

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**[2015] NZEmpC 214  
EMPC 218/2014**

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

BETWEEN                      KUNAL GOEL  
   Plaintiff

AND                                THE DIRECTOR-GENERAL FOR  
   PRIMARY INDUSTRIES  
   Defendant

Hearing:                      10, 11, 12 and 13 November 2015  
   (heard at Wellington)

Appearances:                K Goel, plaintiff in person  
   A Scott-Howman, A Williams and L Cook, counsel for the  
   defendant

Judgment:                    2 December 2015

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**JUDGMENT OF JUDGE A D FORD**

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**Introduction**

[1]      The plaintiff, Mr Kunal Goel, was dismissed from his employment with the defendant, the Ministry for Primary Industries (MPI), for serious misconduct. In his pleadings, Mr Goel alleges that his dismissal was unjustified. He denies he committed any act of serious misconduct and alleges that he had been the "victim of managerial bullying and abuse of power". Those allegations are strongly challenged by MPI.

[2]      Mr Goel worked for MPI as a Ministerial Coordinator in the Ministerial and Official Correspondence Team. His role involved coordinating responses to incoming Ministerial and official correspondence. It included responsibility for formatting and proof-reading MPI responses to formal requests for information

under the Official Information Act. On 13 December 2012, Mr Goel was suspended from his employment; principally for failing to follow what MPI claimed was a lawful and reasonable instruction regarding a particular item of correspondence. On 5 February 2013, following a formal investigation, Mr Goel's employment was terminated on notice as from 4 March 2013. He has not been able to work since then.

[3] Mr Goel did not raise his personal grievance for unjustified dismissal until 29 August 2013, which was well outside the 90-day statutory limitation period. He therefore had to apply to the Employment Relations Authority (the Authority) for leave to raise his personal grievance out of time. His application for leave was declined by the Authority.<sup>1</sup> However, Mr Goel challenged that determination in this Court and in a judgment dated 30 April 2015, Chief Judge Colgan granted his application.<sup>2</sup> The Chief Judge directed the parties to attend mediation in an attempt to try and mutually resolve the grievance. Mediation proved unsuccessful.

[4] In accordance with the decision of the full Court in *Abernethy v Dynea New Zealand Limited (No 1)* the decision of the Chief Judge had the effect of removing the entire employment relationship problem from the Authority into this Court.<sup>3</sup> In other words, Mr Goel's grievance has never been investigated by the Authority.

[5] Mr Goel elected to act in person. In a minute dated 27 May 2015, the Chief Judge suggested how he might contact a particular officer at the Registry office to avail himself of a limited form of legal assistance from an employment lawyer. It appears that Mr Goel did make contact with the Registry officer but that was as far as it went. In an earlier minute, the Chief Judge had also alerted Mr Goel to the fact that he may be eligible for legal aid but it is not clear whether that possibility was ever pursued. I mention those matters by way of background only. In representing himself, Mr Goel acted completely professionally and with a fine sense of decorum.

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<sup>1</sup> *Goel v The Director-General for Primary Industries* [2014] NZERA Wellington 77.

<sup>2</sup> *Goel v The Director-General for Primary Industries* [2015] NZEmpC 54.

<sup>3</sup> *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] ERNZ 271, at [59].

## **Background**

[6] Mr Goel is an Indian national. He holds a Bachelor's Degree in Commerce with Honours from the University of Delhi. He also holds a Diploma in Introduction to Chartered Accountancy. On 25 November 2008, Immigration New Zealand granted Mr Goel a multiple student visa enabling him to study for a graduate diploma in business studies at Massey University in Wellington. Mr Goel arrived in New Zealand on 13 December 2009. His student permit was extended, allowing him to finish his studies in 2010. On 18 February 2010, Mr Goel was granted an "open" work permit allowing him to work in any occupation for any employer in New Zealand.

[7] When he travelled to New Zealand in 2009, Mr Goel was 25 years of age. He told the Court that he had read and seen films about New Zealand and it impressed him as "the most peaceful place and the least corrupt country in the world." In India he had worked as a chartered accountant clerk in the private sector dealing with a number of large organisations. However, he became "disillusioned" working in the private sector and his goal was to become a public servant because, as he explained it to the Court, public sector jobs appealed to him on an ethical level.

