IN THE EMPLOYMENT COURT
WELLINGTON

WC 13/06
WRC 26/04

IN THE MATTER OF	proceedings removed from Employment Relations Authority
BETWEEN	MALCOLM BRUCE GRIFFITH Plaintiff
AND	SUNBEAM CORPORATION LIMITED Defendant

Hearing: 21, 22 and 23 November 2005

Appearances: G J O'Sullivan, Counsel for Plaintiff
R L Towner, Counsel for Defendant

Judgment: 28 July 2006

JUDGMENT OF JUDGE A A COUCH

Introduction

[1] Sunbeam Corporation Limited ("Sunbeam") operated a factory in Palmerston North where it manufactured electrical goods. The plaintiff, Mr Griffith, was employed there by Sunbeam for 22 years until his dismissal on 24 September 2003. The reasons given for the dismissal were that Mr Griffith had abused his right to take sick leave and had deceived his employer in the course of the investigation of that issue.

[2] Mr Griffith pursued a personal grievance alleging that his dismissal was unjustifiable. He also pursued a personal grievance alleging that a warning he was given on 16 September 2003 was unjustifiable and affected his employment to his disadvantage.

[3] Both personal grievances were lodged with the Employment Relations Authority. A member of the Authority began an investigation of the problems and, on 20 September 2004, held the first day of an investigation meeting. In the course

of that meeting, the parties jointly asked the Authority to refer the proceedings to the Court. In a determination dated 23 September 2004, the Authority granted that request. On that basis, the matter came before the Court without any determination of the merits by the Authority.

Transfer under s178(2)

[4] The parties' request for transfer was made in reliance on s178(2)(a) of the Employment Relations Act 2000 – that is, an important question of law was likely to arise in the matter other that incidentally. The question of law was said to be *"Specifically, whether a medical certificate is capable of retrospectivity in determining an employee's fitness for work."*

[5] In its determination, the Authority concluded that the issue relied on by the parties in their application did not constitute *"an important question of law"* and therefore declined to grant the application on that basis. At the same time, the Authority was of the view that it was appropriate to refer the matter to the Court under the jurisdiction conferred by s178(2)(d) of the Employment Relations Act 2000, the Authority being of the opinion that in all the circumstances the Court should determine the matter. The basis on which the Authority reached that conclusion included the fact that the parties were represented by experienced counsel, the cost to the parties in completing the investigation which was likely to take at least another day, and *"in particular, because of the very real prospect of challenge to an Authority determination."*

[6] The matter proceeded before the Court on the basis of the statement of problem and statement in reply filed in the Authority. The statement of problem consisted essentially of two letters. The first was written by Mr Griffith's then advocate, Vic Jarvis, to Sunbeam on 13 October 2003. The other was a response to Mr Jarvis' letter from the company's solicitors and dated 7 November 2003. The statement in reply largely repeated the content of the letter from Sunbeam's solicitors.

[7] Some 3 months after proceedings were commenced in the Authority, an *"Amended Statement of Claim"* was filed but this was solely for the purpose of changing the remedies sought.

[8] Proceeding in the Court on the basis of statements of this kind is far from ideal. The initial correspondence between the parties inevitably intermingled allegations of fact, propositions of law, and statements of evidence said to be in

support of both. While this approach may be appropriate, indeed helpful, to the Authority in exercising its investigative role, it lacks the clarity which assists the Court in exercising its judicial role. In cases where matters are removed to the Court in their entirety, it will generally be desirable that statements of claim and defence in the form contemplated by the Employment Court Regulations 2000 be filed unless the statement of problem and statement in reply are already in that form. I do not make this observation by way of criticism of the parties in this proceeding or their counsel. Rather, I make it in relation to future proceedings of this nature.

Remedies sought

[9] Mr Griffith sought the following remedies:

i. Reinstatement to his former position on the same terms and conditions he had at the time of his dismissal.

ii. Reimbursement of lost wages.

iii. Compensation for the loss of Sunbeam's contribution to his superannuation fund.

iv. Compensation for the loss of medical benefits provided by Sunbeam.

v. Compensation for humiliation, loss of dignity, and injury to his feelings: $10,000 in respect of the unjustifiable dismissal claim and $5,000 in respect of the disadvantage claim.

[10] Sunbeam's Palmerston North facility ceased production in July 2004 and was closed in early 2005. Despite this, and despite the fact that he had obtained alternative employment in the meantime, Mr Griffith maintained his claim for reinstatement. On his behalf, Mr O'Sullivan acknowledged that actual reinstatement had been rendered impossible by the closing of the plant but maintained the claim for reinstatement in order to found a claim for redundancy compensation to which he said Mr Griffith would have been contractually entitled had he remained employed until the time the plant closed.

[11] In the course of the hearing, I expressed the view that this was probably unnecessary. A claim for a lost opportunity to receive redundancy compensation in circumstances such as these may be pursued under s123(1)(c)(ii) of the Employment Relations Act 2000 on the basis that it is a *"benefit … which the employee might reasonably have been expected to obtain if the personal grievance*

had not arisen." After hearing counsel on the point, I have treated Mr Griffith's claim for reinstatement as if it were such a claim for loss of a benefit.

[12] In the course of discussion on this point, Mr Towner agreed on behalf of Sunbeam that, had Mr Griffith not been dismissed or otherwise decided to leave in the meantime, his position would have been disestablished in January 2005 and he would have been entitled to redundancy compensation at that time.

Evidence

[13] Mr Griffith began employment with Sunbeam in January 1981. In the latter period of his employment, his position was that of manufacturing engineer. Until May 2003, Mr Griffith reported to the operations manager, Craig Dais. He, in turn, reported to the general manager, David Walker. In May 2003, Mr Walker left. Mr Dais was appointed as general manager. Mr Griffith then reported to the technical manager, Brent Forbes.

[14] In April 2003, Mr Griffith requested 3 months' leave from the end of May until the end of August that year. The request was approved.

[15] There was some difference in the evidence of witnesses about the reason for which Mr Griffith sought this leave and for which it was granted. Mr Dais and Mr Forbes said that they understood the leave was for "*personal development*". Mr Griffith said this was not the case and that it was common knowledge he wanted leave to pursue his interest in property development and building. I was provided with a copy of a file note made at the time which records the grant of leave but does not record the reason for it.

[16] During Mr Griffith's absence on leave, it became well known around Sunbeam that he was engaged in building a house in Palmerston North as part of his interest in property development. About a month before the period of leave was due to conclude, Mr Griffith telephoned Mr Forbes asking for a month's extension. The reason Mr Griffith gave for this request was that construction of the house he was building was behind schedule and that he wanted more time to work on it. Mr Forbes discussed this request with Mr Dais. They agreed that the backlog of work at Sunbeam requiring Mr Griffith's attention was such that he could not be spared for an additional month and refused his request. Mr Griffith returned to work on or about 1 September 2003. He was immediately provided by Mr Forbes with a detailed list of tasks to do over the following nine months.

[17] On Thursday 11 September, there was a trailer filled with plants attached to Mr Griffith's car in the Sunbeam car park. Mr Griffith told a colleague, Susan Calkin, that these plants were for his property and showed them to her. Mr Forbes also said that he saw the trailer filled with plants.

Friday 12 September 2003

[18] On Friday 12 September, Mr Griffith telephoned Sunbeam and left a voice mail message for Mr Forbes. Mr Griffith could not recall exactly what he said. Mr Forbes' evidence was that the message from Mr Griffith was that he would not be at work that day because he was sick and *"would not be of any use to anyone"*. Mr Forbes said that this message had been left before he arrived for work at 7.45am.

[19] At morning tea time that day, it was mentioned in the canteen that Mr Griffith was off sick. This prompted another staff member, Brian Sefton, to recount to Mr Forbes and Mr Dais a discussion he said he had with Mr Griffith a few days previously. This was to the effect that Mr Griffith had told him that "*he needed three good days to get the building/roof closed in"* on the property he was building. Mr Sefton confirmed in evidence that this was what Mr Griffith had told him and that this was what he passed on to Mr Dais and Mr Forbes on 12 September. Mr Griffith denied having made such a statement to Mr Sefton.

[20] Mr Sefton's report, coupled with the history of Mr Griffith's involvement in his building project and the fact that it was what Mr Forbes described as "*a beautifully fine day*", caused Mr Forbes to wonder whether Mr Griffith was actually sick. He discussed his suspicions with Mr Dais. They decided the matter warranted investigation and went out together in a car to find Mr Griffith.

[21] They left the factory at approximately 10.15am. They did not know where Mr Griffith's building site was but they had been told by Mr Sefton that it was near his home so they initially went there. Mr Griffith's home was at the end of a long driveway. Mr Dais said that he looked down the driveway and could see no activity around Mr Griffith's home so they began to drive off. At this point, both Mr Dais and Mr Forbes saw someone on the roof of the property immediately adjacent to Mr Griffith's home, down the same driveway. Mr Dais said he looked down the driveway again and saw a trailer with goods on it and a man standing in the driveway.

