

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5097926
AA 52/08

BETWEEN HILARY MORRISH ALLEN
 Applicant

AND RIVERSUN NURSERY
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Rodger Pool, counsel for Applicant
 Bridget Fleming, counsel for Respondent

Investigation Meeting: 11 & 12 October, 8 November 2007

Submissions received: 14 & 16 November 2007, 12 February 2008

Determination: 19 February 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hilary Morrish Allen was employed by Riversun Limited (“RSL”) as General Manager from October 2004 until she was dismissed by the company in July 2007.

[2] Ms Allen considered her dismissal to be unjustified and raised a personal grievance to challenge RSL’s action.

[3] The grievance remained unresolved between the parties, even after mediation. To determine the claim the Authority has investigated it.

[4] As well as a determination that her summary dismissal was unjustified, Ms Allen seeks remedies of reinstatement to her former position of employment, compensation for humiliation, hurt feelings and general distress caused to her by the

dismissal, and the reimbursement of remuneration lost at present and in the future as a consequence of the dismissal.

[5] Ms Allen's employment relationship problem arose from allegations of serious misconduct made against her. A letter from RSL written on 24 May 2007 made five allegations, each specifying a separate failure by Ms Allen. They were in relation to;

1. Reviewing and reporting on the causes, consequences and containment of an outbreak of a viral infection in RSL's imported grapevine stock;
2. Properly managing the recruitment of a sufficient number of suitable staff for RSL's operations;
3. Ensuring RSL was registered to attend at and participate in the New Zealand Winegrower's 'Bragato' conference;
4. Complying with instructions for approval to be sought before sending advertising copy to be printed;
5. Complying with instructions for job descriptions to be created or updated for RSL employees.

[6] The notification of the allegations to Ms Allen included the following advice from RSL in its letter;

The allegations outlined above are extremely serious in their nature and are the cause of significant concern for Riversun. In particular, both individually and cumulatively, they raise issues in relation to your judgement and, if proven, and subject to your explanation, could undermine the necessary relationship of trust and confidence, to the extent that the summary termination of your employment may be appropriate.

[7] An inquiry into the allegations was commenced by a director of RSL, Mr George Paterson. In the letter of 24 May his involvement was explained as being necessary because other directors of RSL, Executive Director Mr Geoff Thorpe and Managing Director Mr Ross Kane, were those who had raised the matters alleged against Ms Allen and it was therefore considered that they should not take part in any decision-making needed in the course of the inquiry.

[8] In conducting the inquiry Mr Paterson interviewed Ms Allen and he received correspondence from her legal adviser Mr Rodger Pool about the allegations. Mr Paterson then sought further information from Mr Thorpe and Mr Kane and received written statements from them further to the advice they had given earlier. Others were spoken to as well by Mr Paterson.

[9] Following receipt of submissions from Mr Pool addressing the additional statements provided by Mr Thorpe and Mr Kane, Mr Paterson wrote to Ms Allen setting out his conclusions in respect of the five allegations. He advised that he had found serious misconduct established in respect of two of the allegations and that he had found misconduct, but not serious misconduct, established in relation to two others. In respect of a fifth allegation he advised that he had found Ms Allen's conduct did not amount to misconduct at any level but did raise "serious questions" about her performance.

[10] In his letter Mr Paterson advised Ms Allen of his preliminary view that her conduct warranted summary dismissal. He offered her an opportunity to make any submissions as to the proposed penalty. Mr Pool responded on behalf of Ms Allen, submitting that the conclusions reached by Mr Paterson were wrong and that in any event summary dismissal was unduly harsh and excessive. A denial of any misconduct was maintained on behalf of Ms Allen by Mr Pool. He submitted that the conclusion most adverse to Ms Allen able to be drawn from the circumstances was that issues about her standard of performance and level of communication had been revealed that needed to be addressed, and not just by Ms Allen but others at RSL as well.

[11] Mr Paterson wrote again to Ms Allen, on or about 20 July 2007, and advised that after taking into account her explanations and the submissions made on her behalf he had concluded that her conduct amounted to serious misconduct in respect of two of the allegations. Mr Paterson advised Ms Allen that because of the nature and importance of those two matters he had also concluded that the summary termination of her employment was "the only appropriate outcome."

Test of justification

[12] As required by s 103A of the Employment Relations Act 2000, the Authority must determine the justification for any dismissal on an objective basis. In applying

s 103A in this case, the Authority must consider whether RSL's actions and how RSL acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[13] When considering what a fair and reasonable employer would have done the Authority must keep it in mind that RSL presented, all at once, five separate allegations of serious misconduct. Those allegations related to different conduct occurring at different times over a period of several months.

[14] No doubt it was convenient for RSL to have one inquiry into all five allegations instead of investigating each one separately, but there was a danger that the number and weight of the allegations, all of which were categorised as matters of "serious misconduct," would prejudice Ms Allen and compel the conclusion that she must have done something wrong as alleged. I consider that "misconduct" was a misnomer with regard to at least one and probably more of the allegations. This misuse of terminology may have increased any risk that the various allegations would not be distinguished but would all blur into the form of the most serious of them.

[15] The allegation of mismanagement of staff levels was in my view properly a "performance" matter of an alleged serious lapse in that regard, but nevertheless performance issues if serious enough are capable of providing grounds for dismissal. The allegations relating to advertising copy and job descriptions were also more performance than misconduct issues, and the latter was concluded by RSL to be so.

[16] I find however the use of incorrect terminology did not cause any misunderstanding by Ms Allen about the seriousness of the situation she faced in responding to the allegations. RSL's inquiry was not unfair by reason of any misdescription of the nature of Ms Allen's acts and omissions inquired into.

[17] As to the multiple allegations of misconduct, the Employment Court has held that for an employer to store up disparate matters of dissatisfaction in relation to an employee over a period of time, and then to suddenly confront the employee with them all at once, will be a breach by the employer of the duty of trust and confidence; see *Donaldson v Youngman & Dickson* [1994] 1 ERNZ 920, at page 928.

