Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 65
3003854

	BETWEEN	WAISEA BULA Applicant
	AND	AORAKI MOUNT COOK ALPINE VILLAGE LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Geoff Bevan, counsel for Applicant Janet Copeland, counsel for Respondent
Investigation Meeting:	22 and 23 August 2017 in Christchurch
Submissions received:	8 and 29 September 2017 & 21 November 2017 for the Applicant 22 September 2017 and 22 December 2017 for the Respondent
Determination:	11 May 2018

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the evidence lodged in these proceedings about the identity of Mr A.

Employment relationship problem

[2] Upon migrating to New Zealand, Waisea Bula was employed by Aoraki Mt Cook Alpine Village Limited (Aoraki) on 14 April 2007 at "The Hermitage". The Hermitage is located at the Mt Cook Village in the Aoraki/Mt Cook National Park. Mr Bula held various positions and received several promotions during his employment. At the time of his summary dismissal on 13 January 2017, Mr Bula was front office manager. In that

position, he was responsible for managing 18 staff. As part of his role, Mr Bula was responsible for operating an effective "night audit function" and balancing floats and banking in the absence of the General Manager.

[3] Aoraki dismissed Mr Bula within the context of a broader inquiry it was conducting into missing cash. Aoraki said it did not believe Mr Bula took the money. Another employee, Mr A, would be dismissed for theft. However, Aoraki said Mr Bula was responsible for receiving and securing the money and failed to do so in contravention of company policy and his employment agreement.

[4] Mr Bula claimed his dismissal was procedurally and substantively unjustified. He said he made an error of judgment, which breached neither procedure nor process, and it should have been dealt with by Aoraki as a "performance" issue. A personal grievance was raised on his behalf and subsequently a statement of problem was lodged with the Authority.

[5] In settlement of his personal grievance with Aoraki, Mr Bula sought reinstatement, an award of lost wages and compensation for hurt, humiliation and injury to feelings. However, as the matter progressed to an investigation meeting, Mr Bula advised he no longer wished to be considered for the remedy of reinstatement. Mr Bula had also raised an unjustified action grievance during the disciplinary process but he said, sensibly, this had been "subsumed" by his unjustifiable dismissal grievance.

Issues

[6] The issues for investigation were and determination are:

(i) Was Mr Bula's dismissal, and how the decision was made by Aoraki, what a fair and reasonable employer could have done in all the circumstances at the time?;

(ii) If Aoraki's actions were not justified, what remedies should be awarded, considering:

(b) Lost wages and other moneys under s 123(1)(b); and

(c) Compensation under s 123(1)(c)(i) of the Act.

(iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Bula, which contributed to the situation giving rise to his grievance?

(iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[7] During the investigation, I heard evidence from the following: Mr Bula, Aoraki's managers Nathan Quinlan and Jason Winter, human resources manager, Lynn Foord and Leanne Kafrda, human resources manager for Trojan Holdings Limited, which owns Aoraki.

[8] I also received a common bundle of documents from the parties and Aoraki provided some CCTV footage.

[9] This determination been issued outside the three month timeframe after receiving the last information from the parties. I record the Chief of the Authority has decided s 174C(4) of the Act has been met. Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Mr Bula's employment relationship problem. While I have not explicitly referred to all the submissions of counsel in this determination, I have fully considered them.

Narrative

The incident

[10] On 24 December 2016, Mr Bula was working at Reception of the Hermitage with another staff member. At approximately 11.00am, another staff member brought a night audit bag from the Mt Cook Lodge and Motels, a geographically distinct operation, to the Reception and handed it to Mr Bula. Mr Bula said there had been a problem with Lodge's safe, which had been on-going for several weeks, so Lodge staff were bringing their takings to Reception. However, this was only occurring during weekends, as during the week the takings were delivered directly to the accounts department.

[11] Mr Bula said he put the bag in the "night audit tray" which was located atop the main safe in the Reception office and returned to his duties. The Reception office is locked via a security coded door. In addition, a CCTV camera, which evidently operates continuously, is positioned in such a way as to monitor the safe and night audit tray.

[12] The bag contained approximately $3000 cash and associated paperwork. Between the bag being received by Mr Bula and the cash takings being collected from the Reception safe on 27 December 2016, the money from the bag went missing.