[22] Leaving Mr Forbes in the car, Mr Dais walked down the driveway to the property next door to Mr Griffith's home. He asked the man if Mr Griffith was there

or at home. The man replied that Mr Griffith was on the site and that he would get him. Mr Dais said that he then walked around the trailer to a position where he could get a better view of the property. He said that he saw Mr Griffith on the property working. Specifically, he said that Mr Griffith was "*banging a piece of metal, which looked like a flashing or something like that.*" According to Mr Dais, Mr Griffith then walked to a pallet which had a stack of board on it which looked like some sort of external cladding. He said that Mr Griffith "*started talking with another person, and he bent down and was showing the other chap how to mark the boards out, and he was physically marking the boards out himself.*" Mr Dais described Mr Griffith as "*wearing corduroy long trousers, work boots, a tool belt, a jersey, and a baseball type cap.*" He said that the tool belt had tools in it. According to Mr Dais, Mr Griffith "*did not appear to be incapacitated.*" Specifically, he said that Mr Griffith "*did not appear to be suffering from the effects of a serious migraine; he sounded very coherent and very direct in his speech.*"

[23] Mr Dais said that, after he had made these observations, the man he had first spoken to had walked across to where Mr Griffith was and alerted him to Mr Dais' presence. He said that Mr Griffith looked up and, when he saw him, he said "*oh Craig*".

[24] Mr Dais' evidence was that he then said to Mr Griffith in a quiet way that he understood he was sick and that Mr Griffith replied "*that he had been to see the doctor that morning, and that he had had an injection and was now feeling better.*"

[25] Mr Dais said that he told Mr Griffith that he did not want to discuss the issue with him then and there and that he would talk to him again on Monday when he returned to work. He said Mr Griffith was insistent that they talk about it immediately and began to follow him down the driveway but that Mr Dais was equally insistent that they would discuss the matter the following Monday at work.

[26] Mr Forbes said that, when Mr Dais returned to the car, he gave him an account of what he had seen and heard at the building site. In particular, Mr Forbes recalled that Mr Dais had told him that Mr Griffith was on the site and was doing building work. He also said that Mr Dais reported Mr Griffith as having said that he had just got back from seeing the doctor who had given him an injection. Mr Forbes and Mr Dais left at about 11.05am.

[27] Mr Griffith's account of events that morning was very different. He said that he had a history of migraine headaches and that, the previous afternoon, he had felt such a headache coming on. He said that, on the morning of 12 September, he

awoke in considerable pain at about 6am and took medication before returning to bed. He said that he left a telephone message for Mr Forbes at approximately 7.30am saying that he was unwell and would not be at work that day. Mr Griffith said that he remained in bed until about 9am when he got up and took more medication.

[28] Mr Griffith said that, at about 10.15am, the builder he had engaged to build a new house on the property next door, Roy Dobbin, came to the door. He said that Mr Dobbin wanted help with handling sheets of cladding which needed to be fastened to the outside of the house. Mr Griffith said "*Even though I was still in considerable pain from my migraine headache, I felt obliged to assist Roy with this request as I knew the time and effort involved would be minimal and I would be able to return to my rest once completed.*"

[29] Mr Griffith said that he then went next door to assist Mr Dobbin wearing the clothes he had on at the time. He described these as being "*a pair of track pants, track shoes and a light sweatshirt*".

[30] Mr Griffith agreed in his evidence that Mr Dais arrived at the property at approximately 11am. He also agreed that, at the time, there were two other men on site delivering roofing iron. According to Mr Griffith, at the time Mr Dais arrived, he was standing in front of the house talking to Mr Dobbin who was marking out the sheets of cladding. Mr Griffith specifically denied that he was banging a piece of metal as Mr Dais described.

[31] Mr Griffith's account of the conversation he had with Mr Dais was also distinctly different. He said that he told Mr Dais that he was unwell and that the reason he was on the building site was because the builder had needed a hand. Mr Griffith denied telling Mr Dais that he had been to the doctor that morning. He also denied saying that he had received an injection and was feeling better.

[32] Although Mr Griffith denied what Mr Dais had said occurred in the first part of their conversation on the building site, they were in broad agreement about what then happened. Mr Griffith said that he was anxious to explain to Mr Dais in more detail why he was working on the site when he had called in sick and that Mr Dais told him they would talk about it the following Monday.

[33] In the course of his evidence about these events, Mr Griffith said that he felt threatened by Mr Dais unexpectedly turning up on the building site.

[34] Mr Dobbin also gave evidence. This agreed in several respects with Mr Griffith's evidence. He said that Mr Griffith had told him he was unwell when he asked for his help on the building site. He also said that, when Mr Dais arrived on site, Mr Griffith was standing in front of the house talking to him while he marked out sheets of cladding. He denied that Mr Griffith was "*off the ground, hammering up flashings on the house"*. The implication of Mr Dobbin's evidence was that Mr Griffith was working with him on the building site for half to three-quarters of an hour.

[35] Mrs Griffith gave evidence based on her recollection of what occurred on 12 September. She said that her husband had been suffering from a migraine headache overnight for which he had taken medication on several occasions. She said that Mr Griffith got up at about 7am with the apparent intention of going to work but she persuaded him to call in sick and return to bed. Mrs Griffith then went to work but I was not told the time at which she left.

Monday 15 September 2003

[36] On Monday 15 September, Mr Griffith went to work as usual at Sunbeam. Shortly after that, Mr Dais sent an email headed *"Meeting – Explanation for Friday"* asking Mr Griffith and Mr Forbes to attend a meeting with him at 9am. The text of the email was:

> *This meeting is to allow Malcolm Griffith an opportunity to explain his actions relating to Friday 12th September when he rang in explaining that he had a migraine headache but was found build* [sic] *a new house.*
>
> *In addition to this incident Malcolm will also be requested to re-confirm the reason for his recent 3 months leave application which was originally approved for educational purposes.*
>
> *It is strongly recommended that Malcolm has a support person present at this meeting. Union, Friend etc*

[37] Susan Calkin attended that meeting with Mr Griffith as his support person. She gave evidence of it, as did Mr Griffith, Mr Dais and Mr Forbes.

[38] At the meeting, Mr Dais began by explaining that the purpose of the meeting was to give Mr Griffith an opportunity to explain why he was working on a building site the previous Friday when he had called in sick.

[39] Mr Dais and Mr Forbes were clear in their recollection of the explanation Mr Griffith gave. According to them, he said that he had been to the doctor relatively early on Friday morning, had received an injection which helped him feel better and that, on returning home, he agreed to a request from Mr Dobbin to help him with

some work on the building site. They also recalled Mr Griffith saying that the builder only needed him for a few minutes and that it would have taken the builder a long time to do the job without his assistance.

[40] In the course of giving his explanation, Mr Griffith gave Mr Dais a medical certificate from his general practitioner, Dr Stephan Lombard. This was dated 12 September 2003 and said:

> *Malcolm has reported to the Surgery today the 12 September 2003.*
>
> *From my knowledge of the condition and from what I understand is the nature of the job, the patient is unfit for work / normal duties from 12/09/2003.*
>
> *Return to work / normal duties is expected on 16/09/2003.*

[41] In his evidence, Mr Griffith agreed that he told Mr Dais at this meeting that he had been to see his doctor at 9am on the Friday morning but he denied saying that he had received an injection from his doctor.

[42] In her evidence-in-chief, Ms Calkin did not recount any of what Mr Griffith said at the meeting on 15 September. In answer to questions in cross-examination, however, she agreed that Mr Griffith told Mr Dais at that meeting that he had been to see his doctor at 9am on Friday morning and that he had received an injection from the doctor. She also said that, after hearing Mr Griffith say this, she believed it to be true.

[43] In his evidence, Mr Griffith said that he felt "*extremely intimidated*" by Mr Dais at this meeting and that he believed Mr Dais "*clearly had a predetermined agenda which was adverse to my employment with the company.*" Mr Dais denied that this was so and both he and Mr Forbes said that Mr Dais' demeanour during the meeting on 15 September was moderate. Ms Calkin said that she had no difficulty saying what she wanted to at this meeting and at later meetings she attended as Mr Griffith's support person.

[44] Although the email from Mr Dais to Mr Griffith calling the meeting on 15 September recorded that one of the issues to be discussed was the reason for Mr Griffith's 3-month period of leave, it appears this was not actually discussed at the meeting.

[45] Following the meeting on 15 September, Mr Dais and Mr Forbes were still concerned about Mr Griffith's explanation for his presence on the building site the previous Friday when he had called in sick. The exact nature of their concern was the subject of extensive cross-examination of them both. The effect of their answers was that they were prepared to accept Mr Griffith's explanation if he

provided independent confirmation that he had seen his doctor at 9am on Friday 12 September as he said. To this end, Mr Dais sent an email to Mr Griffith on the afternoon of Monday 15 September. It said:

> *As you indicated to me earlier today that your doctors appointment re: Injection was at 9.00am, I forgot to get you to have this time confirmed in writing (email/Fax or Letter) from The Doctors.*
>
> *Please arrange for this information to be provided before Thursday this week so I can complete all paperwork.*

[46] Also in the afternoon of Monday 15 September, a completely unrelated issue arose concerning Mr Griffith. An electrical contractor working at the Sunbeam factory needed to do some work in the ceiling of the canteen. He approached Mr Griffith for assistance. Sunbeam's health and safety rules required that a permit be obtained whenever work was to be carried out at a height which might be dangerous.

[47] Mr Griffith said that he completed a working at height permit for use of a ladder in the canteen. He then used a forklift to raise the contractor up to the ceiling without obtaining a permit for that activity. According to Mr Griffith, Mr Forbes was standing nearby when he began to use the forklift and, when it was part way up, he asked Mr Griffith whether he had the necessary working at height permit. Mr Griffith said he did not. Mr Forbes then told him to wait while he went and obtained it. Following this incident, Mr Forbes told Mr Griffith that he needed to speak to him about the issue of carrying out the work without first obtaining the necessary permit.