[8] In 2010 Mr Goel graduated from Massey University in Wellington in Business Studies with grades for which he was listed in the Dean's list of top performing students. He worked as a part-time Tutor at Massey University for a period and in December 2010 he obtained full-time employment with the Ministry of Fisheries. In 2011 the Ministry of Fisheries merged with the Ministry of Agriculture and Forestry to become MPI. Mr Goel said in evidence that the merger resulted in around 200 staff positions being made redundant but he retained his role as a Ministerial Coordinator with essentially the same duties. A key part of his job continued to be the responsibility for formatting and proof-reading responses to Official Information Act requests and other Ministerial and official correspondence.

[9] After the merger, Mr Goel's terms and conditions of employment were contained in a collective employment agreement between the Ministry of Agriculture and Forestry and the New Zealand Public Service Association Incorporated. The collective agreement contained certain provisions relating to discipline, dismissals

and personal grievances but the more detailed provisions were contained in MPI's Code of Conduct dated April 2012 which incorporated the Public Service Code of Conduct and set out, with commendable precision, guidelines and processes for dealing with misconduct and other matters that could impact on the employment relationship between MPI and its employees.

[10] From about February 2012, Mr Goel's reporting line was to Mr Craig Spanhake, Team Leader Ministerial. Mr Spanhake reported to Mr Jeff Stewart, Manager Ministerial and Business Support, who had an overview of the Ministerial team. In turn, Mr Stewart reported to Mr Dan Bolger, the Deputy Director-General at MPI responsible for managing the branch that included the Ministerial team that Mr Goel was a part of. Mr Goel's immediate manager, however, was Mr Spanhake and it was Mr Spanhake, in his capacity as team leader, who carried out the day-to-day management of the Ministerial team.

### **Performance issues**

[11] Mr Goel said in evidence that he received good performance reviews throughout his two years of service. His last report, for July 2012, was produced. In answer to a question from the Court, Mr Luke Southorn, MPI's Director of Human Resources (HR), summarised the report as indicating, "somebody who is making good progress, having not yet reached what I'd call performing the role to the full requirements of the job."

[12] In his evidence, Mr Stewart noted the comment in Mr Goel's July 2012 performance review, that: "*He has good relationships with his Groups and understands what they mean. His interpersonal skills have improved dramatically*". For his own part, Mr Stewart, spoke about Mr Goel having "peaks and troughs" in his relationships with people and he expressed the observation that on occasions Mr Goel had an inability to let go of things. In August 2012, Mr Stewart and Mr Spanhake met with Mr Goel and Mr Stewart told him "Kunal, you've got to learn to let go". Up to that stage, however, there were no serious issues involving Mr Goel's performance.

[13] In November 2012, there was an incident which resulted in Mr Goel receiving a written warning from Mr Stewart. It related to what MPI's HR Manager, Mr Donnelly, described as Mr Goel's "particularly disruptive" behaviour at a team meeting on 5 November 2012. Mr Stewart carried out a "fairly low key" investigation and concluded that Mr Goel's behaviour had caused unnecessary distress to others in the team. On 12 November 2012, Mr Stewart sent Mr Goel a formal written warning regarding his behaviour at the team meeting. Mr Stewart pointed out that any further misconduct of a similar nature could lead to dismissal. His letter concluded:

...

I do not believe that your behaviour was appropriate or conducive to a collegial and successful team environment and based on the feedback I have received, I do believe that your relationship with your Team Leader needs to be reset. I will write to you separately on how I expect this to be achieved.

[14] Mr Stewart told the Court that Mr Goel's reaction to the warning letter was typical of the conduct Mr Goel sometimes displayed. He said he could move between being incredibly belligerent and at other times incredibly submissive. On this occasion he read the letter when Mr Stewart handed it to him but had no questions and then wanted to leave the room as soon as possible.

[15] Mr Donnelly said in evidence that on 21 November 2012, he received an email from Mr Goel saying that he would like to lodge a complaint against Mr Stewart "for unfair resolution" at the disciplinary meeting on 12 November and asking what steps he needed to take. In response, Mr Donnelly sent him a link to the Misconduct Guidelines on the MPI Intranet. However, no formal complaint was ever received by Mr Donnelly and Mr Goel raised no grievance in relation to the warning letter.