[18] This raises a question of whether RSL had previously, before writing to Ms Allen on 24 May 2007, made known to her its dissatisfaction about each matter. It is an undisputed fact that before the decision was made to dismiss her, Ms Allen in

her entire employment with RSL had never received an explicit formal warning of a disciplinary nature for any conduct or performance of hers.

[19] Mr Paterson, in conducting the disciplinary inquiry for RSL, considered that Mr Kane had on several occasions spoken with Ms Allen about her performance in such a way as to serve the purpose of a warning, or to amount in substance to a warning. It is for this reason it seems Mr Paterson, as he said, took no account of the absence of a formal disciplinary warning in reaching the decision to summarily dismiss Ms Allen.

[20] I accept that there were several occasions when Mr Kane, in the course of general discussions with Ms Allen, raised her style of management and urged her generally to act more decisively and with greater speed. It is one question whether any of Mr Kane's entreaties in this regard fulfilled the purpose of a disciplinary warning. A more immediate question is whether in the circumstances RSL, as a fair and reasonable employer, had been required to give any warning at all before concluding she had committed serious misconduct and before imposing summary dismissal as the punishment for that.

Absence of any prior disciplinary warnings and performance reviews

[21] On behalf of RSL, Mr Paterson and Mr Kane confirmed that during her tenure of nearly three years as General Manager of the company, Ms Allen had not received any explicit warning as understood in employment law.

[22] Mr Paterson told the Authority that any resort by an employer to such disciplinary warnings must be taken as an acknowledgment that trust and confidence has been lost in the employee. I took him to be referring in particular to employers of employees holding very senior positions such as general manager, which require a higher level of trust and confidence than less senior positions of employment.

[23] There is no legal authority for the proposition Mr Paterson seemed to be putting forward, that disciplinary warnings will be too late and pointless, and therefore not required to be given at all, in the case of senior management employees performing to an unsatisfactory or unacceptable standard.

[24] In the dismissal letter, with reference to the submission that Ms Allen had not received any prior warnings, Mr Paterson said he was concerned about her conduct

because previously Ms Allen had been, “made aware of the standard of behaviour and conduct that is expected of you, as well as particular technical requirements.” Mr Paterson regarded the awareness by Ms Allen of RSL’s standards and requirements as being sufficient warning for disciplinary purposes.

[25] Counsel for RSL, Ms Fleming, referred me to a particular case where the Employment Court held that having a “warning dialogue” in the course of which adverse views of an employee were articulated by the employer, met the requirements of employment law for warnings to be given, particularly in cases of sub-standard performance by the employee. It was contended that there had been such dialogue between Mr Kane and Ms Allen in this case.

[26] The case referred to by Ms Fleming of *Dearns v Eagle Technology Ltd*, unreported, 5 July 2002, Palmer J, AC 43/02, is I find distinguishable on its facts. In its judgment the Court held that although there had been no “formal” warnings given to an employee, there had been ongoing purposeful dialogue by the employer with the employee. The dialogue was described by the Court as having been constant, searching and materially critical in a pervasive way, concerning numerous adverse conduct and performance issues.

[27] I accept Mr Kane’s evidence that there were several occasions when he had talked to Ms Allen about aspects of her performance, particularly in relation to her “style” of management, and that he had also discussed her timeliness and her vision. He emphasised that he had done so informally, in a collaborative, collegial and constructive way.

[28] Mr Kane said he found Ms Allen was unresponsive to this approach and seemed not to comprehend its purpose, and she refused to take responsibility for the things discussed with her in this way.

[29] While I accept that there were times when Mr Kane expressed adverse views of aspects of Ms Allen’s performance, as a matter of degree I do not consider he did so as often, as pointedly, or as strongly, as was found to have occurred in the *Dearns* case to such an extent that the employers expressions were able to be regarded as a warning dialogue in substance.

[30] If Ms Allen seemed not to understand what Mr Kane was coming at, and especially if she seemed to reject responsibility for aspects of her contractual role, it is

surprising that Mr Kane did not organise a performance review as a stronger and clearer way of getting his message across. As Managing Director of RSL, Mr Kane was required by Ms Allen's employment agreement to organise a performance review biannually. Ms Allen should have had at least one if not two in the period between May 2006 and July 2007. Several more should have been given in the period from October 2004 until May 2006 before Mr Kane became managing director. After then Mr Kane ought to have insisted on a performance review, given the serious doubts he said began to have about Ms Allen from around September 2006, and given also what he regarded as her repudiation of her role when he had discussed his concerns.

[31] I find that RSL, without giving Ms Allen any performance reviews or formal disciplinary warnings, proceeded suddenly from the casual and informal attempts by Mr Kane to address performance issues, to a full blown disciplinary inquiry involving multiple allegations of serious misconduct. Mr Kane was clear that when his mentorings seemed not to have had any effect, the situation escalated directly to an investigation into allegations of serious misconduct. Mr Kane said that given the failure of Ms Allen to respond to his attempts to "coach and encourage" her;

.....Riversun determined that the only realistic course of action in light of the nature and seriousness of the issues and the ineffectiveness of previous efforts to address the concerns, was to commence a disciplinary investigation.

[32] In my view this action over-reached the situation in respect of allegations which were in essence about matters of performance. The problems should have been addressed as such earlier, when they were first encountered by RSL directors, with performance reviews and explicit warnings if necessary.

[33] As a consequence Mr Paterson found himself in two of the instances of alleged serious misconduct faced with sharply conflicting accounts given by Mr Kane and Ms Allen. The outcome of his enquiry depended on whether he accepted the word of one or the other, placing a heavy burden on him to decide. I consider the number and weight of the allegations partly swayed him to reject the word of Ms Allen in favour of Mr Kane's account of events.

[34] In his evidence Mr Paterson conceded that it would have been reasonable for Ms Allen to have been given a performance review. It was a contractual obligation of RSL to provide one every six months. As well as not taking the lack of any

explicit warnings into account, Mr Paterson gave no consideration to the lack of any performance review of Ms Allen. He said that when conducting his inquiry he had not been aware of that situation. It is likely he was also unaware of the contractual obligation RSL had to provide one.

