

# [Mr the applicant informing him of the](https://assignbuster.com/mr-the-applicant-informing-him-of-the/)

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Mr Maxwell that he was employedunjustifiablydismissedby Taranaki Sawmills Ltd. 1 II         Facts (          Mr. Maxwell (the applicant), anemployee of Taranaki)for three and a half years as a sawmilloperator until he was  Sawmills Ltd (the respondent), was dismissedon 6 May 1999 EEP1 foreating another employee’s biscuits without consent.  2       The incident thatcaused Mr Maxwell’s dismissal occurred on 6 May 1999.

Mr Maxwell was inIn the cafeteria andtheapplicant noticed, and withoutthinking, atean open packet of biscuits.  Without thinking he ate biscuits.  He did not realise that the biscuits belonged belonging to another employee, Mr. Sinclair.  After speaking to other employees present whenMr Maxwell ate Mr Sinclair’sFinding out from witnesses that the respondent hadeaten hisbiscuits, Mr. Sinclair lodged a formalcomplaint with Taranaki.  3       Following the complaint, the respondent.

This led to an investigation bythe Health and Safety Manager, Mr. Kearns, investigated theincident..  Mr. Kearns interviewedMr Maxwellheldan interview with the applicantinforminghim of the allegation and that it could result in dismissal under his contract of employmentagreement.   4       During the meeting MrMaxwelltheapplicantadmitted he ateeating thebiscuits and provided the explanation that he did so without thinking and thathe regretted doing so.

III       Contract of Employment 5       Mr MaxwellThe dismissal was summarily dismissedfor serious misconduct.  Seriousmisconduct is defined in “ Taranaki Sawmills Limited Company Information, Standing Instructions and Rules””, formingpart of the contract, as including being in possession of another employee’s personalproperty without permission (the HouseRule). IV        Claims The Applicant 6       Mr Maxwell claimshis dismissal was unjustified.

Mr Maxwell submitted that The applicant claimsthat even if Taranakithe respondent had followedadhered to a fair processprocedure in itsinvestigation, and was entitled to conclude that hethe applicant had taken the biscuitswithout permission breachingand therefore breached the House Rule, summary dismissal was not an appropriate or proportional response.  The Respondent 7       TaranakiThe respondent claims that it wasopen to it to find that Mr Maxwellthe applicant had breached the HouseRule.  Therefore, Taranaki claims it wasrule againstpossessing another employee’s property, and that it was therefore justified indismissing Mr Maxwell forserious misconduct as it had lost all trust and confidence in himthe respondentunder clause 10. V         Issues 8       The issues fordetermination wereraised by this case are: (a)        (a)Whether Mr.

Maxwell’s dismissal was justified?(a)        If not, what are the appropriate remedies? VI        WhetherMr. Maxwell’s dismissal was justified? (b)       Ifnot, what if any remedies should be awarded? (c)        Whatif any costs should be awarded? Was Mr Maxwell’sdismissal justified? The test ofjustification 9       The test as to whether a dismissal isunjustifiable is set out in section 103A of the Act. The test is whether the employer’sactions were what a fair and reasonable employer could have done in all thecircumstances at the time the dismissal or action occurred. 2  Thisrequires the Authorityauthority to objectivelyassess Taranaki’s actions were what a decide whether theprocess of the dismissal was fairand reasonable employer couldhave done in all the circumstances at the time Mr Maxwell was dismissed, and whether theemployees conduct was worthy of dismissal. 3   10    When assessing justification, theAuthority must also have regard to Taranaki’s compliance with its good faithobligations in s 4(1A) of the Act. 4  Section 4(1A) of the Act requires Taranaki toprovide Mr Maxwell with access to relevant information and an opportunity tocomment on that before he was dismissed.

5 11       Throughout Mr Kearns’investigation Mr Maxwell was informed of the complaint and evidence againsthim. He was also given a fair opportunity to respond with an explanation. Basedon the facts I accept Taranaki has complied with its good faith obligations.   A          Proceduralfairness  12     Section 103A of the Act also sets out theminimum considerationsthe Authority must consider in relation to procedural fairnessrequirements. 6The employer must have sufficiently investigated the allegations against theemployee before dismissal, 7 given the employee achance to respond, 8 and genuinelyconsidered the employee’s explanation in relation to the allegations againstthe employee before dismissing or taking action against the employee. 9  TheAuthority may also take into consideration any other appropriate factors.

10 13     After The respondentseems to have met some of the requirements under section 103A(3) for proceduralfairness. Onreceiving the complaint, allegation from Mr. Sinclair, Mr. Kearns carried out aninvestigation.  This included informing MrMaxwelltheapplicantof theallegation and of the possibility of summary dismissal, and giving him anopportunity to respond. Mr. Kearns alsointerviewed other employees whosaw the incidentwitnesses therespondent’s conduct.

14     However, Mr. Kearns didhas not genuinelyconsidered Mr Maxwell’sthe respondent’s explanation. of his conduct.  Upon admission of guilt by the respondent, MrMaxwell, Mr. Kearns dismissed him.

the respondent.  He did not give any consideration to the lackof intent on the part of MrMaxwell. therespondent in taking the biscuits.  This seems to be an important factor indetermining the correct penalty for breaking the HouseRule. rulespecified in the contract (see above).