[16] Mr Stewart made another observation in his evidence which seemed to be borne out on the facts. He had found that whenever management tried to work through an issue with Mr Goel on an informal basis, his immediate response would be to go on sick leave for three or four days afterwards which his team found frustrating.

## **The incident**

[17] The incident that ultimately led to Mr Goel's dismissal occurred on the afternoon of Thursday, 13 December 2012. By way of background, Mr Goel, who is over 195 centimetres in height, periodically experiences severe back pain. On the day in question Mr Stewart had asked Mr Goel to move some files to a cabinet and in moving the file trolley he aggravated his back pain. Mr Goel complained about the back pain and Mr Stewart suggested that he convalesce in the sick room. At no stage did Mr Goel ask to be excused for the day because of his back symptoms. At 3.31 pm Mr Stewart sent an email to Mr Goel which commenced:

Hi Kunal,

I understand that you have spent some time in the sick bay today, as your back has [been] causing you pain. See below for the Department of Labour's website which supports folks to ensure they have an appropriate workstation set up.

...

Jeff

[18] Mr Goel replied in an email timed at 3.33 pm:

Thanks very much Jeff!

I wonder if it's the workstation or a complex combination of various factors. Knowing life, most probably the latter. I'll go through that link and update you once I can.

Regards,

Kunal Goel

[19] The incident in question was then about to occur. Mr Spanhake was not in the office on the afternoon of 13 December 2012.

[20] MPI had received a formal request from a senior university lecturer for information under the Official Information Act. Mr Stewart said that the request related to Maui dolphins although the response indicated that it primarily concerned sea lions and squid. In all events, the request related to what was described as a "contentious subject" and Mr Stewart said that it had generated a fair amount of public comment at the time. After briefing the Minister's Office and receiving the Minister's approval, MPI proposed to refuse the request for information on the basis that it was "frivolous or vexatious". MPI had apparently received numerous requests

for similar information from the same lecturer over the previous 12 months, including 17 other formal requests under the Official Information Act.

[21] MPI's response refusing the request for information was to be sent out in the name of Mr Scott Gallagher, a Deputy Director-General. MPI had seven Deputy Director-Generals at the time – each was in charge of a different branch of the organisation. The template for the signature block for official correspondence included the name of the branch but the evidence was that the seven Deputy Director-Generals had a discretion as to how they wanted to sign off on official correspondence. Mr Gallagher's Executive Assistant, Ms Anna Gordon, explained to the Court that Mr Gallagher was quite particular about how his name was to be signed off on correspondence. She said that his preference was to sign off as: "Yours sincerely, Scott Gallagher, Deputy Director-General".

[22] On the morning of 13 December, in response to an email enquiry from a staff member, Mr Goel confirmed that he would complete his proof reading and formatting of Mr Gallagher's response letter after lunch that day. Mr Gallagher was anxious to have the letter sent out. Mr Goel duly delivered the formatted letter in a folder to Ms Gordon but when Ms Gordon opened the folder she noticed that the signature block of the letter did not comply with Mr Gallagher's preference. The version Mr Goel had produced included reference to the branch of MPI that Mr Gallagher was in charge of. It read: "Scott Gallagher, Deputy Director-General, Resource Management and Programmes". Ms Gordon, therefore, took the draft response downstairs to Mr Goel and explained to him the change that was required. Some other minor changes were also necessary but they were duly made and I need not refer to them any further. A short time later Mr Goel took the folder back to Ms Gordon and left it on her desk but when she opened it up she saw that Mr Goel had still not made the change required to the signature block.

[23] Ms Gordon, who has been with the MPI and its predecessor for approximately six years, was not challenged on her account of what then followed. Although Ms Gordon was uncertain about the timing, other evidence indicated that the following sequence of events would have commenced at approximately 3.45 pm on 13 December 2012. Ms Gordon's description of the events as they unfolded (which I accept) is recorded in the transcript in these terms:

10. ... At the time we were located on different floors, so I walked back down to Kunal and I again said to him "You just haven't made this change" – something along those lines.
11. Kunal then started getting quite vocal about the fact that there is a template and there is a process and "Scott is not above the process" and he wasn't going to change it.
12. I had an understanding that all the other Ministerial Co-ordinators were sort of along the lines of you know, "Scott's the hierarchy" and if he wanted something the way he wanted it, then they pretty much just did it. So I kind of just said to Kunal "I understand but you know, this is what Scott wants". To which he then started getting louder and started saying things like "Scott is not God" or "he's not Jesus" or something along those lines. He said why should he get to have his title the way he wanted it and he was getting really loud which was making me feel quite uncomfortable because I obviously wasn't expecting that and had never come across that before.
13. So he and I basically fought over this for a little bit and then Jeff Stewart came in – so that was Kunal's manager. So he came in and because he had overheard the whole thing said "what's going on here?" I sort of said this is the situation and then Kunal had a bit of an argument with Jeff about why he didn't want to change it. Jeff said to me "Leave it with me, I'll get the proper copy up to you shortly".
14. So I went back to my desk and Kunal came by again and dropped the folder back on my desk, didn't say anything and when I opened the folder he hadn't changed the sign-off again. So I went back downstairs with the folder.
15. Kunal, Jeff and myself had a conversation in the hallway standing outside a meeting room and I remember Jeff saying to Kunal, you know "I'm your manager" or whatever, "I'm giving you a direct order that this is what I need you to do" and Kunal was sort of going "No I'm not going to do it. I'm not doing it". So I remember there was a bit of that because I remember Jeff having to repeat that quite a few times, saying "I'm giving you a direct order. You will do it".
16. Kunal then delivered me another wrong copy. So I think at that point I said something to Scott, my manager, about it, and what had gone on. Scott then grabbed the folder from me and came down to level 15.

[24] Mr Stewart, who worked on the same floor and within listening distance of Mr Goel's pod, described in evidence how his attention was drawn to the change in tone in Ms Gordon's voice. He described it as sounding "a little bit pressured and slightly incredulous as though she sort of couldn't believe the conversation she was having". He said that Ms Gordon outlined Mr Gallagher's requirements for the particular letter three or four times and she obviously couldn't believe that "Kunal was still standing there basically saying 'No I won't do that.'"



[25] Mr Stewart walked over to the pod and told Ms Gordon that he would sort the matter out. He told her not to stand around and that he would explain to Mr Goel what she and Mr Gallagher needed to be done. He then told Mr Goel that it was Mr Gallagher's preference to sign off the letter that way and he gave Kunal a directive to do what he had been asked but Mr Goel "was still belligerent and argumentative."

[26] Mr Stewart repeated more than once that he was instructing Mr Goel to do something that was fair and lawful for his role and that he needed to do it as part of his employment. He said Kunal then made some comment about a pressing piece of work and Mr Stewart left it on the basis that if he had something pressing to do then he should do it but Mr Gallagher's letter needed to go out that day. Mr Stewart then went back to his desk and carried on working.

[27] About 10 minutes later Mr Goel took the letter over to Mr Stewart's desk and continued to argue that he should not have to make the change to the signature block. He made remarks like it was "wrong" and "not honest". Once again, Mr Stewart gave him a clear direction that he was to make the change required by Mr Gallagher. Mr Goel went back to his desk and a few minutes later he stood up as if he was about to take the folder containing the letter to Ms Gordon. Mr Stewart caught up with him and they had a brief interchange. Mr Goel said something along the lines of, "Oh well, this is the last thing I've got to do for the day. When I've done it can I go?" Mr Stewart agreed. He then asked to see the Gallagher letter.

[28] Mr Stewart opened the folder and found that the letter was still not correct and so he gave Mr Goel another "unequivocally clear" direction as to what was required. However, a few minutes later, as Mr Stewart was walking along the hallway, he met Mr Gallagher who had been given the folder containing the letter and Mr Gallagher was "clearly unhappy" that it had still not been corrected. Mr Stewart then arranged for another coordinator in the Ministerial team to make the required change to the signature block of the letter to enable Mr Gallagher to have it sent out that day. He told Mr Goel to leave the building and go home. Mr Stewart proceeded to seek HR advice.

## **The suspension**

[29] Mr Stewart met with Mr Donnelly and explained the incident involving Mr Goel. Mr Donnelly made notes of the meeting. They decided to suspend Mr Goel on pay pending an investigation the following week into an allegation of serious misconduct. A letter to that effect, prepared by Mr Donnelly but signed off by Mr Stewart, was emailed through to Mr Goel that evening.

[30] Mr Donnelly recorded in his file note that cl 53 of the collective agreement provided: "If the offence is sufficiently serious an employee is to be placed on suspension pending the investigation."