[35] When applying the statutory test of what a fair and reasonable employer would have done in the circumstances, the Authority must take into account as a relevant consideration the absence of any performance reviews given to Ms Allen and the absence of any formal explicit disciplinary warnings issued to her at any time for any of her conduct. I find that the entreaties of Mr Kane, as urgent and as blunt as they may have been, did not amount to a “warning dialogue” as described in the *Dearns* case (above). Since it appeared to Mr Kane that his efforts in this regard had been ineffective and that Ms Allen had not comprehended his concerns, the issue to her of an explicit disciplinary warning should have been the obvious next step to take before disciplinary action. That is unless any of her conduct was misconduct sufficiently serious to justify summary dismissal without the requirement for a prior warning to be given.

[36] RSL must bear responsibility for depriving Ms Allen of an opportunity, through formal warnings and/or performance reviews of having it made clear what her employer’s reasonable and lawful requirements were of her performance. She was not given the opportunity to improve accordingly and to do so in the knowledge of the likely adverse consequences to her employment if she did not.

[37] For the purposes of the Authority’s investigation into this personal grievance claim, RSL accepted that summary dismissal could not be justified for the less than serious misconduct found by Mr Paterson in relation to two of the allegations. RSL did not purport to dismiss solely in reliance upon either of the instances of misconduct at that lower level. Neither did the employer purport to dismiss in reliance only on the matter of performance that was found by Mr Paterson to raise a serious question.

[38] As justification for Ms Allen’s dismissal RSL relied largely upon her conduct it investigated in relation to the allegations about infected grapevine stock and the Bragato conference. RSL contends that justification is to be found individually and cumulatively in those two instances and also in the matters found to amount to less than serious misconduct. From paragraphs 6 and 7 (on page 8) of Mr Paterson’s 19 July letter, it is clear that in deciding to impose the penalty of summary dismissal he

did not completely disregard his findings of less than serious misconduct in two instances and a serious question about her performance in third instance.

Authority's investigation

[39] In investigating this employment relationship problem the Authority has considered the reasonableness of Mr Paterson's conclusions that;

- (i) Ms Allen had acted in certain ways as alleged, and
- (ii) Through her actions Ms Allen committed misconduct, and
- (iii) Her misconduct was to a standard of serious misconduct in two instances, and
- (iv) Individually or cumulatively, the instances of misconduct justified Ms Allen's summary dismissal as the only appropriate outcome or punishment.

[40] The absence of any proper disciplinary warning, as I have found established, is a matter I take into account in relation to the last three of the above matters for consideration, and particularly (iv).

Infected grapevine stock

[41] In connection with this matter RSL in its letter of 24 May 2007 made the first of five allegations against Ms Allen. The conclusion reached by Mr Paterson was that her conduct amounted to serious misconduct for which summary dismissal was justified.

[42] Viewing the matter objectively, I disagree and find that was not a reasonable conclusion for Mr Paterson to reach. I find that summary dismissal in relation to this allegation was not justified, for the following reasons.

[43] The allegation remained imprecise, or was fluid, changing as Mr Paterson's inquiry progressed. Also and especially given the most serious consequence to Ms Allen likely to flow from a finding of serious misconduct, there was a material flaw in the way Mr Paterson reached his conclusion. In particular, his preference for the word of Mr Kane over that of Ms Allen was substantially based on an expectation

of what others in Mr Kane's position would have done, rather than on facts ascertained by Mr Paterson from his inquiry about what Mr Kane himself had done.

[44] The allegation as originally made was that after the discovery of the viral infection Ms Allen had been requested by Mr Kane to complete, as a matter of urgency, a thorough review of all RSL's imported grapevine stock to ensure there was no exposure to further risk. The allegation was that Ms Allen had failed to follow a lawful and reasonable instruction by not completing the report as requested, and that she had thereby exposed RSL to a risk that the extent of the problem might prove to be wider than had been thought. It was alleged in the letter of 24 May 2007 that Mr Kane had asked Ms Allen for a further report to be presented to him and that she had failed to provide that further report and had also failed to make any reference to new viruses in a report to the RSL Board. It was alleged that this raised questions as to whether she had fully appreciated the seriousness of the situation faced by RSL.

[45] The allegation as outlined to Ms Allen in the letter of 24 May 2007, concluded with the following;

It is alleged that your conduct in failing to adequately review the imports in the Riversun Import Programme as expressly requested, and failing to report adequately to Management, amounts to serious misconduct;

[46] Ms Allen's explanation about this matter, as given on her behalf by Mr Pool in a letter dated 9 July 2007, was that she had conducted a review as requested by Mr Kane and that she had reported back to him, not in writing but verbally. She had not been asked for a written report and Mr Kane had made no subsequent request for a written report. Neither had he questioned the absence of a written report during a period of 7 or more weeks that went by after he had allegedly first made his request. She further explained that neither had Mr Kane indicated he was dissatisfied with the report given to him verbally.

[47] Her explanation included the following;

[Hilary Allen] specifically advised you that she gave a verbal report to Mr Kane. Neither Hilary nor Mr Kane have any evidence of a request for a written report or a follow-up to inquire about the absence of a written report.

[48] When Mr Paterson asked Mr Kane for further information about this matter Mr Kane referred to an "initial report" which should have covered certain issues that

he had listed. He said he had discussed these issues in detail with Ms Allen, as he had wanted to make quite sure that she knew what was expected of her. Mr Kane said that he had fully expected her to prepare “a detailed and systematic report” which would;

- *set out the issues,*
- *list the key facts about what had happened, the causes, how to avoid it happening again, and who was responsible,*
- *summarise Hilary’s findings and conclusions,*
- *set out the way forward for dealing with the matter.*

[49] Mr Kane said he believed he had made all of this perfectly clear to Ms Allen at the time. He advised Mr Paterson that he had given instructions to Ms Allen verbally about the preparation of this report. He denied he had received any report, verbal or written.

[50] I do not consider that Mr Paterson reasonably could have reached any conclusion beyond that there had been a request made by Mr Kane in general terms for a report and for a review to be carried out of the entire situation surrounding the infection discovered in the grapevine stock.