Aoraki's investigation

[13] Upon being advised that money was missing, Mr Winter began to investigate. He informed Mr Quinlan and Ms Foord, who also became involved. A meeting between the three was convened to discuss the missing money at 9am on 28 December 2016.

[14] At or about this time, Mr Winter, Mr Quinlan and Ms Foord also appear to have had a discussion with Mr Bula about the missing bag and had agreed to meet again later that day. Ms Foord then reviewed the CCTV footage based on a timeframe provided by Mr Quinlan.

[15] Mr Quinlan, Mr Winter and Ms Foord then had a meeting with Aoraki's assistant accountant, who discovered the money was missing. Subsequently, Ms Foord had a telephone conversation with the staff member who brought the bag from the lodge to Reception. The staff member confirmed to Ms Foord the bag contained cash and associated paperwork. Mr Winter said using the "zoom" function for the CCTV footage also confirmed the bag contained money.

[16] Mr Bula said he was asked to attend a meeting. He said he did not receive any letter or notice about what Aoraki wanted to talk about. Mr Bula said he knew the meeting was about the missing money but had few details including that there was an investigation or that Aoraki was interviewing other staff. Ms Foord claimed Mr Bula did have notice of the meeting, which she described as "not a disciplinary meeting", and what it was about because he had been party to a discussion about the missing money earlier that day.

[17] Mr Bula was interviewed in the afternoon of 28 December 2016. Mr Quinlan, Mr Winter and Ms Foord also attended the meeting. Mr Bula was asked about cash handling procedure involving the lodge takings. He was told there was CCTV footage of him receiving the bag. Mr Bula was asked why he did not lock the bag in the safe.

[18] Mr Bula said he was unable to think clearly during the meeting and, after reviewing the transcript of it, said he gave confused answers. He said he provided two answers as to where he put the bag (the night audit tray and the safe) and did not mention the bag had only been coming to Reception for two or three weeks. Mr Bula said there was no written procedure or process about what to do with the bag and no-one had given it much thought. He said the decision to bring the bag to Reception was made by someone else and the bag just started arriving. Mr Bula said he had seen the bag in the night audit tray himself and presumed Finance were aware it was being left there because they collected it. Mr Bula said staff did not sign for the bag as they did with a float or other takings.

[19] At this stage, Mr Quinlan removed himself from the investigation because there were now, on his account, "concerns over [Mr Bula's] management of cash" in addition to the serious allegations against the other staff member ultimately dismissed for stealing the money. Mr Quinlan said he did this because he would be the decision-maker.

[20] On 5 January 2017, while Mr Bula was spending a day-off in Timaru he was contacted by Ms Foord who asked him to attend a meeting on 6 January 2017. Mr Bula confirmed he was able to attend and Ms Foord advised she would send him a letter confirming the meeting. Ms Foord claimed she told Mr Bula he was entitled to seek independent advice and he could delay the meeting if necessary. Mr Bula claimed no such advisories were made.

[21] Mr Bula received a letter via email from Ms Foord around 3.30pm on 5 January 2017 but did not have the opportunity to read it until he had returned from Timaru at or about 5pm. The meeting was set for 3.30pm the next day. Ms Foord would also email Mr Bula notes from interviews with other Aoraki employees at about 5pm on 5 January 2017.

[22] The letter advised Mr Bula that Aoraki had completed its investigation into the missing bag "… and would like to meet to discuss our findings to date in terms of the [Aoraki] disciplinary policy". It also advised the time and date of the proposed meeting, who would be attending on behalf of Aoraki and that Mr Bula was entitled to be accompanied and assisted by a representative.

[23] The letter went on to state:

> The purpose of the meeting is to discuss that above [the missing bag] and whether or not this constitutes a breach of any of our company rules/policies, or the disciplinary schedule. The Employment Handbook, p37, states misconduct is conduct which is contrary to the accepted rules of behaviour or threatens other staff, guests, personal health, well-being or security, or which endangers property or services is unacceptable. Specifically we are investigating:
>
> - The security of cash and company property;
> - Negligence resulting in the loss of $3061.10;
> - Not exercising reasonable care in the discharge if your duties.
>
> We are compiling all the investigation notes taken to date for you and will forward all relevant documentation and investigation outcomes to you shortly so you may consider these prior to the meeting.
> You should be aware that if, following this meeting and any further investigation required, a finding of Serious Misconduct is made, this could lead to disciplinary action, up to and including the possibility of termination if your employment.
> ….