[31] Mr Donnelly did not make reference in his notes to the more detailed provisions in MPI's code of conduct relating to suspension pending an investigation. They confirmed that suspension was a serious step and alternatives to suspension should be considered. They also provided that the individual concerned (and their representative) must be given a reasonable opportunity to make submissions about suspension before it is imposed.

[32] Mr Donnelly said in evidence that any consultation would "have effectively been purely lip service, because whatever he said, for health and safety reasons Kunal shouldn't have been in the office for the period of the investigation." Mr Donnelly explained that Mr Goel's behaviour that afternoon had upset people and staff were "very wound up about it". Mr Stewart confirmed Mr Donnelly's evidence in this regard. Although Mr Goel had the opportunity had he so desired, no grievance was ever raised in relation to the suspension and neither Mr Donnelly nor Mr Stewart were challenged on that aspect of their evidence.

[33] The letter of 13 December 2012 informing Mr Goel of his suspension described the allegation made against him in these terms:

...

The allegation is that on 13 December 2012:

- Your behaviour at work disrupted the workplace and caused unnecessary distress to others, not for the first time; and
- You repeatedly failed to follow lawful and reasonable instruction in the performance of your duties.

...

[34] Mr Goel was informed that the allegations were serious and, if made out, could constitute serious misconduct resulting in his dismissal. He was advised that another manager would be appointed to investigate the allegations the following week and he was informed of his right to have a support person or union delegate at the disciplinary meeting.

[35] Mr Goel arrived at work the following day despite his suspension. He was reluctant to leave but Mr Stewart talked through the contents of his suspension letter and asked him to collect whatever immediate belongings he required and leave the building. He eventually did so.

### **The first investigation**

[36] Following the investigation process for dealing with allegations of misconduct/serious misconduct prescribed in MPI's Misconduct Guidelines, Mr Bolger, the Deputy Director-General in charge of the branch Mr Goel worked for, appointed an MPI Manager, Ms Helen Guisanne, to conduct the investigation into the allegations made against Mr Goel. Mr Bolger was to be the final decision-maker.

[37] Ms Guissane then proceeded to carry out her investigation which involved interviewing a number of staff members and Mr Goel. At the commencement of her interview with Mr Goel, he complained that Ms Guisanne was not impartial because she had not short-listed him for a previous role. He also expressed concern that Mr Stewart was not in attendance and that he had not had the opportunity to lay a complaint against Mr Stewart prior to being suspended. Ms Guissane, nevertheless, continued working on her report to Mr Bolger.

[38] When Mr Donnelly sent a copy of Ms Guissane's draft investigation report to Mr Goel on 19 December 2012 for his comments, Mr Goel emailed him back to say that he rejected the report because it didn't address his concerns about the process. After considering Mr Goel's response, Mr Bolger decided to "redo the investigation". Terms of reference were drafted and Mr Bolger appointed Mr Todd Firman, an HR Advisor with MPI, as the new investigator.

[39] Mr Bolger communicated his decision in this regard to Mr Goel in a letter dated 21 December 2012. In his letter, Mr Bolger explained the reasons for his decision in these terms:

...

I have decided, taking into account your concerns, that in order to ensure a fair and robust process, the most reasonable thing to do in all the circumstances is to undertake a fresh investigation with you. This means I will not rely on Helen Guissane's Report, but instead appoint a new investigator to undertake the investigation starting from the beginning.

I hope this provides some immediate assurance Kunal that I am committed to ensuring a fair and proper process is completed in relation to the issues under investigation and my decision.

For the avoidance of doubt, the allegation of serious misconduct is that your behaviour on 13 December 2012, disrupted the workplace, caused unnecessary distress to others (not for the first time) and that you repeatedly failed to follow lawful and reasonable instructions in the performance of your duties.

...

[40] Mr Bolger confirmed that pending the outcome of the new investigation, Mr Goel would remain suspended on pay. He also reminded Mr Goel that he was entitled to seek independent support and/or legal advice and representation to assist throughout the investigation process from the Employment Assistance Programme (EAP) and he was given the EAP telephone number to make contact should he wish to obtain such assistance.