[48] Mr Forbes' account of this incident was broadly similar except that he was clear that he arrived on the scene after Mr Griffith had begun to lift the contractor with the forklift and that, when he asked Mr Griffith whether he had the necessary working at height permit, Mr Griffith replied "*no do I need one.*" Mr Forbes also said that when he told Mr Griffith they would need to discuss the matter further, he also told Mr Griffith that it was a serious issue.

Tuesday 16 September 2003

[49] Early in the morning of Tuesday 16 September, Mr Forbes sent an email to Mr Griffith requiring him to attend a meeting that morning regarding the issue of the working at height permit.

[50] That meeting between Mr Forbes and Mr Griffith duly took place at 8.30am. According to Mr Griffith, Mr Forbes had a prepared written warning on the table and told him at an early stage of the meeting that the warning would be issued to him.

According to Mr Griffith, he tried to explain his actions but Mr Forbes was unwilling to listen.

[51] Mr Forbes' account of this meeting was somewhat different. He agreed that he had prepared a written warning but said that it was unsigned and was face down on the table during the meeting. Mr Forbes explained that he had prepared it in advance in case he decided at the end of the meeting that a warning was appropriate but that he had not made a decision to give the warning to Mr Griffith prior to the meeting. Mr Forbes said that it was only after discussing matters with Mr Griffith at the meeting that he decided the warning should be issued, that he signed it after the meeting had concluded and then gave it to Mr Griffith.

[52] I was provided with a copy of the warning. In addition to the original text written by Mr Forbes and signed off by him, it also contains a handwritten comment by Mr Griffith. In that comment, Mr Griffith complained that, after 3 months' absence from work, he had not been given a "*proper induction*". He said that he genuinely forgot the rules and suggested that this was easily done.

[53] Later in the morning of Tuesday 16 September, Mr Griffith replied to Mr Dais' email requesting confirmation of the time he attended his doctor the previous Friday. The text of Mr Griffith's reply was:

> *Due to the very personal and confidential nature of the information you have requested I regretfully decline your request. I find your request breaches my privacy and is frankly absurd. Please accept this email as confirmation that I attended a doctor's appointment on Friday 12th Sept and received the required medication.*

[54] Mr Dais responded shortly afterwards in the following email:

> *I have no interest in obtaining specific details of your doctor's visit however, confirming the appointment time of 9.00am is all that is being requested.*
>
> *Without this information it is extremely difficult to validate your version of events.*
>
> *Obviously I cannot force you to provide this information but would appreciate your co-operation.*

Wednesday 17 September 2003

[55] On Wednesday 17 September, Mr Forbes sent a brief email to Mr Griffith asking him to provide a sick leave form for his absence the previous Friday.

[56] Mr Griffith did not respond to Mr Dais email of 16 September regarding confirmation of the time at which he saw his doctor on 12 September. Nor did Mr Griffith provide the sick leave form requested by Mr Forbes.

Friday 19 September 2003

[57] On Friday 19 September, Mr Dais arranged a further meeting with Mr Griffith at 2.45pm that day. The meeting took place as arranged. Mr Dais was accompanied by Mr Forbes. Mr Griffith again had Ms Calkin as his support person. All four people gave evidence of what occurred at this meeting.

[58] It was common ground that Mr Dais opened the meeting by saying that he was unhappy with Mr Griffith's failure to provide confirmation from his doctor about the time of the consultation on 12 September and that Mr Dais said he wanted to resolve that issue promptly. It was also common ground that Mr Griffith then sought to shift the discussion to the warning he had received from Mr Forbes 3 days earlier. After Mr Griffith had pursued this issue for a period of time, which Mr Griffith himself estimated to be about 10 minutes, Mr Dais made it clear that the purpose of the meeting was to discuss the events of 12 September, not the warning.

[59] Mr Dais then summarised the issue from his perspective, focussing on what he perceived to be the outstanding issue. This was whether the medical certificate provided by Mr Griffith's doctor was based on a consultation Mr Griffith said he had with the doctor at 9am on 12 September. Mr Dais referred to his repeated requests to Mr Griffith to provide confirmation from the doctor of the time of that consultation and the fact that Mr Griffith had not done so.

[60] It appears that Mr Griffith was invited to say what he intended to do about this situation but none of the witnesses gave evidence of what he may have said in response.

[61] The meeting ended with Mr Dais stating what was then to happen. Firstly, Mr Dais said that he still required Mr Griffith to provide a further certificate from his doctor stating the time of his visit on 12 September. Secondly, Mr Dais said there would be two immediate consequences for Mr Griffith. One was that he would not be paid for his absence on Friday 12 September. The other was that he would be required to produce a medical certificate to support any claim for sick leave over the following 3 months. Thirdly, Mr Dais said that, if Mr Griffith provided confirmation from his doctor of the time of his consultation on 12 September, those consequences would no longer apply.

[62] At the end of the meeting, Mr Griffith said that he was dissatisfied and that he would be "*obtaining legal advice.*"

[63] Although the witnesses were in broad agreement about what was said at this meeting, there was a stark contrast between the conclusions they drew from it. Mr Griffith and Ms Calkin said that they believed this was an end to the issue of what had occurred on 12 September. Mr Dais and Mr Forbes said that this was not the case and that it was clear to all concerned that the matter was ongoing. In support of this, they referred in particular to the continuing requirement for Mr Griffith to provide confirmation from his doctor of the time of his visit on 12 September.

[64] On Sunday 21 September, Mr Dais went to China on business. Before doing so, he handed over the issue of Mr Griffith's conduct to Andrew Tyler, Sunbeam's finance and operations manager. Mr Dais said that he had kept Mr Tyler informed of events since 12 September through discussions with him and by providing him with copies of emails. This included a final briefing following the meeting on 19 September.

Tuesday 23 September 2003

[65] Arising out of the meeting on 19 September, Mr Forbes prepared what was described as a "*conversation log*". This recorded a brief summary of the meeting under the headings "*Discussion*", "*Action Required*" and "*Consequences*". Mr Forbes said that he showed this document to Mr Griffith later on 19 September and asked him to sign it. Mr Griffith declined, referring to his intention to seek legal advice. On Tuesday 23 September, Mr Forbes spoke to Mr Griffith again about the conversation log. Mr Griffith said that he was still in the process of seeking advice and again refused to sign it.

[66] Shortly after that, Mr Tyler had a meeting with Mr Griffith. This was at about 9.35am. Mr Forbes was also in attendance. They all agreed that the meeting began with Mr Tyler explaining that, in Mr Dais' absence, he was taking over responsibility for the investigation into events on 12 September. It was also common ground that Mr Tyler then asked Mr Griffith again to provide written confirmation from his doctor of the time of his visit on 12 September. As to the rest of the meeting, their evidence diverged.

[67] According to Mr Griffith, Mr Tyler told him that he had to provide that written confirmation from his doctor by 2pm that day or further disciplinary action would result. Mr Griffith said that his response was to say that penalties had already been imposed on him at the meeting on Friday 19 September and that, as far as he was concerned, the matter was at an end. Mr Griffith went on to say that Mr Tyler persisted with his request and suggested that, if Mr Griffith did not arrange for the

confirmation required, Sunbeam could obtain that information "*through other channels*". Mr Griffith said he regarded this as a threat.

[68] Mr Forbes and Mr Tyler gave a distinctly different account of events. They said that Mr Griffith acknowledged the repeated requests for confirmation from his doctor and said that he would do his best to obtain it. Mr Forbes denied that Mr Griffith had suggested that the matter had been resolved at the meeting on 19 September.

[69] Mr Tyler made a file note of this meeting. This recorded that Mr Griffith was given until 2pm on 23 September to provide the confirmation sought and that Mr Griffith acknowledged that. The notes made no mention of Mr Griffith suggesting that the matter had been resolved on 19 September.

[70] At 10.30 that morning, there was a further meeting between Mr Griffith and Mr Tyler. Mr Griffith did not refer to this at all in his evidence-in-chief but, in cross-examination, he agreed that it had taken place. Mr Tyler gave a detailed account of it supported by another file note he made at the time.

[71] According to Mr Tyler, the meeting was initiated by Mr Griffith coming to his office and saying that he wished to talk more about what had been said in the earlier meeting. Mr Griffith said that he was unhappy about going back to his doctor for confirmation of the time of the visit and gave three reasons for this. The first was that it would be embarrassing for him to do so. The second was that it would cost money to have the doctor write another letter or certificate. Thirdly, Mr Griffith said that he had already told management what had happened. Mr Tyler said that he responded by saying that he believed the request was a reasonable one in order to substantiate Mr Griffith's account of events and that he doubted whether it would be embarrassing for Mr Griffith to ask his doctor for a further letter. Mr Tyler said that he also told Mr Griffith that Sunbeam would meet any expense incurred in obtaining the information. Mr Tyler said that the meeting concluded with his reminding Mr Griffith that this was a serious issue, that he asked Mr Griffith if he would now get the written confirmation sought and that Mr Griffith said that he would try to do so.

[72] At 1pm on Tuesday 23 September, there was a third meeting between Mr Tyler and Mr Griffith. In his evidence-in-chief, Mr Griffith referred to this meeting only briefly. He said that, at about 1pm, he attempted to speak with Mr Tyler and tried to explain why he had said that his appointment with his doctor on 12 September had been at 9am. Mr Griffith's evidence then was "*As soon as I began*

to explain, his attitude turned cold and dismissive and he would not talk to me any further."