[51] In view of the severe consequences that his finding would have for Ms Allen if he decided there had been serious misconduct, it was not a reasonable conclusion Mr Paterson reached about this, given the differences between Mr Kane and Ms Allen as to what had been required in the review and the report. In the circumstances I consider a reasonable conclusion was that there had been some misunderstanding or mis-communication between Mr Kane and Ms Allen as to exactly what was required to be in the report, and when it was to be delivered, to whom and how, and whether verbally or in writing.

[52] Mr Paterson gave a detailed and considered statement to Ms Allen on 16 July about his conclusions in respect of the allegations. He noted Mr Kane’s advice that Ms Allen had been requested by him to provide a “comprehensive initial report” on the viral infection. This is more descriptive than the original allegation in May.

[53] In his conclusion about this allegation Mr Paterson stated that he had considered the differing versions of events he had been provided with as part of his investigation process, and he said;

In the circumstances I have concluded that I consider Ross' [Kane] version of events as more likely to be correct. This is on the basis that I consider it would be unusual, in the circumstances, for a Managing Director not to ask a General Manager for a full review and report of a programme following multiple instances of viral infection in the candidate clones. I would expect that the Managing Director would not consider such an important issue could be dealt with simply via a verbal discussion between the Managing Director and General Manager and that the Managing Director would require a comprehensive written report, as supported by Ross' version of events.

[54] Given that Ms Allen's job was put on the line by Mr Paterson's inquiry, I consider it was unreasonable and unsafe for him to base his conclusion on what he expected of managing directors generally. Merely because others might do things in a certain way in certain circumstances does not mean that Mr Kane acted in the same way on the occasion in question that Mr Paterson was inquiring into. Mr Kane as an individual cannot be compared with managing directors generally, as he obviously has his own personal style. In this regard he compared his off-the-cuff or spontaneous approach to management decisions with Ms Allen's "process-driven" style, as he called it.

[55] Mr Paterson's conclusion was constructed from supposition rather than from an assessment of known facts or likely facts, and it was not reasonable for him to rely on the notion that in this particular case things would have been done in the way they are usually done by others occupying Mr Kane's position.

[56] It might equally be reasoned that if Mr Kane had asked for a report in writing on a matter of such high importance or seriousness to RSL as this matter undoubtedly was, Mr Kane would not simply have waited patiently for seven or more weeks to receive that report, saying nothing more about it in all that time, but would have asked Ms Allen where it was. He said he had given her one week to provide it.

[57] It might also be expected that if Mr Kane had repeatedly asked Ms Allen about booking the Bragato conference he would also have repeatedly asked for the written report, especially if the "potentially catastrophic" virus emergency, as it was described by RSL, was a matter of even higher importance than the Bragato conference.

[58] In my view, given the information Mr Paterson had obtained from his inquiry, if he had focused on what he was been told by Mr Kane and by Ms Allen that they had done, he could not reasonably have concluded that she was guilty of wilfully failing to review and report upon the situation following the outbreak of viral infection in the root stock. Given that the future of Ms Allen's job was resting on his conclusions, Mr Paterson needed to be satisfied to a relatively high standard that there had been a deliberate failure in terms of this allegation of serious misconduct.

[59] Looking at the matter objectively (or from the point of view of a neutral observer as the Court has described the test of justification; see *Air New Zealand Ltd v Hudson* [2006] 3 NZELR 155, para [113]) the Authority finds that the conclusion of RSL as reached by Mr Paterson in relation to this particular matter was unreasonable. RSL did not act as a fair and reasonable employer and therefore Ms Allen's dismissal cannot be justified by her conduct in relation to infected grapevine stock.

[60] Had I found the employer's conclusion was a reasonable one, the absence of any previous explicit warning of a proper disciplinary reached would have led to the finding that summary dismissal was not justified on this ground.

Bragato Conference

[61] In relation to this matter RSL made the third of the five allegations about Ms Allen's conduct. Upon completing his inquiry Mr Paterson concluded that Ms Allen's conduct amounted to serious misconduct.

[62] The allegation was expressed by Mr Paterson in his letter of 24 May 2007, in the following terms;

I have been advised that you have repeatedly assured Ross [Kane] that you had signed up and paid for Riversun's sponsorship of the Bragato Conference, and had completed booking the Riversun stand at the Trade Exhibitors' Hall. Ross has advised that despite your representations, it appears that you had not in fact completed either of those tasks at the time you asked him to take over responsibility for the marketing function of Riversun and Linnaeus.

The Bragato Conference is Riversun's premier marketing activity. Accordingly, your apparent failure to complete these tasks creates a significant risk for Riversun in terms of an absence of publicity and presence at what is a major industry event.

Again, it appears you have failed to follow a lawful and reasonable instruction to complete a task. Further, and of significant concern, you

appear to have deliberately misled the Managing Director in relation to the work you have completed.

[63] The Bragato Conference was planned to be held in Auckland between 23 and 25 August 2007. A deadline of 1 May was set by the organisers for registration of participants. The application form shows that it was sent to the organisers only a few hours before the deadline. The form was signed by Mr Kane on behalf of RSL on 1 May and sent by fax at 5.40 pm that day.

[64] There is no dispute about the importance of the Bragato Conference to RSL. As stated by Mr Paterson in his brief, this event is a leading industry conference in which RSL's participation was regarded as fundamental to the development of the reputation, brand, image and position of RSL within the industry. Mr Paterson also said that to not be involved in the Bragato Conference would have been extremely serious for RSL and would potentially have caused a significant amount of damage to the company's reputation. It would, he said, have resulted in RSL missing out on a valuable marketing and profile-raising opportunity.

[65] Of the decision he made that Ms Allen's conduct in relation to the registration of RSL for the Bragato Conference had amounted to serious misconduct, Mr Paterson said the following;

[my decision] was based on the seriousness of the misleading and deceptive behaviour in its own right, and also on the significance of the Bragato Conference to Riversun and the potential effects this matter would have had, had it not been picked up earlier.