### **Mr Firman's investigation**

[41] Mr Firman has an Honours degree in Psychology from Victoria University. His background had been as HR Advisor with the former Ministry for Fisheries and when he undertook the investigation in 2012 he did not know any other members of the Ministerial Services Team apart from Mr Goel who he knew from Fisheries. Mr Firman had never been given a copy of Ms Guissane's investigation report and he had no knowledge of her recommendations or conclusions. Until he was provided with his terms of reference from Mr Bolger, he had no prior knowledge of the incident. A copy of the terms of reference was sent to Mr Goel on 24 December 2012.

[42] In many ways, the process followed by Mr Firman was a textbook example of how a disciplinary investigation should be carried out. After receiving the terms of reference and finding out what was alleged, Mr Firman proceeded to work out what was required to be determined and who needed to be spoken to. He then constructed a series of open-ended investigation questions that would not bias the investigation. He used his manager to critique his questions and make sure that they were fit for the purpose. He told the Court that after crafting the questions he then made contact with Mr Goel and asked him who else he should talk to. He also ran over the process with Mr Goel and arranged to meet with him on 10 January 2013 in a neutral area, the Wellington Library Cafe. He confirmed the meeting arrangement with Mr Goel in writing, reminding him that he could bring a support person/representative with him and he recommended that Mr Goel obtain support and assistance that was available to him through the EAP service.

[43] Mr Firman followed the same process for all interviews. He asked the open-ended questions that he had prepared and he recorded the responses "hopefully verbatim" as the interviewees answered. There was nothing said to him that was not recorded in his notes. At the end of each interview he spell checked and then sent the transcript to each person interviewed, including Mr Goel and he had each person verify that the interview was correctly recorded. He then proceeded to draft his investigation report. He attached all of the interview notes to the report and sent a copy of everything to Mr Goel for his response. He had emailed Mr Goel and spoken to him on the telephone informing him that he needed his comments on the draft report prior to it being sent to the decision-maker.

[44] Mr Goel went through the draft report and added his comments to the document through "track changes" which were highlighted in red. Mr Firman said that he carefully considered all of Mr Goel's comments but they did not lead him to change his conclusions or recommendations. He then proceeded to finalise his Formal Investigation Report which was dated 31 January 2013 and sent it through to Mr Bolger. The document Mr Bolger received included Mr Goel's marked-up comments highlighted in red. Mr Firman had no discussion with Mr Bolger about the nature of the disciplinary action (if any) to be taken against Mr Goel.

[45] Mr Firman was unaware that Mr Goel had been issued with a written warning, so that was not a consideration in his investigation. In his report, Mr Firman concluded:

In terms of the matters which I have been asked to determine:

1. I find that Kunal Goel repeatedly failed to follow lawful and reasonable instructions in the performance of his duties on 13 December 2012.
2. I find sufficient evidence of the specific allegation of not removing 'RMP' from Scott Gallagher's sign off to support the above finding.
3. I find no mitigating reasons for repeatedly failing to follow lawful and reasonable instructions in the performance of duties on 13 December 2012.
4. I find that Kunal Goel did unreasonably question Scott Gallagher's authority as Deputy Director General on 13 December 2012.
5. I find that Kunal Goel did question Scott Gallagher's Executive Assistant, Anna Gordon in an unacceptable tone about the appropriateness of Scott Gallagher's directions, on 13 December 2012.
6. I find that Kunal Goel through his actions on 13 December 2012, did disrupt the workplace and caused a tense and uncomfortable working environment.
7. I find that Kunal Goel's actions on 13 December 2012 did not cause widespread unnecessary distress to others.
8. I find that Kunal Goel's actions on 13 December 2012 did cause unnecessary distress to Anna Gordon.

[46] With reference back to the definitions of "misconduct" and "serious misconduct" in the disciplinary guidelines annexed to the MPI Code of Conduct, Mr Firman's conclusions were that Mr Goel had committed two acts of serious misconduct and four acts of misconduct. Elaborating in evidence on these findings, Mr Firman stated:

25. I can understand how, for someone looking at this from the outside, it looks like a pretty serious finding over something pretty minor – a refusal to change a signature block in a letter. In order to understand it in context you have to appreciate a couple of things.
26. The first thing to appreciate is the nature of the fundamental role played by this part of the organisation, and the absolute need to follow instructions. Here you had an employee acting belligerently in response to request to do something pretty simple.
27. And then there's more going on in this case. My finding was that the genesis of the incident was in all the other things or the other issues going on between Kunal and his team. His behaviours and interactions stemmed from that. This wasn't an isolated incident.