[73] Mr Tyler gave a much more detailed account of this meeting which he said lasted approximately 10 minutes. His evidence was again supported by a file note he made at the time. The essence of what Mr Tyler said about this meeting was put to Mr Griffith in cross-examination and the key points accepted by him.

[74] Mr Tyler's account of this meeting was as follows. At 1pm, Mr Griffith came to see him again in his office. Mr Griffith began by saying that he thought the issue of what occurred on 12 September had been resolved at the meeting on 19 September and that Ms Calkin had also got that impression. Mr Griffith explained that he thought the matter was over because he had not been paid for his day's absence and had been required to provide medical certificates for sick leave in future. Mr Griffith said that he regarded that as "*disciplinary action*". Mr Griffith then went on to say that Mr Dais had told him that the company could not force him to provide a medical certificate. Mr Tyler explained to Mr Griffith that the issue would not be determined until the company either received confirmation of the time of Mr Griffith's visit to his doctor on 12 September or Mr Griffith said that he would not be providing that information. As Mr Griffith was walking out of Mr Tyler's office at the end of the meeting, Mr Tyler asked him if he did actually visit his doctor at 9am on 12 September. Mr Griffith replied that he did not visit the doctor then and that he had only made an appointment at that time. Mr Griffith said that he actually visited his doctor in the afternoon. That was the end of the discussion.

[75] In answer to questions in cross-examination, Mr Griffith explicitly confirmed that he told Mr Tyler at this meeting that he had visited his doctor in the afternoon of 12 September rather than at 9am and that he told Mr Tyler that 9am was the time at which he made the appointment to see his doctor. Mr Griffith also conceded that this was inconsistent with what he had told Mr Dais and Mr Forbes previously.

[76] Later that afternoon, Mr Tyler wrote a letter to Mr Griffith requiring him to attend a disciplinary meeting the following day. The text of that letter was:

> *I write further to our recent discussions in relation to your absence from work on Friday, 12 September. We had asked you a number of times to validate your explanation of events on Friday, 12 September by providing us with a doctor's certificate which stated what you were treated for together with the time at which you had allegedly visited the doctor.*
>
> *We are concerned that you were fit for work on Friday, 12 September and that you did not visit the doctor at all prior to Craig arriving at your building site.*

We are also concerned that you may have taken sick leave from the company with the intention that you would work on your building project which is near your own home.

Further, we are concerned that you may have prevaricated in your response to the company in relation to the events of 12 September. Specifically, you told Craig last week that you had been feeling unwell on Friday and had visited the doctor at 9am that day but that you felt better after the visit and worked on your building project for only half an hour that morning. As a result of your explanation to Craig, he asked you to provide the details of your visit to the doctor. In response to Craig's request in this regard, you refused to provide the details of your doctor's visit because you considered it to be a breach of your privacy.

In an informal discussion with me today, you admitted that you did not visit the doctor at all before Craig's visit. This is despite what you had told Craig.

We wish to schedule a disciplinary meeting on Wednesday, September 23, 2003 at 3pm to hear your responses to the allegations set out above. We wish to put you on notice that we consider these allegations to be serious. A consequence of the process may be that you are dismissed without notice for serious misconduct. You are entitled to bring a support person or representative to the disciplinary meeting.

Please feel free to contact me should you have any questions.

Wednesday 24 September 2003

[77] The meeting arranged for Wednesday 24 September began at about 3pm. Present were Mr Tyler, Mr Forbes, Mr Griffith, Ms Calkin as Mr Griffith's support person, and Vic Jarvis as Mr Griffith's advocate. Mr Jarvis did not give evidence. The other four people present at the meeting did give evidence of it. Both Mr Tyler and Mr Forbes made notes at the time, copies of which were produced. The evidence they gave was consistent with those notes.

[78] The account of the meeting given by Mr Tyler was that it began with the following summary of the position as he understood it. Mr Griffith had phoned in sick early on Friday 12 September. At about 11am, he had been seen by Mr Dais working on a building site. The explanation he gave was that he had been to see his doctor at 9am, received an injection and then felt well enough to assist the builder. When asked repeatedly to provide confirmation from his doctor of the time of the visit, he had not done so. On Tuesday 23 September, Mr Griffith had admitted not seeing his doctor until the afternoon of 12 September, well after Mr Dais' visit to the site.

[79] Mr Tyler said that, on the basis of this understanding of the facts, he summarised the allegations against Mr Griffith as being that he had:

(a) Prevaricated in his response to the company regarding the timing of his visit to the doctor; and

(b) Attempted to take paid sick leave from the company while at the same time pursuing activities from which he intended to personally benefit.

[80] According to Mr Tyler, Mr Griffith and Mr Jarvis then responded to these allegations. He said that Mr Griffith's explanation for telling Mr Dais that he had seen his doctor at 9am on 12 September was that he felt intimidated by Mr Dais' conduct. According to Mr Tyler, Mr Griffith told him that he had actually called the doctor's surgery at 9am to make an appointment and had "*accidentally replaced the time he saw the doctor with that time.*" Mr Griffith also said that he had been on the building site only briefly to assist the builder rather than "*labouring*" as Mr Dais had suggested.

[81] Mr Tyler said that Mr Griffith then went on to discuss his medical history, to say that he felt he was being picked on and that he felt he was being unfairly treated compared to other people. Mr Griffith said that he believed the matter had been finally resolved at the meeting on 19 September.

[82] Mr Tyler also gave evidence of a number of submissions and assertions put forward by Mr Jarvis on behalf of Mr Griffith. These included the proposition that, once a medical certificate from a doctor had been provided, it was not open to an employer to question whether sick leave was being properly taken.

[83] In all, Mr Tyler recorded seven explanations or submissions made by Mr Griffith and Mr Jarvis in response to the two allegations he had outlined at the beginning of the meeting.

[84] After hearing the response from Mr Griffith and Mr Jarvis, Mr Tyler adjourned the meeting to enable him and Mr Forbes to consider what had been said. Mr Tyler's evidence was that he and Mr Forbes went methodically through each of the seven responses given by Mr Griffith or by Mr Jarvis on his behalf. Mr Tyler acknowledged that there was a conflict between Mr Dais' account of his visit to the building site on 12 September and what Mr Griffith said about the same events. Mr Tyler said that, having heard what both men had to say, he and Mr Forbes preferred Mr Dais' version of events. This included Mr Griffith being dressed in building clothes, wearing a tool belt and boots and performing manual work. Mr Tyler said that he and Mr Forbes concluded that, if Mr Griffith was well enough to be working on the building site in this fashion, he was well enough to be at work at Sunbeam. This led them to the conclusion that Mr Griffith had improperly attempted to take sick leave.

[85] Mr Tyler said that he and Mr Forbes also reached the conclusion that Mr Griffith had prevaricated in his response to the company about when he had visited his doctor on 12 September. Mr Griffith had initially given an explanation which he admitted was wrong but he only made that admission after repeated requests to verify what he had originally said.

[86] Mr Tyler went on to say that, in considering what disciplinary action should be taken, they took into account that Mr Griffith was a long serving employee. He also said that they took into consideration that Mr Griffith had "*a background of performing personal work in work time*". In answer to a question in cross-examination, however, Mr Tyler said that they gave no weight to this factor. Mr Tyler went on to say that he and Mr Forbes reached the conclusion that, because the building site in question was Mr Griffith's own property, he would be deriving personal benefit from working on it. In Mr Tyler's view "*This made his abuse of company time and sick leave all the more concerning to us.*"

[87] Mr Tyler said that he and Mr Forbes reached the view that the seriousness of Mr Griffith's misconduct was such that it warranted dismissal on notice. He went on to say, however, that he was concerned that Mr Griffith's migraine headaches may have been caused by work induced stress.

[88] The meeting resumed after about half an hour. According to Mr Tyler, he then asked Mr Griffith about the cause of his migraine headaches and expressed concern that they may be caused by work induced stress. According to Mr Tyler, Mr Griffith replied that his migraines were caused by diet, including coffee and tea, by the weather, by hormonal changes, by eye problems and by dehydration. Mr Tyler said that he then asked Mr Griffith if the building was a factor and that Mr Griffith replied "*who knows?*" and that his father had experienced similar problems.

[89] Mr Tyler said that he then told Mr Griffith that he had decided to dismiss him on notice and gave him detailed reasons for that decision. Mr Tyler said that this consisted of going through each of the seven points that he and Mr Forbes had noted were made by Mr Griffith or Mr Jarvis in response to the two allegations of misconduct and giving reasons for rejecting each of those submissions.

[90] Mr Tyler's evidence was that the meeting finished at about 4.30pm which was the end of the normal working day at Sunbeam. He said that he asked Mr Griffith to collect his belongings and leave immediately, which he did. This was done under Mr Forbes' supervision.

[91] In his evidence, Mr Forbes confirmed that what Mr Tyler had said about the meeting on 24 September was accurate.

[92] In his evidence-in-chief, Mr Griffith gave a very brief account of this meeting. He said that he told Mr Tyler that he and Ms Calkin understood that the matter had been resolved on 19 September. He also said that Mr Tyler was told that he was not obliged to provide further information from his doctor and that he would not be providing it. Mr Griffith described Mr Tyler as "*dismissive of my and my representative's submissions indicating from the start of the meeting a clear bias and predetermination of the issue.*" He said that he was not asked any questions about what he was doing on the building site and that no allegations based on Mr Dais' observations were put to him for comment or explanation. Mr Griffith also said that he was not asked any questions or invited to respond to any allegations about "*financial gain*" he might have derived from being on the building site on 12 September.