[66] After completing his investigation, Mr Paterson expressed his conclusion about this alleged misconduct in the following terms in his letter of 16 July 2007;

I have taken into account your submissions and I have concluded that in this instance I prefer the version of events provided by Ross Kane. Namely, that you advised him on a number of occasions that you had booked the Bragato Conference and once responsibility for marketing was removed for your area of responsibility, with your agreement, it subsequently became apparent that in fact this booking had not been made.

Further, I consider on the basis of the information before me that you deliberately misled Ross in relation to work you had completed and that you failed to comply with the obligations set out in your Job Description to ensure that management are informed of relevant issues.

I have taken into account the fact that you were under a significant amount of pressure at the time. However again I consider that this was a fundamental aspect of your role and as such should have been a priority. Further, I do not believe that being under pressure can justify deliberately and repeatedly

deceiving the Managing Director in relation to whether work had been completed. I consider your conduct amounts to serious misconduct in that it is conduct which goes to the heart of the employment relationship and undermines the necessary relationship of trust and confidence.

[67] In his letter of 20 July 2007, Mr Paterson confirmed his conclusion and preliminary decision given earlier, that Ms Allen's conduct amounted to serious misconduct and that summary dismissal was the only appropriate outcome.

[68] Again, the question to be answered by the Authority in looking at this particular allegation of misconduct is, what would a fair and reasonable employer have done in the circumstances RSL faced? RSL undertook an inquiry, one that led to conclusions adverse to Ms Allen in her employment and brought about summary dismissal, the severest consequence of all to an employee.

[69] A fair and reasonable employer will only reach conclusions adverse to the employee and that are likely to result in dismissal, after conducting a sufficiently thorough investigation that discloses information on which it is safe to rely. As the allegation of deliberately misleading Mr Kane was tantamount to an accusation of dishonesty, a reasonably high standard of proof was required to support a misconduct charge of such seriousness.

[70] A general statement of principle as to the degree of thoroughness required of an investigation or inquiry carried out by an employer, is contained in *Timu v Waitemata District Health Board*, unreported, 7 June 2007, AC 34/07, where the Court said;

[93] In general, it may well be acceptable when initiating an investigation into suspected misconduct for an employer to simply ask witnesses what they know and to listen uncritically to their reply. Equally, if what the witnesses say is consistent and apparently complete, it may be acceptable to rely on what they have said without further inquiry. Where, however, there are significant differences between the accounts given by witnesses or the responses are unsatisfactory, more will be required of the employer to ensure that the investigation is full and fair.

[71] In accepting the task of inquiring into the several allegations of misconduct against Ms Allen, Mr Paterson took on a difficult role undoubtedly. On the one hand Mr Paterson had a version of events supplied by Mr Kane, a colleague director on the Board of RSL and Managing Director of the company. On the other hand he had a version of events from Ms Allen, the General Manager of RSL who had held that

position for several years. In relation to the Bragato Conference, again his conclusion came down to choosing between the word of two people, again Ms Allen and Mr Kane.

[72] There was a sharp conflict between their respective versions of what Ms Allen had told Mr Kane she had done in relation to the registration for the conference. Mr Paterson told the Authority that in reaching his conclusion he had had no reason to doubt the honesty of Ms Allen.

[73] As well as a complete lack of any known earlier instance of dishonesty or misleading behaviour during her time with RSL, other circumstantial matters that Mr Paterson said he had taken into account when considering Ms Allen's explanation included a lack of any apparent motive for her to deliberately mislead Mr Kane and the probability that if she had said that the conference had not been booked she would have suffered no disciplinary consequences for that omission.

[74] Nevertheless, Mr Paterson preferred the version of events Mr Kane had given him.

[75] After the first interview of Ms Allen had been conducted, Mr Paterson was obviously left with enough doubt about what had happened for him to want further information from Mr Kane. The questions he put to Mr Kane in writing show the degree of thoroughness and care with which Mr Paterson wished to conduct his inquiry. Mr Paterson asked Mr Kane whether he recalled being told by Ms Allen that the Bragato Conference had been booked and also whether he could have confused that conference with the Avocado conference.

[76] The written response to this given by Mr Kane was as follows;

I clearly and distinctly remember on several occasions asking Hilary [Allen] about the booking. I have absolutely no doubt whatsoever that Hilary told me that the Bragato Conference had been booked. ... I am quite certain that this was not confused with the Avocado Conference, as the Bragato Conference was referred to by name.

[77] Further in this response, Mr Kane wrote;

Let me be totally clear – I asked Hilary if the Bragato Conference was booked several times, as I wanted to be quite certain about it. Hilary confirmed that she had booked it several times.

[78] Notes made of the meeting record that when Ms Allen was interviewed on 7 June she denied ever saying even once to Mr Kane that the conference had been booked, and she said;

- wouldn't be able to sign off booking anyway as she does not have the authority. ... No, I never signed, I have no powers to sign off a \$15k conference. Nothing goes out without Geoff [Thorpe] or Ross [Kane] signing it off.

[79] Mr Kane was asked by Mr Paterson about signing off for the conference, and he replied;

No. I don't sign off on conferences. I did not sign off on the Avocado Conference. This is Hilary's responsibility.

[80] As shown on the application/registration form, it was Mr Kane who did sign off for the 2007 Bragato Conference.

[81] In applying the s 103A test of justification, the Authority must decide whether the inquiry carried out by Mr Paterson was sufficiently searching to disclose information on which he could safely rely in reaching conclusions about the alleged misconduct of Ms Allen.

[82] I take into account what has been said by the Employment Court about the standard expected of a fair and reasonable employer in carrying out a disciplinary investigation. This was expressed in *Murphy v Steel & Tube New Zealand Ltd*, unreported, 16 October 2007, CC 18/07, as follows –

A fair and reasonable employer is a good employer but not necessarily a perfect employer. What a fair and reasonable employer will do must be assessed in the real world where employers have limited resources and where there are considerations other than the interests of the employee.

[83] The Authority would add that a fair and reasonable employer, or its representatives or agents carrying out a disciplinary inquiry, will not usually be trained in questioning witnesses. Owing to limits on their resources, generally speaking fair and reasonable employers will not be expected to engage professional investigators.