28. I looked at what equates to serious misconduct or misconduct for someone in this context and asked myself where that sort of behaviour actually sits – and that's how I came to my findings.

...

30. Kunal's response was that it wasn't a regular part of his job to remove the signature block or the description of the particular area of business of the DDG. He said, over and over, that he didn't think it was appropriate for him to make the change.

31. I don't think he really acknowledged the key point. His boss was telling him – reasonably – to make the change ... to the point of directing Kunal to do it – but Kunal kept arguing the point. He just wouldn't do what Jeff had asked him to do.

### **The dismissal**

[47] Mr Bolger told the Court that Mr Firman's report caused him significant concern because he could clearly see that there was a lot of behaviour from Mr Goel that did not align with the MPI Code of Conduct which all staff were expected to be familiar with. Mr Bolger sent a copy of the investigator's report to Mr Goel with a covering letter dated 1 February 2013. The letter set out Mr Bolger's preliminary decision that Mr Goel's employment should be terminated but Mr Goel was invited to a meeting on Monday, 4 February 2013 to enable him or his support person or legal representative to make submissions to try and persuade him to adopt another course of action.

[48] Mr Goel elected not to have a support person with him but Mr Bolger had arranged for Mr Donnelly to also attend the meeting. Mr Goel was invited to make comments on the report which he duly did but Mr Bolger described his demeanour as "quiet and downcast". At the end of the meeting, after taking a short adjournment, Mr Bolger confirmed his decision to dismiss Mr Goel but he decided to terminate his employment on notice which meant that Mr Goel received an additional month's wages.

[49] Mr Bolger explained that it was a decision he took very seriously. He said that he considered whether other options were appropriate but decided that ultimately Mr Goel knew what was expected of him but had refused to follow urgent instructions from his manager. Mr Bolger was also concerned about how Mr Goel had behaved towards other staff, in particular Ms Gordon. Mr Bolger was aware of

the previous incident which had resulted in Mr Goel being issued with a written warning.

## **Discussion**

[50] Mr Goel pleaded that his dismissal was unjustified and he had been the victim of managerial bullying and abuse of power. I say at once that I found no evidence of managerial bullying or abuse of power and I, therefore, have no hesitation in rejecting those allegations.

[51] The unjustified dismissal claim is more complex. The thrust of Mr Goel's case was that he was seeking, first from Ms Gordon and then Mr Stewart, some sound reason for the deletion of the branch designation from the signature block of the letter. He maintained that in the two-years he had been carrying out formatting work in relation to official correspondence, he had never previously been required to vary the template by deleting the name of the branch from the signature block.

[52] In answer to questions from the Court Mr Goel's manager, Mr Spanhake, accepted that the branch title should have been included in the signature block of the response to the Official Information Act request and he also accepted that Mr Goel was entitled to ask the reason why they wanted it removed on this occasion. Mr Spanhake drew the line, however, at the point when Mr Stewart became involved in the matter. He told the Court that Mr Goel would have known that, in his (Mr Spanhake's) absence, Mr Stewart was the boss and once he received instructions from Mr Stewart to change the signature block on the letter then it became a different ball-game and Mr Goel should have obeyed that direction.

[53] Mr Scott-Howman, counsel for the defendant, accepted that in the face of such an absolute refusal by Mr Goel to make the change, it was reasonable to query why Mr Stewart did not take the document off Mr Goel at an early stage and make the change himself or simply have someone else attend to it. Mr Scott-Howman submitted that the "cogent answer" to this question was that, in the context of the job, "the team's function only works because people do what is asked of them." In this regard, counsel referred to the following passage from Mr Stewart's evidence:



If you're going to have people dipping in and out of the process and randomly refusing minor tasks it's a recipe for disaster. I talked earlier about the fact the impact that Kunal's attitude was having on the team and I would not, and still would not, be comfortable with allowing that behaviour by taking jobs off that he just refused to do. The whole team has to function by actually people doing the job that they are asked to do. Kunal was not acting reasonably. Not at all.

[54] The test for determining whether a dismissal was justifiable is that set out in s 103A(2) of the Employment Relations Act 2000, namely 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. That issue must be determined on an objective basis<sup>4</sup> and, in applying the test, the Court must consider the factors listed in subs (3) and any other factors it thinks appropriate. Section 103A(5) provides that the Court must not determine a dismissal to be unjustified solely because the employer followed a defective process if the defects were minor and did not result in the employee being treated unfairly.