[93] In answer to questions in cross-examination, Mr Griffith agreed that there was probably an hour of discussion at the meeting on 24 September prior to the adjournment being taken. He also agreed that Mr Jarvis spoke up forcefully on his behalf. In answer to a further question, Mr Griffith confirmed that, following the adjournment, Mr Tyler had discussed with him the reasons for his migraine headaches and that he had given a range of reasons other than stress.

[94] Ms Calkin's evidence about the meeting on 24 September was almost identical to that given by Mr Griffith although she said, in addition, that Mr Griffith gave an explanation concerning his visit to his doctor on 12 September. She also noted that Mr Tyler asked Mr Griffith about the cause of his migraine headaches.

[95] In answer to questions in cross-examination, Ms Calkin said that Mr Jarvis was "*aggressive*" in his representation of Mr Griffith at the meeting on 24 September. She also agreed that Mr Jarvis was "*assertive*" in what he said and that he spoke in "*pretty strong terms*" on behalf of Mr Griffith. She recalled that the time of Mr Griffith's visit to his doctor on 12 September "*was always the issue*" at that meeting.

[96] On 1 October 2003, Mr Tyler wrote to Mr Griffith confirming his dismissal and the reasons for it. The substance of that letter was:

> *I write further to the disciplinary meeting which was held on 24 September 2003 and wish to record the reasons for the company's decision to terminate your employment.*

After having considered your responses, I have reached the view that you:

a) Attempted to take sick leave from the company, when you were fit for work (at least for part of the day). While claiming sick leave you were pursuing activities from which you were benefiting personally.

b) Prevaricated in your responses to the company. In particular, I do not accept your responses in relation to the timing of your visit to the doctor to be truthful.

The company has given you a fair opportunity to respond to the allegations and after listening to and considering your responses, I have concluded that your actions constitute misconduct warranting termination on notice. The company will pay you one month's notice in the normal manner together with any outstanding holiday pay.

[97] It was common ground that Mr Griffith finished work on 24 September 2003 and was paid one month's salary in lieu of notice.

[98] On 13 October 2003, Mr Jarvis wrote a detailed letter to Mr Tyler submitting Mr Griffith's personal grievance. In the statement of Mr Griffith's view of the facts contained in that letter, it was recorded that Mr Griffith had telephoned his doctor at 9am on 12 September to arrange an appointment to see the doctor later that day.

[99] On 12 March 2004, Mr Griffith's solicitors wrote to Sunbeam's solicitors enclosing two letters. One was from Dr Lombard dated 25 September 2003 in which he said that, on 12 September 2003, Mr Griffith "*phoned us before 9.30am.*" The second letter was from the receptionist at Dr Lombard's practice and was dated 1 December 2003. In that letter, she said "*Malcolm phoned me early on the morning of the 12 December 2003 needing an appointment with Dr Lombard that day.*"

[100] In response to this letter, Sunbeam's solicitors wrote to Mr Griffith's solicitors asking that Mr Griffith obtain from Telecom a record of calls made from his home telephone on 12 September 2003. Mr Griffith's solicitors agreed that he would do this.

[101] On 6 May 2004, Mr Griffith's solicitors sent a fax to Sunbeam's solicitors attaching a handwritten note signed by Mr Griffith. This said:

Time in receptionist's letter 25/9/03 of 9.30am is incorrect. First telephone call to the doctor's surgery was made after I spoke with Craig Dais. Time of my first call on 25/9/03 [sic] *to the doctor's surgery was probably around 11.00am but I cannot be certain.*

[102] On 24 May 2004, Mr Griffith's solicitors disclosed the telephone call records obtained from Telecom. These showed that, on 12 September 2003, three

telephone calls were made from Mr Griffith's home number in relatively quick succession. At 11.22am, a call was made to the branch of the Westpac Bank where Mrs Griffith worked. At 11.24am, a call was made to Dr Lombard's surgery. At 11.25am, a further call was made to Mrs Griffith's workplace.

[103] In evidence, Mr Griffith conceded that this was an accurate record of the telephone calls he made on 12 September 2003 and when he made them. Specifically, he conceded that he did not seek an appointment with his doctor until after Mr Dais' visit to the building site. As a consequence Mr Griffith also conceded that not only the original explanation he gave to Mr Dais of having seen his doctor at 9am was incorrect but also the subsequent explanation he gave to Mr Tyler of having telephoned his doctor's surgery at 9am.

[104] Dr Lombard was called as a witness. He gave evidence that he saw Mr Griffith at 3.30pm on 12 September 2003. He said that it was then that he diagnosed Mr Griffith as suffering from a migraine headache and issued him with a medical certificate certifying him unfit for work before 16 September.

[105] Dr Lombard was cross-examined about the letter he had signed dated 25 September 2003 saying that Mr Griffith had telephoned the surgery before 9.30am. Dr Lombard agreed that he put that time in the letter because Mr Griffith had asked him to do so.

Credibility

[106] On a number of issues, there was a substantial conflict of evidence between Mr Griffith and other witnesses. To a much lesser extent, there was also a significant conflict between what Ms Calkin said and the evidence of witnesses for Sunbeam.

[107] To the extent it is necessary to do so, I have no hesitation in rejecting the evidence of Mr Griffith where it is in conflict with that of other witnesses. I do so for three reasons.

[108] Firstly, on Mr Griffith's own admission, he twice gave his employer false information about the time at which he sought and obtained medical assistance on 12 September 2003. On each occasion, he maintained the deception for an extended period despite ample opportunity to tell the truth. With respect to the second position he adopted, namely that he had telephoned his doctor at 9am on 12

September 2003, Mr Griffith deceived not only Sunbeam but also his own advocate and solicitors over a period of 8 months. He induced his doctor and his doctor's receptionist to make false statements to support him in that deception. He only admitted the second deception when he knew that he was about to be found out by disclosure of the telephone records.

[109] Mr Griffith attempted to explain his false statements to Sunbeam as being the result of "*intimidation*" by Mr Dais. Mr Tyler did not accept that explanation at the time and I do not accept it now. Rather, I find it was a deliberate and calculated attempt by Mr Griffith to deceive his employer in order to explain his presence on the building site when he had called in sick.

[110] The second reason I doubt the veracity of parts of Mr Griffith's evidence is that he made numerous concessions in cross-examination which substantially and significantly changed the impression given by his evidence-in-chief. This may be contrasted with the evidence of Sunbeam's witnesses, in particular Mr Tyler and Mr Forbes. In response to persistent and penetrating cross-examination by Mr O'Sullivan, they made some appropriate concessions but the substance and tenor of their evidence did not change under cross-examination in the way that Mr Griffith's evidence did.

[111] A third significant factor in my assessment of credibility is that the evidence of Sunbeam's witnesses was consistent with contemporary documentation of the events. The provenance of those documents was not questioned nor was their content shown to be incorrect to any significant extent.

[112] As to Ms Calkin, it became increasingly clear as she gave her evidence that her recollection of events was limited. It was also noticeable that, in many respects, her written brief of evidence was in nearly identical language to that of Mr Griffith, giving the strong impression that both had been written by the same author. Like Mr Griffith's evidence, the answers she gave to questions in cross-examination significantly altered the impression given by her evidence-in-chief. On balance, I accept that Ms Calkin was an honest witness but, to the extent that her evidence was inconsistent with that of witnesses for Sunbeam, I prefer the latter.

[113] I reach similar conclusions with respect to the evidence of Mr Dobbin. I accept that he gave his evidence honestly to the best of his recollection but it was apparent to me that his recollection was limited and inconsistent. An example of

this was the evidence Mr Dobbin gave about the activities of two roofing contractors who were at the building site on 12 September 2003. In his evidence-in-chief, Mr Dobbin said that these men simply dropped off some materials and left. In cross-examination, he was asked if he knew the identity of the men Mr Dais and Mr Forbes had seen on the roof that morning. He replied that they were the roofing contractors. When asked about the inconsistency between this reply and his earlier statement, Mr Dobbin said that his recollection that the men had dropped off materials and left was solely based on the fact that this statement was contained in his brief of evidence. He then said that he had no recollection of anyone being on the roof. It was noticeable also that, although much of Mr Dobbin's evidence was based on the premise that there was a strong wind blowing on the day in question, he agreed in cross-examination with the proposition that there was little wind or perhaps "*a breeze*".

[114] As to Dr Lombard, I accept that the evidence he gave to the Court was honest and accurate as far as it went. Clearly, however, the letter he signed dated 25 September 2003 was incorrect. It was unwise of him to have acceded to Mr Griffith's request to write a letter in particular terms without verifying for himself that it was true.

Principles

[115] The principles to be applied in determining whether Mr Griffith's dismissal was justifiable are those enunciated by the Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. The key principles are those set out in the following paragraphs:

> *[31] While in a breach of contract case an employee alleging wrongful dismissal must establish to the satisfaction of the Court that the employer has breached the contract, in a personal grievance, once the employee has established a prima facie case of unjustifiable dismissal, the onus is on the employer to justify the dismissal. The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would", used in the formulation expressed in the second* BP Oil *case ([1992] 3 ERNZ 483 (CA) at p487).*
>
> *[32] The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. This distinction is highlighted in cases involving alleged dishonesty by employees. An employer can justify dismissal without having to prove the dishonesty by showing that, after a full and fair investigation, it was*

> *at the time of the dismissal justified in believing that serious misconduct had occurred (*Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd *(1990) ERNZ Sel Cas 985; [1990] 3 NZLR 549 (CA), at p989; pp552-553.)*

[116] The principles set out above may be distilled into three questions to be answered in this case:

(a) Did Sunbeam conduct a full and fair investigation of Mr Griffith's conduct in relation to the two issues of concern?