[24] Mr Bula reviewed the letter and interview notes upon his return from Timaru at or about 5pm. Mr Bula said the letter suggested he could be represented during the meeting but it did not specifically advise him he was entitled to seek advice before the meeting. Aoraki would deny this. Mr Bula confirmed his attendance at the meeting via email on the morning of 6 January 2017.

Meeting of 6 January 2017

[25] Mr Bula said he received notes from an interview with Aoraki's assistant accountant before the meeting.

[26] Mr Bula attended the meeting on 6 January 2017 without a representative. Mr Bula accepted the letter said he was entitled to be accompanied and assisted by a representative. However, he said he did not want to make trouble by delaying and wanted to clear everything up.

[27] In attendance on behalf of Aoraki were Ms Foord and Mr Winter, who took notes. During the meeting, Mr Bula was shown CCTV footage showing he received the bag on 24 December 2016. Mr Bula said this was the first time he had seen the footage and had been given no indication before the meeting that he would be shown it. Mr Bula said he was also questioned extensively about Aoraki's cash handling procedures and his cash handling training. Reference was made during the meeting to an occasion when Mr Bula mistakenly put a cash tip in the rubbish bin. Mr Bula said he was allowed to pay this money back and nothing formal flowed from this at the time.

[28] Aoraki's cash handling procedures and training records were not provided to Mr Bula prior to, or during, the meeting. He said he received these on 11 January 2017.

[29] Mr Bula said he could have answered Aoraki's question much better if he knew what the meeting was about. He said some of his answers were the result of not having access to the procedures and policies he subsequently received. Mr Bula said in answer to a question during the meeting he said the correct procedure for dealing with the lodge bag was to lock it in the safe. However, upon further reflection, he believed there was no procedure, due to the lodge bag situation being a recent occurrence and only happening at weekends.

Events of 9 January 2017

[30] Following the meeting, and after considering Mr Bula's responses, Mr Quinlan rang Mr Bula to inform him of the tentative decision he be dismissed without notice for serious misconduct. During the conversation, Mr Quinlan made an arrangement for a meeting on 10 January 2017 so Mr Bula could provide any further information before he made a final decision.

[31] Later that day, Mr Quinlan issued Mr Bula with a "tentative" conclusion letter via email. The letter stated under the heading "serious misconduct":

> I have taken the opportunity to consider all the evidence, including the CCTV footage and the explanations you have given in relation to the above matter. In summary, I have concluded that your actions do constitute Serious Misconduct due to the following:
>
> - You admitted that you accepted the night audit bag, which you believe most likely contained cash
> - You acknowledged you understood the procedure for receiving cash or bags possibly containing money at the front desk is look the bag in the safe
> - You acknowledged that you failed to do that on 24 December 2016
> - The cash from the bag has subsequently gone missing.
>
> I believe that your actions compromised the security of company cash, and that you were negligent and did not exercise care in the discharge of your duties.

[32] The letter asked for Mr Bula's response to the proposed outcome of summary dismissal by 5pm the next day (10 January 2017). Mr Bula said he was incredibly shocked and worried upon reviewing the tentative conclusion letter. Mr Bula said based on what the letter said it was clear he was going to be dismissed.

Meeting of 10 January 2017

[33] During the morning of 10 January 2017, Mr Bula, Mr Quinlan and Ms Foord met, seemingly at Mr Bula's request, to discuss Mr Quinlan's letter. Ms Foord said she asked Mr Bula if he had taken advice and he said no. The meeting proceeded.

[34] A review of the notes prepared by Ms Foord discloses that in reply to Mr Bula's oral response to his letter, Mr Quinlan referred to it being "very hard to ignore the past" and "unfortunately this has happened in the past …". No context was given for these remarks. Mr Bula said he had never been spoken to by past general managers or finance managers about cash handling concerns. Ms Kafrda referred in her evidence to an incident in 2015 involving a money handling issue at Reception. However, Mr Bula said, in response, this related to a mistaken electronic foreign exchange transaction by a member of his staff. Mr Bula said this had nothing to do with cash handling or the safe and he was not responsible or held responsible for it.

