was on notice he was unwell was at the function on the evening of 10 September 2015, when he told Mr Dunlop about taking medication which he called "happy pills". The circumstances of that disclosure do not assist. It was a casual remark and nothing more. Mr Dunlop was not invited to act on this information and it was not conveyed to him in a way that ought to have prompted action by him. Nothing said by Mr Smith should have warned Mr Dunlop that the events of later that evening were likely.

[86] If this issue involves criticism of Ms Rowe's decision as giving insufficient weight to Mr Smith's illnesses, it is rejected. Both Mr Blake and Ms Rowe took Mr Smith's health into account. It was raised in his statements to both of them and was specifically discussed in Mr Blake's report.

[87] Furthermore, Mr Smith relied on his illness but did not provide MPI with any medical report, or information, from which it could conclude the incident should be treated less seriously than it might otherwise have been because of it. On 18 March 2015, Ms Rowe wrote to NUPE asking for medical evidence to support statements being made to her about Mr Smith's health. The requested information was not provided.

[88] This lack of information was addressed in Mr McKenzie's submissions when he referred to MPI powers under s 82 of the State Sector Act 1988 to compel the release of medical information. That was an inadequate response to explain why the requested information had not been supplied. Effectively, it reversed the obligation by seeking to impose on MPI a duty to use its statutory powers to obtain information Mr Smith was trying to rely on, which he presumably possessed and should have provided if he wanted it taken into account. Mr Smith was using his health as a mitigating factor and he was responsible for providing evidence to support what he was saying.

[89] I reject the submission that MPI had to exercise its statutory powers to compel the release of medical information relating to Mr Smith's illness when he was the one seeking to rely on his illness as mitigation.

[90] Ms Rowe considered Mr Smith's health based on what he said. She was just not able to take her consideration as far as Mr Smith would have liked her to but that does not invalidate her decision.

***Issue (c): Whether any matter was insufficiently raised for comment?***

[91] Mr McKenzie did not develop submissions to support this issue. There was no suggestion, in the pleadings or in the submissions, that there was an aspect of the

decision-making by Ms Rowe which should have been drawn to Mr Smith's attention and was not. The investigation was thorough, complete and transparent.

***Issue (d): An honest response about dismissal?***

[92] Mr Smith co-operated in MPI's investigation and was candid when he spoke to Mr Blake and Ms Rowe. His decision to co-operate was commendable. It may have been a strategic decision, to make the best he could of the situation, but he also had a duty under s 4 of the Act to be responsive and communicative.

[93] The fact that Mr Smith acted honestly does not have any bearing on the quality of Ms Rowe's decision.

***Issue (e): A fair and reasonable employer?***

[94] The decision by MPI to dismiss Mr Smith for serious misconduct arising from the incident on 11 September 2015 satisfies the test in s 103A of the Act. Objectively assessed, MPI's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time when the dismissal occurred.

**Outcome**

[95] Mr Smith's challenge is dismissed.

[96] Costs are reserved. In the absence of agreement MPI may file submissions within 20 working days of this judgment. Mr Smith has a further 20 working days to respond.

K G Smith  
Judge

Judgment signed at 5.55 pm on 16 March 2018