(b) Did that investigation disclose conduct capable of being regarded as serious misconduct?

(c) Was the decision to dismiss one which a reasonable and fair employer could have taken?

[117] In answering these questions, it is important to bear in mind two factors. The first is contained in the opening words of paragraph [32] of the judgment in *Oram*: *"The burden on the employer is not that of proving to the Court the employee's serious misconduct...".* The second is that the questions must be answered as at the time the dismissal took place and on the basis of the information then available.

Full and fair investigation?

[118] Mr Griffith was dismissed on the basis of two findings of misconduct. The first was that he had abused his right to sick leave on 12 September 2003 by working on the building site for his new house when he had called in sick. The second was that he had prevaricated in the course of Sunbeam's inquiry into the first issue with respect to the time at which he contacted and saw his doctor on 12 September 2003.

[119] As to the first of those issues, the inquiry consisted of the observations made by Mr Dais and Mr Forbes on 12 September together with the meetings held with Mr Griffith on 15, 19 and 24 September. The meetings on 15 and 19 September were characterised by Sunbeam as investigative rather than disciplinary. The final meeting on 24 September was clearly characterised as disciplinary.

[120] With respect to that disciplinary meeting on 24 September, the essential requirements of fairness were met. In his letter to Mr Griffith of 23 September, Mr Tyler defined the issues of concern to Sunbeam and gave a summary of the information on which those concerns were based. Mr Griffith was warned that the issues were serious, that his employment was at risk and he was invited to have a

support person or representative attend the meeting with him. At the meeting itself, the matters of concern and the information which gave rise to them were again stated at the outset. Mr Griffith was then given a full opportunity to respond to those concerns. He took that opportunity in full measure, both personally and through his advocate. The extent to which Mr Griffith's views were expressed is apparent from the fact that discussion of the issues lasted the best part of an hour.

[121] For Mr Griffith, Mr O'Sullivan submitted that this inquiry was not full and fair for four reasons.

[122] Firstly, Mr O'Sullivan submitted that Sunbeam should have regarded the medical certificate produced by Mr Griffith as conclusive evidence that he was unfit for work for the whole of 12 September. Alternatively, Mr O'Sullivan submitted that it was unfair of Sunbeam to disregard the content of the medical certificate without discussing it with Dr Lombard.

[123] I do not accept those submissions. Dr Lombard's certificate was based on his examination of Mr Griffith on 12 September. Significantly, the opinion contained in it was brief and not phrased in retrospective terms. In such circumstances, it was understandable and reasonable for Sunbeam to treat the medical certificate as speaking from the time Dr Lombard examined Mr Griffith. Mr Griffith eventually admitted that he saw Dr Lombard in the afternoon of 12 September, several hours after he had been seen on the building site. It was therefore reasonable for Sunbeam to regard the medical certificate as effective from that time.

[124] In support of this submission, Mr O'Sullivan relied on the decision of Shaw J in *Excell Corporation Ltd v Stephens (No 2)* [2003] 1 ERNZ 568 where the Judge found that an employer's refusal to consider medical reports offered in explanation of an absence from work rendered the investigation into the absence unfair. The facts of that case were distinctly different to this case. Sunbeam did not refuse or fail to have regard to Dr Lombard's medical certificate. On the contrary, it was the subject of critical scrutiny. This was evidenced by the fact that both Mr Dais and Mr Tyler asked Mr Griffith to obtain clarification from Dr Lombard of the time of the consultation on which it was based. It is notable also that the medical certificate which was provided in the *Stephens* case was explicitly retrospective. The certificate in this case was not.

[125] Mr O'Sullivan's alternative submission that Sunbeam's investigation was unfair and less than "full" because Sunbeam did not discuss the medical certificate with Dr Lombard is ironic. It is common ground that Sunbeam asked Mr Griffith to seek clarification from Dr Lombard of the time at which Mr Griffith saw him and that Mr Griffith refused to do so. Indeed he rejected the request as a breach of his privacy and *"frankly absurd"*. Given that any information Dr Lombard may have been able to provide to Sunbeam was subject to medical professional privilege, Sunbeam cannot be criticised for not approaching Dr Lombard directly.

[126] Mr O'Sullivan's second submission was that the inquiry was not full and fair because Sunbeam did not interview Mr Dobbin. This raises the question of the extent of inquiry an employer is expected to undertake. Some guidance is to be found in the following statement of the Court of Appeal in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZILR 584 at page 591:

> *Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.*

[127] I would add to this by saying that, if the employer is put on notice that a particular person is likely to be able to assist in resolving the issue of concern, the obligation to conduct a full and fair investigation will usually require the employer to seek that person's input into it.

[128] As the decision makers, Mr Tyler and Mr Forbes heard a detailed account of events on the building site on 12 September from Mr Dais. In the several meetings about those events, Mr Griffith gave them a somewhat different account of those events but the evidence was that Mr Griffith's response at those meetings focused more on explaining why he felt able to work on the building site than on the suggestion that what Mr Dais had said was wrong. There was no evidence that Mr Griffith or anyone else suggested to Sunbeam that Mr Dobbin could provide useful evidence which would assist in resolving the matter. Thus, Sunbeam was not put on notice or even on inquiry that Mr Dobbin may be able to contribute constructively to the investigation. In these circumstances, the fact that Sunbeam did not speak to Mr Dobbin did not render the investigation insufficient or unfair.

[129] Mr O'Sullivan's third submission was that it was unfair for Mr Tyler to treat the briefings he received from Mr Dais as part of his inquiry and *"to adopt Mr Dais'*

conclusions as his own." In support of this submission, Mr O'Sullivan relied on the decision of Goddard CJ in *Whanganui College Board of Trustees v Lewis* [1999] 2 ERNZ 1006 and, in particular, a passage at page 1016 of the report.

[130] This case is readily distinguishable from the facts in the *Lewis* case. In that case, the decision maker treated a preliminary report by a subordinate which identified the issues of concern as part of the inquiry into those issues and proof of them. In this case, Mr Tyler and Mr Forbes listened to what Mr Dais had to say as an eye witness of events. They both subsequently listened to what Mr Griffith had to say about those same events. There was nothing improper in this methodology. There was no evidence that, in the course of this process, Mr Dais told Mr Tyler of any conclusions he had reached or urged Mr Tyler to reach any particular conclusions.

[131] Mr O'Sullivan's fourth submission was that, when it became apparent to Mr Tyler that Mr Griffith's account of events on 12 September differed from that of Mr Dais, he was obliged to put Mr Griffith's account to Mr Dais for comment and a failure to do so rendered the investigation as a whole unfair. I do not accept this submission. It assumes that an employer investigating suspected misconduct will conduct a hearing in the nature of a trial, the very thing the Court of Appeal said in the *Airline Stewards* case an employer was not required to do. In any event, putting what Mr Griffith said to Mr Dais for comment would have been inviting Mr Dais to assess his own credibility and thereby have a role in the decision-making process which had been handed over to Mr Tyler. That would not have been appropriate.

[132] Overall, I conclude that Sunbeam has discharged the onus of showing that a full and fair investigation was conducted into the matters of concern which subsequently formed the foundation for the decision to dismiss Mr Griffith.

[133] The second issue only arose after Mr Griffith's third meeting with Mr Tyler on 23 September 2003. The investigation into it was conducted at the disciplinary meeting on 24 September, although Mr Tyler and Mr Forbes took into account what Mr Griffith had said on 12 September, at the previous meeting on 15 September and in the email correspondence. Mr O'Sullivan did not challenge the sufficiency or propriety of this investigation and I conclude that it also was full and fair.

Serious misconduct?

[134] The decision to dismiss Mr Griffith was based on the conclusion that both of the allegations against him had been established, that both matters were serious and that Mr Griffith's actions in respect of each constituted misconduct warranting dismissal.

[135] With respect to the allegation that Mr Griffith had abused his right to sick leave, Mr Tyler and Mr Forbes concluded that:

(a) Early on 12 September, Mr Griffith called in sick saying that he would be of "*not be of any use to anyone*".

(b) At approximately 11 am that morning, Mr Griffith was found on a building site assisting in the building of his new home. He was dressed in working clothes including a tool belt and boots.

(c) In assisting in the building of his home, Mr Griffith was engaged in an activity from which he would personally benefit.

(d) Mr Griffith produced a medical certificate saying that he was unfit for work from 12 September to 16 September. This was obtained as a result of a consultation Mr Griffith had with his doctor several hours after he had been on the building site.

[136] With respect to the allegation that Mr Griffith prevaricated in his response to questions about when he had seen his doctor on 12 September, Mr Tyler and Mr Forbes concluded that:

(a) On 12 September, Mr Griffith told Mr Dais that he had seen Dr Lombard at 9am that day.

(b) At the meeting on 15 September, Mr Griffith repeated that statement.

(c) Mr Griffith maintained that position for more than a week, during which time he refused repeated requests from Sunbeam to have Dr Lombard verify it.

(d) On 23 September, Mr Griffith admitted that the statement was wrong and that he had not seen Dr Lombard until the afternoon of 12 September, well after Mr Dais' visit to the building site.