The penalty issubjective.  Breakingthe House Rulerule, may result in summarydismissal.  However, Mr. Kearns did not takethe explanation into account, and therefore did not give MrMaxwelltherespondentthe genuine consideration required by law under section 103A(3).  15     However, the lack of considerationis not sufficient by itself, being only onecomponent of procedural fairness, to conclude Taranaki’stherespondent’s investigation and actionswere not procedurally fair.  Substantivejustification B          Justifiability 16     Serious misconductis conduct which fundamentally undermines the trust and confidence which isinherent in an employment relationship. 11  Conduct of this sort is generallyconduct that is wilfully or deliberatelydishonest, and breaks the obligations of good faith.

12  Careless action or negligent conduct typically do not have this effect. 13 17     Taranaki identified the sort of behaviourit considered would be fundamentally destructive of the employment relationshipby setting out examples of serious misconduct in its House Rule.  TheHouse Rule is expressly incorporated into MrMaxwell’s terms and conditions of employment.  18     Taranaki has the onus of establishing onthe balance of probabilities that it held a genuine view based on a reasonablegrounds that Mr Maxwell’s behaviour amounted to serious misconduct.  Taranaki must also establish that itsconclusion about that was one that a fair and reasonable employer could havereached in all the circumstances.  19     Mr Maxwellapplicant was in possession ofanother employee’s possessions.

This fact is notdisputed by Mr Maxwellthe applicant.  Onthe face of it, this is a breach of theHouse Rule set out in thecontract of employment.  I accept that it was reasonable for Taranakithe respondent to conclude MrMaxwelltheapplicant was in breach of thisrule.

I also accept that upon a breach of this ruleTaranakithe respondent may dismiss anemployee for serious misconduct under clause 10.  20     However, an important aspect of this rule is the subjectivity of the penalty.  The rule clearly states that dismissal is notthe only possible result.  The issue tobe decided is whether this dismissal is justified in the circumstances.   21     TaranakiThe respondent claims that they madeit clear to employees that issues of theft were taken very seriously. It contends that a fair andreasonable employer could have concluded that upon breaching the House Rule, MrMaxwelltheapplicantcouldbe dismissed fromemployment. However, itis on this point I am not convinced.

17    A dismissal will be justified wherethe employer’s actions were what a fair and reasonable employer could have donein all the circumstances. 14A fair and reasonable employer will act in good faith as required under section4 of the Act. 15 18    A dismissal may be justified where theconduct of an employee deeply impairs the basic confidence or trust that formsthe basis of the employment relationship. 16  Conduct ofthis sort is generally conduct that is willfully or deliberately dishonest, andbreaks the obligations of good faith. 17  Careless action or negligent conduct typically do nothave this effect.

18 Abusing a supervisor or the abuse of paid sickleave are common examples of this type of conduct. 1920  22     Mr Maxwellthe applicantate the biscuits without considering hisactions.  Hehad no intention of dishonesty.  In otherwords, he did not decide to steal anything from another employee or from hisemployer.  He simply ate biscuits whichwere unnamed, and left on a public table within the cafeteria.  Itis hard to say his actions were anything beyond an honest mistake.

Itherefore think it is tenuous link to saythese actions undermined the confidence and trust of the employmentrelationship. EEP2  23     In support, MrMaxwelltheapplicant has a near exemplaryemployment history with Taranaki. the respondent.  Thereis no evidence of any previous instances of misconduct in the three and a halfyears Mr Maxwellthe applicant has worked for Taranaki. therespondent.    21     Basedon these factors, I believe a fair and reasonable employer could not havereached the conclusion reached by the respondent to dismiss the applica 24     A fair and reasonable employer would considerthe subjective nature of the rule.

Suchan employer would have exercised discretion in determining the appropriateresponse to Mr Maxwell’sthe applicant’s actions.  Dismissal for an act as trivial as eatinganother employee’s biscuits is sufficiently disproportionate as not to what afair and reasonable employer would do.  Afair and reasonable employer would have taken alternative action, for example, identifying the wrongdoing and informing the employee that the conduct wasserious and would not be tolerated.   25     Therefore, the dismissal of MrMaxwelltheapplicant was not a conclusionthat a fair and reasonable employer could have reached.  OutcomeD         Conclusion       26    Summarydismissal was an overreaction in the circumstances of the case.

The penalty was not proportionate to thewrongdoing, and was not a penalty a fair and reasonable employer could have imposed.   27    Mr MaxwellThe applicant has therefore made outhis case for unjustifiable dismissal.  1 EmploymentRelations Act 2000, s103(1). 2 Employment Relations Act 2000, s103As103A(2). 3 AirNew Zealand v V 2009 ERNZ 185. 4 Section 4(1A). 5 Section 4(1A)(c).

6 Section 103A(3). 7 Section 103A(3)(a). 8 Section 103A(3)().

9 Section 103A(3)(d). 10 Section 103A(4). 11 BP Oil New Zealand Ltd v NorthernDistribution Union (1992) 1 NZELR 259 (CA) at 1. 12 Cowles v Balance Agri-Nutrients Ltd2017 NZERA Christchurch 125 at 67. 13 At 80. 14 15 16 BP Oil New Zealand LimitedandLtd v Northern Distribution Union, (1992) 1 NZELR 259 (CA) at 1.

17 Cowles v Balance Agri-Nutrients Ltd2017 NZERA Christchurch 125 at 67. 18 At 1. 19 Griffith v Sunbeam Corp Ltd (ECWellington WC 13/006, 28 July 2006).

20 Dodd v DE & LM Spence Ltd t/a Pak N’Save2002 2 ERNZ 572.  EEP1Doyou want to change this? EEP2Ithink also the severity of the loss is greatly outweighed by the severity ofthe punishment – work on this bit.