[84] Applying the statutory test and the principles given in judgments of the Court, I must find that the inquiry or investigation carried out by Mr Paterson was not

searching enough in the circumstances. The standard of proof was not high enough for the serious accusation made of Ms Allen that she had deliberately misled Mr Kane. In my view it was not reasonable in the circumstances for Mr Paterson to rest his inquiry and make a decision once he reached the point where there was almost a complete conflict between what each of Mr Kane and Ms Allen said had happened.

[85] Also, Mr Paterson did not satisfactorily resolve the issue raised by Ms Allen when she claimed not to have had authority to sign off at the level of expense required for the Bragato Conference. She claimed that either Mr Thorpe or Mr Kane would have been required to sign off. If Mr Kane had known it was his responsibility to sign off, then he should also have realised the conference had not been booked, since he did not sign off on the booking at any time before about the last day for registration. He told Mr Paterson his signing off was not required, but in my view Mr Paterson should have looked more closely at this aspect of whether Mr Kane genuinely believed he was not required to sign off.

[86] I also find that a sufficiently thorough inquiry would have led Mr Paterson to question Mr Kane more closely about his recollection of asking Ms Allen about the conference and of being told that it had been booked. He said he had a clear and distinct recollection of being told this on several occasions. In my view Mr Kane should have been, but was not, asked for details of those occasions, such as the date, or the day of the week, or who else if anyone was present, or what else if anything was discussed and where the discussion took place. If Mr Kane had such a clear and distinct recollection of what Ms Allen had told him, it is likely he could also recall other surrounding details.

[87] This is even more likely in a situation where Mr Kane had said he had asked Ms Allen “several times as I wanted to be quite certain about it.” This suggests a degree of concern was held by Mr Kane about the receipt of confirmation that the conference registration had been attended to. A question that should have been asked of Mr Kane, but was not, was whether he asked for information from Ms Allen to corroborate her word, such as the registration form completed, signed and faxed, or records relating to the sending of any cheques, or any other independent way of verifying what Ms Allen had told him. Mr Kane had implied in his written response that it was not once or even twice that he asked Ms Allen about this but several times, and it is therefore strange that he would want to keep asking her unless he had a doubt

about what she was telling him. In that case he might have sought some independent verification of her word. The point is that Mr Paterson did not test further the accuracy of recollection by Mr Kane in a matter that was most critical to Ms Allen's employment.

[88] Mr Kane has very recently explained to the Authority why he had asked Ms Allen several times whether the conference was booked, but of course that explanation was not given to Mr Paterson who made no further inquiry of Mr Kane after receiving his written response.

[89] Although Mr Paterson did get the written response of Mr Kane to his further questions, from the point of view of a neutral observer I conclude that Mr Paterson did not obtain information from his investigation that was sufficient for him to safely rely upon when deciding to prefer Mr Kane's version of events over Ms Allen's. To allege that Ms Allen, the General Manager of RSL, had deliberately misled the Managing Director was a far more serious accusation than that Ms Allen had been forgetful or careless on one occasion. Here, RSL correctly identified its allegation as one that was capable of amounting to serious misconduct. In those circumstances a correspondingly higher level of proof was required to be obtained by the employer before it could reasonably conclude that the allegation was established and that Ms Allen was guilty of serious misconduct in relation to the Bragato Conference.

[90] I find that RSL did not act as a fair and reasonable employer and it follows that Ms Allen's dismissal cannot be justified by her conduct in relation to the Bragato Conference.

[91] Had I found that RSL was reasonably able to conclude that Ms Allen had deliberately deceived Mr Kane, not once but several times, I would also have found it was reasonable for RSL to conclude that this was serious misconduct. Further to that finding I would have found reasonable RSL's conclusion that summary dismissal was justified, even without any prior warnings being given in relation to the misconduct.

Requests for staffing

[92] In relation to this allegation I consider it was reasonable for Mr Paterson to conclude that there had been failings or lapses by Ms Allen, but I do not consider they should have been categorised as misconduct in his findings. They were in the nature of performance issues and should have been regarded as such.

[93] It was a mitigating circumstance that there had been constraints on spending which limited Ms Allen in following up the requests made of her for more staff to be employed. She was also becoming overworked, performing three roles by the end of 2006. She had complained to Mr Kane about that in December 2006.

[94] This was not a recent matter of concern to RSL. Mr Paterson had information that by September 2006, Mr Thorpe had found the matter to have become so serious that he stepped in then. Therefore it should have been raised in a disciplinary context at that time and not many months later in May 2007 as one of five allegations of serious misconduct. To some extent RSL had tolerated a “long saga,” as Mr Thorpe called this matter, and a disciplinary warning should have preceded any stronger action.

[95] Mr Paterson’s conclusions were also muddled by his express finding that Ms Allen had failed in her obligation to communicate adequately with staff. This was not an allegation that had been put to her for an explanation. It was unfair for her not to be given that opportunity before any finding was made. In the eyes of a decision maker a finding of inadequate communication with staff by a general manager would tend to increase the overall seriousness of the complaint about inadequate staffing levels, and this may explain why the lapses or failures were wrongly categorised as misconduct.

[96] I find that neither by itself nor in combination with the other finding of less than serious misconduct in relation to the obtaining of approval for advertising material, could this matter justify the dismissal of Ms Allen.

Obtaining approval for advertising

[97] This was another matter that had arisen several months earlier, in about the spring of 2006, but was left unaddressed in a disciplinary context until May 2007 when it was presented jointly with four other allegations of serious misconduct.

[98] I am satisfied that there was confusion during Mr Paterson’s inquiry about the scope of the instruction given to Ms Allen to have advertising copy checked. Added to that it seems the allegation was narrowed down to four particular advertisements which Ms Allen asked to sight. She was not shown them and Mr Paterson did not see them either, as he should have done to have a full appreciation of the exact issue he was inquiring into and to be able to fairly assess Ms Allen’s explanation.