[137] An unusual feature of the evidence in this case was that, in reading his brief of evidence, Mr Tyler departed from the written text describing his conclusion that Mr

Griffith's actions constituted "serious misconduct" by omitting the word "serious". Thus, his evidence about the decision to dismiss Mr Griffith was *"… we decided that we would dismiss him on one month's notice for misconduct."* Mr O'Sullivan subsequently questioned Mr Tyler in detail about the reason he had made this change. In essence, Mr Tyler's response was that it reflected legal advice he and Mr Forbes had received during the adjournment of the meeting on 24 September.

[138] Mr O'Sullivan based a strong submission on this distinction Mr Tyler had apparently made between "serious misconduct" and "misconduct". On the basis of this, Mr O'Sullivan invited me to characterise this as an admission by Mr Tyler that Mr Griffith's conduct was not capable of amounting to serious misconduct. On that basis, Mr O'Sullivan submitted that Mr Griffith's dismissal was inevitably unjustifiable.

[139] I do not accept that submission for two reasons. Firstly, justification is a matter of substance not semantics. Had Mr Tyler characterised Mr Griffith's actions as serious misconduct, that would not of itself have justified dismissal. As is apparent from paragraph [32] of the decision in *Oram*, the issue is whether the conduct disclosed by the employer's investigation is *"capable of being regarded as serious misconduct"*, not whether the employer labelled it as such.

[140] Secondly, while it is correct that Mr Tyler did describe Mr Griffith's conduct as "misconduct", he did so in the context of saying that it was misconduct which he believed justified dismissal. Thus, he used the term "misconduct" to describe what those familiar with employment law would almost certainly characterise as "serious misconduct". Had Mr Tyler said that he used the term "misconduct" as opposed to "serious misconduct" because he did not believe Mr Griffith's actions warranted dismissal, Mr O'Sullivan's submission would have had considerably more weight. That was not the case. Mr Tyler was consistent in his evidence that he regarded Mr Griffith's actions as serious and deserving of dismissal.

[141] I turn now to the substance of the conclusions reached by Mr Tyler and Mr Forbes about the first issue relating to sick leave. Having considered all the evidence about the information known to Mr Tyler and Mr Forbes at the time, I conclude that it was open to them to reach those conclusions. In particular, I find that they were justified in their view that, if Mr Griffith was capable of working on the building site in the morning of 12 September, he was capable of working for Sunbeam.

[142] Mr O'Sullivan challenged one particular aspect of the conclusions reached by Mr Tyler and Mr Forbes in relation to this issue. This was the conclusion that Mr Griffith would benefit personally from working on the building site. While this point was the subject of significant evidence in the Court, there was little evidence that it was canvassed to any extent in the investigation conducted by Sunbeam. It is recorded in Mr Tyler's notes of the meeting of 24 September that the issue was mentioned in the opening statement he made at that meeting but there was no evidence that Mr Griffith or Mr Jarvis responded to it. Mr Griffith's evidence was that the issue was never raised but, for the reasons given earlier, I reject that evidence in favour of Mr Tyler's evidence that it was raised. In the absence of any evidence that Mr Griffith explained the financial arrangements between himself and Mr Dobbin to Sunbeam, I find that it was a reasonable conclusion for Mr Tyler and Mr Forbes to reach that Mr Griffith would benefit from assisting his builder in building the house.

[143] As to the second issue, I have no difficulty in finding that the conclusions reached by Mr Tyler and Mr Forbes were open to them. I also find it was entirely appropriate for them to reject Mr Griffith's explanation that he gave false information to his employer as a mistake or the result of "*intimidation*" by Mr Dais.

[144] I turn now to whether the conclusion reached by Mr Tyler and Mr Forbes disclosed conduct capable of being regarded as serious misconduct. Serious misconduct is "*conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship"* – see the decision of the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487 subsequently adopted by the Court of Appeal in other cases including *Oram* and, most recently, *Chief Executive of the Department of Inland Revenue v Buchanan & Symes* unreported, Chambers J, O'Regan J, Panckhurst J, 22 December 2005, CA2/05.

[145] The use of sick leave is, by its nature, a matter requiring a significant degree of trust of the employee by the employer. In most instances, the employer must trust the employee to exercise the right to take sick leave honestly because it is impractical to do otherwise. It may also be said that, in general, abuse of the right to paid sick leave will be serious because it involves obtaining payment by a false pretence or, at least, attempting to do so. Having said that, not every case of misuse of the right to sick leave will necessarily be capable of amounting to serious misconduct. In some cases there may be special factors suggesting that it ought

not to be regarded in this way, either generally or in a particular case. It follows that each case must be determined on the facts.

[146] In this case, Sunbeam reposed a high degree of trust in its staff generally by allowing sick leave to be taken for periods up to three days without requiring a medical certificate. On the other hand, there was no evidence of a specific provision in the employment agreements of staff or in general policy documents identifying abuse of sick leave as serious misconduct or otherwise likely to lead to dismissal. Equally, however, there was no evidence of any factor which would suggest that the right to take sick leave could be exercised other than honestly and in genuine cases of sickness. In this particular case, there was an aggravating factor that, in working on the building site, Mr Griffith was engaged in other work from which he would logically benefit.

[147] On balance, I find that Mr Griffith's conduct on 12 September 2003 in relation to sick leave was capable of being regarded as serious misconduct.

[148] As to the second issue of "*prevarication*" in the course of Sunbeam's investigation of the sick leave issue, I find that this was clearly capable of being regarded as serious misconduct. Mr Tyler and Mr Forbes were entitled to regard Mr Griffith's actions as a deliberate and sustained attempt to deceive his employer in an effort to avoid the consequences of his actions on 12 September.

[149] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that an employee is honest and open in responding to the employer's concerns about possible misconduct. Accordingly, it will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on such concerns. Where, as in this case, the deception is prolonged and relates to a key issue in the employer's consideration of the matter, the breach of duty by the employee can readily be regarded as serious misconduct.

[150] Mr O'Sullivan submitted that any suggestion that Mr Griffith's conduct in relation to this second issue could be regarded as serious misconduct was "*nonsense*". He characterised what Mr Griffith did as a mistake and, referring to Dr Lombard's letter of 25 September 2003, suggested that such a mistake was easily made. I totally reject that submission. Having heard the evidence, there is no doubt in my mind that Mr Griffith's actions were deliberate and self-serving. Equally, as I

have noted above, it was clearly open to Mr Tyler to reach a similar conclusion on the information available to them at the time. As for Dr Lombard's letter, Mr O'Sullivan's submission entirely overlooked the evidence he gave in cross-examination that Mr Griffith asked him to write the letter in question in the terms he did.

[151] I conclude that Mr Griffith's actions in relation to the second issue were also capable of being regarded as serious misconduct.

Could a fair and reasonable employer dismiss?

[152] The third and ultimate question is whether Sunbeam's decision to dismiss Mr Griffith was one which a fair and reasonable employer could have taken.

[153] In light of the conclusion I have reached that Sunbeam conducted a full and fair inquiry which disclosed conduct capable of being regarded as serious misconduct, this question turns largely on whether there were any other factors in this case which would have persuaded a fair and reasonable employer not to dismiss Mr Griffith.

[154] Mr O'Sullivan submitted that it was not open to Sunbeam to dismiss Mr Griffith because the events of 12 September had been finally dealt with at the meeting on 19 September. Had there been clear evidence that Sunbeam intended the outcome of that meeting to be an end to the matter, there would be force in this submission, at least so far as the issue of misuse of sick leave was concerned. An employee ought not to be disciplined twice for the same misconduct.

[155] But that was not the evidence. At best, from Mr Griffith's point of view, the evidence was that he and Ms Calkin thought the matter was at an end following that meeting. There was no evidence that Mr Dais or Mr Forbes thought so. Indeed, their evidence was that they regarded the matter as an ongoing issue. There was also the relatively objective evidence of the meeting log. On one hand, it recorded the withholding of sick pay to Mr Griffith for 12 September and the imposition on him of a requirement to provide medical certificates for future sick leave as "C*onsequences*". On the other hand, it recorded the provision of a further medical certificate by Mr Griffith as "A*ction Required*". It also recorded that the two consequences would no longer apply if Mr Griffith did produce further evidence to support his statement about the time he saw his doctor on 12 September. This was

clearly inconsistent with the view that the matter was at an end. I find as a fact that the sick leave issue was not resolved at the 19 September meeting.

[156] In any event, the second issue of Mr Griffith's false account of the time at which he saw his doctor on 12 September was a separate and serious issue which did not emerge until after 19 September and which was clearly not resolved other than by Mr Griffith's dismissal. Even if dismissal had not been justifiable in reliance on the sick leave issue, I find it was clearly justifiable on the deception issue alone.

[157] Another issue advanced by Mr O'Sullivan in relation to several aspects of this case was that it was not open to Mr Tyler and Mr Forbes to prefer Mr Dais' account of the events of 12 September to that of Mr Griffith. Alternatively, Mr O'Sullivan submitted that this was not what a fair and reasonable employer would do. Mr O'Sullivan did not elaborate on these submissions or refer to any authority in support of them but, in fairness to counsel and to Mr Griffith, I will deal with them.

[158] It is inevitable that employers will be faced with differing accounts of events when investigating possible misconduct. If decisions are to be made, those differences must be resolved. Often the differences are irreconcilable and they can only be resolved by preferring one account to another. Provided the process is not tainted by prejudice, predetermination or other improper motive, it is open to employers to make such decisions.