[55] In *Angus v Ports of Auckland Ltd (No 2)*, the full Court held that the test means that there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome.<sup>5</sup> In other words, subject to its consideration of the factors described in subs (3) of s 103A and the procedural steps followed, the Court's function is to determine whether the decision to dismiss was one that fell within the band of reasonable responses available and not to substitute its view for that of the employer.

[56] It is a well established principle of employment law that employees are required to carry out lawful and reasonable instructions given by their employers in the course of carrying out their duties. Insubordination occurs when an employee wilfully disregards or fails to comply with such an instruction and, for obvious reasons, insubordination in the workplace cannot be tolerated or condoned.

[57] In this case, no plausible explanation was proffered by Mr Goel for his blatant refusal to comply with the lawful and reasonable instruction Mr Stewart had given him regarding the required change to the signature block of the letter in question. In a concession which Mr Scott-Howman described as "bizarre", Mr Goel

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<sup>4</sup> Employment Relations Act 2000, s 103A(1).

<sup>5</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [22]-[23].

acknowledged, in answer to a question from the Court, that if he had been asked by his immediate Manager, Mr Spanhake, to delete the branch name from the letter, then he would have done so. Mr Goel was fully aware that Mr Stewart was higher in the managerial hierarchy at MPI than Mr Spanhake and his answer, that he would have obeyed Mr Spanhake but not Mr Stewart, simply defied all elements of rationality and logic.

## **Conclusion**

[58] As I have noted above, the investigation process carried out into the misconduct allegations against Mr Goel was exemplary in every respect and cannot be faulted. In all the circumstances, dismissal was certainly a fair and reasonable option open to MPI. For these reasons, I reject Mr Goel's claim and hold that his dismissal by MPI was justifiable.

[59] There are two additional matters I wish to touch upon briefly.

[60] In the normal course, costs will follow the event and, as the successful party, MPI would be entitled to a costs order against Mr Goel. Neither in his pleadings nor in his comprehensive submissions, however, did Mr Scott-Howman seek costs. I would like to think that this was a deliberate decision rather than an oversight. Regardless of my conclusions regarding the conduct that led to his dismissal, I have no doubt that Mr Goel was devastated over the loss of his job with MPI. His dismissal led to a deportation order being issued against him and may also have been a factor in the mental health problems touched upon by Chief Judge Colgan in his judgment of 30 April 2015.<sup>6</sup> Medical evidence was given on these matters by MPI witnesses which counsel and MPI officials will be keenly aware of. I did not find it necessary to refer to that evidence. I simply opine, however, that in all the circumstances, and in the face of this Court's equity and good conscience jurisdiction, I would need to be persuaded that in this particular case it would be in the interests of justice for a costs order to be made against Mr Goel.

[61] The second matter relates to Mr Goel's immigration status. A senior Immigration Officer, Mr Bruce Jenkins, gave evidence on behalf of MPI that

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<sup>6</sup> *Goel v The Director-General for Primary Industries*, above n 2, at [7]-[44].

Immigration New Zealand had given an undertaking to Mr Goel not to proceed with his deportation pending the outcome of this case. The day of reckoning has, thus, arrived. In his closing oral submissions to the Court, Mr Goel spent a considerable amount of time dealing with issues which should properly be addressed to the Immigration authorities. He spoke, for example, about the unfairness of being deported from a country he loves as a result of losing his job for reasons which did not involve any element of incompetence or dishonesty. There is a certain amount of truth in that submission. In one respect, it could be argued that he lost his job through being too diligent and conscientious.

[62] One of the other points made by Mr Jenkins in his evidence was that Mr Goel had been given the right to show good reason why he should not be deported and/or appeal to the Immigration Protection Tribunal on humanitarian grounds but, as Mr Jenkins put it, "for whatever reason" he had chosen not to exercise those rights. While I accept that it is entirely up to Immigration New Zealand as to how it proceeds, I would like to think that, given the outcome of this proceeding, Mr Goel will be given a further opportunity to exercise the rights Mr Jenkins gave evidence about.

A D Ford  
Judge

Judgment signed at 10.20 am on 2 December 2015