[99] Again there were matters of mitigation present; Ms Allen's high workload since the end of 2006 and the difficulty contacting Mr Thorpe on occasions for him to approve advertising copy.

[100] I find that neither by itself nor in combination with the other finding of less than serious misconduct in relation to requests for staffing, could this matter have justified the dismissal of Ms Allen.

Completion of job descriptions for RSL employees

[101] There was no finding by Mr Paterson of misconduct at any level in relation to this matter. It could therefore add no weight to any justification for dismissal provided by any of the other four matters.

Dismissal unjustified

[102] The Authority's determination is that in the circumstances prevailing at the time Ms Allen was dismissed, there was no justification for that action taken by RSL. Objectively, the summary dismissal of Ms Allen by RSL was not the action of a fair and reasonable employer.

[103] Accordingly, the Authority must give consideration to awarding Ms Allen remedies she is entitled to.

Remedies

[104] Under s 124 of the Act remedies may be withheld or reduced where there has been contribution or fault on the part of the employee. The Authority may regard as a matter of contribution any blameworthy conduct of the employee that is causally connected to the situation that gave rise to the personal grievance.

[105] That situation had developed in this case from the making by RSL of five specific allegations of misconduct against Ms Allen. In relation to three of those allegations, RSL found the actions of Ms Allen had not amounted to serious misconduct, or any misconduct at all in one instance, but it seems to have relied on those actions in combination with the serious misconduct as found, to provide justification for dismissal. There is therefore a causal connection or link back from the decision to dismiss Ms Allen, to the findings in three cases of less than serious misconduct and to her actions those findings were based upon.

[106] As to what constitutes contribution, a 1993 decision given by the Employment Court is still good law even although it was given under the Employment Contracts Act 1991 which was repealed in 2000. The provisions of the 1991 statute at s 40(2) are identical in material respects to those of the Employment Relations Act 2000 at s 124.

[107] In *Paykel Ltd v Ahfeld* [1993] 1 ERNZ 334, the Court held at page 339 that in considering whether the established failures of an employee contributed to the situation that gave rise to a personal grievance;

.....it would be clearly material whether or not the [employee] had his failures pointed out to him and had been given the opportunity to improve his performance. If such warnings had been given and there had been no proper response the Tribunal would be justified in reducing the remedies accordingly.

[108] To similar effect is *Donaldson & Anor (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920, where the Court held that the grievant's remedies could not be reduced for what was alleged to have been substandard performance unless the areas of dissatisfaction had been identified to the grievant by the employer. Further, they needed to have been fairly and properly enquired into, with the grievant being given an opportunity to participate, and with the proper formation of a method of remedying the situation being conveyed to the grievant. In the event the grievant either then did nothing or failed to comply adequately with the guidelines reasonably given, the conduct could be treated as contributory.

[109] Ms Allen's shortcomings or failures as perceived by Mr Kane were not clearly brought to her attention so that she knew she was required by her employer to improve or else face disciplinary consequences. Although she was urged and encouraged by Mr Kane to change her style, she was I find given no clear instructions in this regard, and she was set no finite period during which her performance would be monitored.

[110] It also seems to me that much greater allowance should have been made for the additional work load Ms Allen had been carrying for a considerable period of time. Although the employment agreement required her "from time to time" to perform other duties, performing three roles within RSL including her own for nine months and then having a fourth added to that by April 2007, seems well beyond the contemplation of the parties' in their agreement. Over time it was likely to put

Ms Allen's health at risk as well. Mr Kane thought the less of her when she eventually relinquished the extra roles, which no doubt caused him to be further dissatisfied with her performance. He identified this as being the point when his trust in her finally fell right away after declining over several months since the previous year.

[111] In relation to the clonal importation programme matter, at the worst Ms Allen was guilty of not paying enough attention to exactly what Mr Kane was requiring of her by way of reviewing and reporting. I consider it was reasonable for her to believe that what she had done was sufficient in the circumstances, as Mr Kane had not made himself clear about what he wanted, both in form and content, and he let a period of some seven or more weeks go by without following up. This also contributed to Ms Allen feeling she had complied with his requests.

[112] Mr Paterson acknowledged in his evidence that Mr Allen had not avoided taking responsibility for managing the virus emergency and had acted promptly once alerted to the situation. He conceded she had understood the seriousness or gravity of the situation and had demonstrated this with the meeting she arranged and attended on 19 March 2007. Her actions and communications did amount to a form of reviewing and reporting.

[113] At most, in a situation that was not initially caused by Ms Allen, RSL may have been justified in giving her a warning that she was required to seek clarification from Mr Kane or any other executive of RSL about instructions, if they were not clear to her.

[114] No contribution is therefore assessed on account of the clonal importation programme matter.

[115] As to the Bragato Conference matter, the Authority must determine what actually did happen. From the evidence obtained during the investigation meeting I consider on balance it is unlikely that Ms Allen did tell Mr Kane several times, or even once, that the Bragato Conference had been booked.

[116] Mr Kane has a very clear recollection that Ms Allen did give him that advice on several occasions, yet he could not recollect any details of the occasions themselves apart from the advice he says he received. It seems Mr Kane was asking

for other details about the conference and there may have been confusion about what Ms Allen told him had been done and what had not been done.

[117] No reason has been suggested by any witness as to why Ms Allen would want to deliberately mislead Mr Kane about this matter or any other. It is clear that Mr Kane had by May 2007 become mistrustful of Ms Allen and her ability to competently perform as the General Manager. He has not suggested that Ms Allen misled him because she did not like him or did not get on with him, or for some similar personal reason. Neither has it been suggested that Mr Kane made up facts to form a basis of this allegation, so that he could bring about the departure of Ms Allen from her job with RSL. Ms Allen and Mr Kane cannot both be correct about what happened. I find from their direct evidence that Ms Allen has a more reliable recollection than Mr Kane about what happened.

[118] No contribution is therefore assessed by the Authority in relation to the Bragato Conference matter.

[119] In my view the conduct that mainly contributed to the situation that gave rise to the grievance was Ms Allen's actions in relation to reviewing and reporting on the virus situation and registration for the Bragato conference. I have found the only possible lapse or failure was in relation to the former matter and was more a matter of performance than misconduct. I therefore decline to reduce remedies for Ms Allen's actions in that regard.