[159] In this case, I have found that Mr Dais gave his account of events at the building site on 12 September to both Mr Forbes and Mr Tyler. Both of those men then heard what Mr Griffith said about the same events. To the extent that those two accounts were irreconcilable, it was necessary and appropriate that they decide whose account they preferred. There was no credible evidence of improper motive leading either Mr Tyler or Mr Forbes to the conclusion they reached. On the other hand there was evidence of at least one good reason to doubt the account given by Mr Griffith of the events of 12 September. He had admitted giving his employers false information about the time at which he saw his doctor that day and Mr Tyler and Mr Forbes were aware that he had persisted in that deception despite ample opportunity to tell the truth.

[160] In these circumstances, I find that it was open to Mr Tyler and Mr Forbes to prefer the information provided to them by Mr Dais and that, in doing so, their action was that of a fair and reasonable employer.

[161] A further submission made by Mr O'Sullivan was that the decision to dismiss was tainted by reliance on an irrelevant factor, being the reason why Mr Griffith sought extended leave in April 2003. That submission was apparently based on answers given by Mr Dais in cross-examination when he said that he thought that Mr Griffith taking leave to further his property development interests was in breach of a provision in Sunbeam's code of conduct restricting involvement in other business activities without consent and that this was a factor in the decision to dismiss Mr Griffith. In isolation, that evidence would be a matter for concern about the fairness of the decision to dismiss. It must, however, be seen in the context of Mr Dais not being involved in the decision to dismiss. That decision was made by Mr Tyler in conjunction with Mr Forbes. Mr Dais was in China when the decision was made and played no part in making it. Mr Dais also said that he did not discuss this issue in the course of the investigation while he was involved in it and there was no evidence that Mr Tyler or Mr Forbes had regard to it. I find that it played no part in their decision.

[162] In conclusion, I find that the decision to dismiss Mr Griffith was one that a fair and reasonable employer could have taken. I therefore find that Mr Griffith's dismissal was justifiable.

Disadvantage grievance

[163] In addition to his claim that he had been unjustifiably dismissed, Mr Griffith pursued a separate personal grievance alleging that the warning he received on 16 September was unjustifiable and affected his employment to his disadvantage.

[164] Following Mr Griffith's dismissal, the warning he received on 16 September 2003 was rescinded in November 2003 prior to mediation. When asked in cross-examination why Sunbeam took this somewhat unusual course, Mr Forbes said it was *"because we felt at the time I did not follow due process and give Malcolm the opportunity to have a support person and be aware – to thoroughly go through a disciplinary process."* Mr Forbes went on to say that another factor in rescinding the warning was that Mr Griffith was seeking reinstatement.

[165] In his submissions on behalf of Sunbeam, Mr Towner accepted that this amounted to a concession that the disciplinary process preceding the warning was inadequate. That was a proper concession. Even on Mr Forbes' account of events, it appears Mr Griffith was not told that the meeting with Mr Forbes on 16 September

was to be a disciplinary meeting. The preparation of the written warning in advance also raised the distinct possibility that the outcome of the meeting had been predetermined, something Mr Forbes did not expressly deny.

[166] While the warning was the result of an unfair and inappropriate procedure, it appears to me there was good reason for it being given. Mr Griffith conceded that, on 15 September 2003, he had begun lifting the contractor with the forklift prior to obtaining a working at height permit for that task. The only real difference between the account of events given by Mr Griffith and that given by Mr Forbes was the time at which Mr Forbes came onto the scene. Mr Griffith said it was before he began to raise the forklift; Mr Forbes said it was while he was doing so. For the reasons given earlier, I prefer Mr Forbes' evidence and reject Mr Griffith's suggestion that Mr Forbes stood and watched him breach the health and safety rules before intervening.

[167] As I have noted earlier, Mr Griffith's explanation for the failure to obtain the necessary permit was that he had forgotten. He attempted to place responsibility for this on Sunbeam by saying that he had not received an adequate induction course on his return after three months' leave. I found that unconvincing for two reasons. Firstly, Mr Griffith said that he had obtained a working at height permit for the same contractor to work from a ladder. That established that he had not forgotten the need for such permits. Secondly, it cannot be said as a matter of general principle that an employer is obliged to remind an employee who has been absent for three months on leave about the need for compliance with established health and safety rules, particularly where the employee has more than 20 years' experience on the worksite.

[168] This leads me to the conclusion that, even if the disciplinary process had been conducted appropriately, Mr Griffith had no valid explanation for his conduct which might have persuaded a fair and reasonable employer not to give him the warning he received.

[169] I turn then to the remedies to be awarded to Mr Griffith in respect of this grievance. The remedy sought was compensation of $5,000. In support of this, Mr Griffith gave evidence that the warning disadvantaged him severely, made him feel very scared and as though he had nowhere to turn. He also said that he felt the warning was part of an attempt to dismiss him and that it caused him to lose trust in his employer. In relation to the effects on Mr Griffith of this warning alone, I regard

that evidence as somewhat exaggerated. It seemed to me that it was influenced by the distress Mr Griffith went on to say he had suffered as a result of his dismissal.

[170] Mr Towner urged me to have regard to the principles relating to fixing the quantum of compensation discussed by the Court of Appeal in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 where, at paragraph [81], they said:

> *[81] Those fixing compensation in this area must have regard to the actual loss suffered by the employee. As indicated, that loss sets an upper ceiling on any award and it is plainly a logical starting point for assessment. We do not go as far as the Chief Judge in* Trotter *in holding that full compensation must be awarded in the absence of good reason to the contrary; this because no such directive appears in the legislation. We also emphasise that full compensation must be assessed in light of all contingencies and in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed. In this regard we draw attention to the English jurisprudence reviewed in* 16 Halsbury's Laws of England *(4th ed, reissue) at para [529].*

[171] While this particular passage is framed in broad terms, it appears in that part of the judgment in which the Court was discussing compensation for economic loss and, in particular, reimbursement of lost earnings in the context of an unjustifiable dismissal. It would therefore be inappropriate to specifically apply those principles to the assessment of non-economic loss, such as compensation under s123(1)(c)(i) of the Employment Relations Act 2000. The principles applicable to the assessment of non-economic loss were dealt with by the Court later in their decision at paragraphs [84] and [85].

[172] In assessing what would be an appropriate award of compensation, however, it is appropriate that I take all relevant circumstances into account. Relevant circumstances include the fact that Mr Griffith was dismissed 8 days after he received the warning in question. It was apparent when he gave evidence of the distress he experienced as a result of the two events that the distress he described as having arisen from receiving the warning was subsumed into the distress he described as the result of his dismissal. This must mitigate in favour of a smaller award than would otherwise be the case.

[173] Another factor I bear in mind is that the warning given to Mr Griffith was a warning *simpliciter*. It was not a final warning. While it can properly be said that it affected his employment to his disadvantage in the sense that it could have been

relied on by Sunbeam as an aggravating factor in respect of any subsequent disciplinary issues, the extent to which that would have been open to a fair and reasonable employer was distinctly limited. I note also that there was no evidence that this warning was actually taken into account by Mr Tyler and Mr Forbes in their subsequent decision to dismiss Mr Griffith.

[174] Authoritative guidelines as to the quantum of awards in disadvantage grievances are few. I note, however, that in *Business Distributors Ltd v Patel* [2001] ERNZ 124, the Court of Appeal described an award of $5,500 as *"quite generous"* compensation for distress arising out of several warnings and other penalties imposed on the employee.

[175] Taking all aspects of the matter into account, and subject to what I will now say about contribution, I find that an appropriate award of compensation would be $1,500.

[176] In relation to that assessment, I must now have regard to s124 which provides:

> ***124 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.*

[177] For the reasons set out earlier, I find that this is one of those cases where the unjustifiable nature of the employer's actions relates solely to the procedure followed and that, had a proper procedure been followed, it is highly likely that the outcome would have been the same. This is one of the circumstances to which s124 is particularly directed.

[178] Mr Towner urged me to find that Mr Griffith's actions had contributed so greatly to the situation which gave rise to this grievance that he should be disqualified from the award of any remedies. While I accept that Mr Griffith's actions created the situation which ultimately gave rise to the personal grievance, I find that the particular manner in which Mr Forbes dealt with the matter warrants some

responsibility for it remaining with Sunbeam. I assess Mr Griffith's contribution at 60 per cent.

Conclusions

[179] In summary, my conclusions are:

(a) Mr Griffith was justifiably dismissed on 24 September 2003. Accordingly, his personal grievance alleging unjustifiable dismissal fails.

(b) The warning given to Mr Griffith on 16 September 2003 was unjustifiable. His personal grievance in that regard succeeds.

(c) I award Mr Griffith $1,500 by way of compensation for distress reduced by 60 per cent to take account of his contribution to the situation giving rise to the grievance. Sunbeam is ordered to pay Mr Griffith the sum of $600.

Costs

[180] Counsel for both parties asked me to reserve costs, which I do. Although Mr Griffith has been successful to a small extent with respect to the disadvantage grievance, he has been unsuccessful with respect to the claim of unjustifiable dismissal which comprised the overwhelming majority of the case. I invite the parties to agree on costs if possible. Failing agreement, Mr Towner is to file and serve a memorandum on behalf of Sunbeam within 21 days of this judgment. Mr O'Sullivan is then to file and serve a memorandum on behalf of Mr Griffith within a further 14 days.

A A Couch
Judge

Judgment signed at 12.45pm on 28 July 2006