[120] The same result must follow in relation to the matter of job descriptions. Mr Paterson concluded that Ms Allen's action did not amount to misconduct but gave rise to serious questions about her performance. Given the absence of any formal disciplinary warnings or even an adverse performance review, Ms Allen's actions cannot be considered as blameworthy for the purposes of assessing contribution under s 124 of the Act.

[121] In relation to the two remaining matters of managing staff recruitment and obtaining approval for advertising copy, I cannot see any material distinction between those matters and the job description matter in terms of the nature and quality of Ms Allen's actions and the presence of mitigation for her conduct. In substance these were equally matters of performance capable of being questioned by the employer, but they were no more matters of misconduct than the job description matter.

[122] Again, the actions of Ms Allen must be viewed along with the circumstance that she had received no warnings and had been given no performance reviews about these matters despite them having first come to RSL's attention in 2006, many months before they became the subject of allegations of serious misconduct. There is also some mitigation in the fact that Ms Allen had been performing several roles in addition to her contractual position, and had been doing so for some time by May 2007.

[123] I find no contribution present in this case for the purposes of s 124 of the Act.

Reinstatement

[124] The primary remedy of reinstatement has been strongly sought by Ms Allen. It may be that in general the reinstatement of an employee to the position of general manager of a company of medium size or larger will usually be impracticable, simply because key relationships must have seriously further deteriorated, if not been destroyed, in the course of a grievance claim being resolved. Whatever the general situation may be, the Authority is sure from the evidence it has received in this case that reinstatement would be impracticable in the circumstances.

[125] I find it is unlikely that a successful and productive employment relationship would, even after a lengthy period of time, result from reinstatement. It is also likely that Ms Allen would not want to stay long at RSL if reinstated, given what she experienced and the views of her expressed by Mr Kane in particular during the Authority's investigation. Despite her obvious strength of character she would find it difficult and stressful resuming this employment for long, and she is unlikely to achieve again the satisfaction previously experienced in the employment.

[126] I also accept that as a consequence of more recent trading pressures on the company, RSL has considered restructuring its operations. I accept that this already has been or is soon likely to be implemented, leading to the position of General Manager becoming surplus to requirements.

[127] I decline to order reinstatement.

[128] In the Gisborne locality where her job was with RSL, and from the high level of position she held with that company, hers was a considerable fall. Fortunately for Ms Allen her constitution is such that she has been able to bear up better than many in

her situation who have been unjustifiably dismissed. I nevertheless accept readily that she was shaken by going from employment in her top level management position with RSL one day, to unemployment the next. I also accept that she has been left feeling anxious about the prospect of being able to resume anything like a comparable position of employment in the Gisborne region where she has settled and wants to stay.

[129] Further, while RSL was well meaning in telling the outside world that Ms Allen had resigned her position, the situation may now come about through the Authority issuing this public determination that some people will learn the truth, which was that Ms Allen was dismissed for alleged misconduct in relation to several separate matters. This may leave people uncertain and sceptical as to Ms Allen's true part in those matters, and she will remain tainted by them despite the outcome of her grievance claim in the Authority.

[130] Taking all relevant matters into consideration I find that pursuant to s 123(1)(c)(i) of the Act an award of \$10,000 is appropriate for hurt feelings, humiliation and general distress caused to Ms Allen through her unjustified dismissal by RSL.

[131] I am satisfied that Ms Allen has to date made reasonable attempts to mitigate her lost earnings by seeking other employment. There are limitations on succeeding with that because of a smaller number of opportunities in the region where she has been living for the last few years. It is unreasonable for RSL to bear her loss indefinitely if she decides to remain living in the Gisborne area after all efforts to find suitable employment there have failed. However in the shorter term I consider that Ms Allen should recover to the date of this determination an amount equal to the salary she would have received had she not been dismissed on 20 July 2007. That is about seven months. I find that she did not contribute substantially to any delays in the disposal of this Authority investigation.

[132] I consider that an award of about seven months lost remuneration is particularly appropriate because the remedy of reinstatement has been declined by the Authority for the reasons given above.

[133] Beyond the date of this determination no award is warranted on account of future or prospective lost earnings. Had Ms Allen not been unjustifiably dismissed

in July 2007 it is likely that her employment would have ended within about six months. RSL's growing dissatisfaction with her performance was likely to be properly addressed by disciplinary warnings and/or performance reviews or performance management. In response Ms Allen is likely to have resigned, or an exit may have been agreed to between the parties, or redundancy may have brought the employment to an end. Her losses after then would not have been attributable to any termination of employment that was unjustified and they would therefore not have been reimbursable losses.

[134] Any income earned during the period covered by the award for lost remuneration is to be deducted from the amount to be paid. As well as straight salary the remuneration is to include the amount of vehicle allowance that was provided under the employment agreement. Alternatively, the loss of that allowance is able to be compensated for as the loss of an expected benefit of the employment, pursuant to s 123(1)(c)(ii) of the Act.

[135] There is no dispute that by the time of dismissal, after receiving two salary increases, Ms Allen's total remuneration had reached \$165,000 per annum including car allowance. Reimbursement for the period ordered is to be based on that amount. Further directions may be sought from the Authority if the parties are unable to agree on any of the sums to be paid.

Summary

[136] The determination of the Authority is that the dismissal of Ms Allen was unjustified. She has a personal grievance for that reason.

[137] Ms Allen did not contribute to the situation that gave rise to her grievance.

[138] As remedies, reinstatement is declined but compensation of \$10,000 is to be paid by RSL to Ms Allen, and she is to be reimbursed lost remuneration (including car allowance) from 20 July 2007 to 19 February 2008, the date of this determination.

Costs

[139] Costs are reserved.

[140] In the first instance the parties through their representatives are to endeavour to resolve any question of costs themselves by discussion. If that is not possible then application can be made in writing to the Authority for an award, and there will be the usual right of reply.

A Dumbleton
Member of the Employment Relations Authority