[35] The notes of the meeting also disclosed Mr Bula asked Mr Quinlan for another chance so he could pay the money back or receive a final written warning or be moved to another department. The meeting concluded with an expectation of recommencing later that day at 2.30pm to discuss Mr Quinlan's decision.

Request for extension of time

[36] After the meeting, Mr Bula obtained legal advice. Mr Bula's lawyer (Mr Bevan) sought an extension of time to 13 January 2017 to provide further feedback and advised Mr Bula would not be attending the further meeting scheduled for 2.30pm that day. This was initially declined, but after a further request by Mr Bula's lawyer who emphasised the need for time to give a proper opportunity to respond, it was agreed to.

[37] On 11 January 2017, Ms Kafrda provided Mr Bula's lawyer via email with several documents said to be relevant in relation to cash handling processes and procedures. Training records were also provided. Mr Bula said this was the first time these documents had been provided during the investigation. Ms Kafrda said in the body of the email to Mr Bula's lawyer the documents were provided to "pre-empt your request".

Interview with further witness

[38] Aoraki interviewed a further witness, night porter Gaynor Ferguson on 10 January 2017. Mr Bula said he only found out about this interview when his lawyer was provided with notes of it when the bundle of documents for the Authority's investigation was being prepared. Ms Foord said Mr Bula did know Ms Ferguson was being interviewed as he had advised Ms Foord she would be back from leave on 8 January 2017. Ms Ford said the reason why Ms Ferguson was not was not interviewed earlier was not because she was on leave.

[39] Ms Ferguson told Ms Foord there was no procedure for Reception dealing with monies from the lodge. Ms Ferguson also advised Ms Foord that porters who did not have the code for the safe would hide money from the lodge in Mr Bula's desk drawer. Mr Bula said he was not made aware of that and did not know whether it was true or not. Ms Foord suggested Mr Bula was aware of the practice. Ms Ferguson said the lodge was aware the money would not always be locked in the safe.

Mr Bula's response

[40] Mr Bula's lawyer provided a response on 13 January 2017. The letter raised a personal grievance on behalf of Mr Bula for unjustified disadvantage. The letter identified several procedural issues, particularly in relation to not being given a proper opportunity to seek advice and the haste of the investigation. Several substantive issues were also raised including Mr Bula's early acknowledgement of responsibility, his length of service and service record.

Decision to dismiss

[41] Mr Quinlan received an email from Ms Kafrda at 4.50pm on 13 January containing a final draft of the letter terminating Mr Bula's employment. At the time, Mr Quinlan believed the letter had gone to Mr Bula's lawyer but really it had been sent to Aoraki's lawyer for review. Mr Quinlan said he and Mr Winter then proceeded to inform the staff at Reception Mr Bula would not be returning.

[42] At 5.15pm, Mr Quinlan was informed by Ms Kafrda that the letter had not been sent. At or about this time, Mr Bula's lawyer was advised by Ms Kafrda in an email there would be a delay in communication of the decision. Ms Kafrda wrote: "I was hoping to have response to you today, however have been delayed. I will have a response to you as soon as possible". Mr Bula said he was advised by his lawyer at 5.20pm there had been a delay and he was not expecting a response until Monday.

[43] At or about 5.45pm, Ms Kafrda emailed Mr Bula's letter of dismissal to his lawyer. She also copied in another lawyer at the firm. The letter advised Mr Bula's lawyer that following consideration of the points raised by him, Aoraki would not be reviewing its position with regards to Mr Bula's employment and the termination was confirmed. Ms Kafrda said given the expected delay, and mobile technology, she reasonably expected Mr Bula's lawyer would have access to email.

[44] Mr Bula said he found he had been dismissed at about 10.00pm when he received a text message from a work colleague, who had been told of his dismissal and that Mr Bula was not allowed in the hotel reception. Mr Bula said he felt confused, embarrassed and distressed.

[45] Mr Bula's lawyer confirmed the dismissal after reviewing his email the next day (a Saturday) after a telephone call from Mr Bula.

Evaluation

Procedure

[46] Mr Bula said that Aoraki had not complied with the requirements of s 103A in various ways. Within this context, Mr Bula identified three themes he argued were recurring throughout the process giving rise to his dismissal.

[47] First, the inexperience of staff involved in his investigation in New Zealand employment law. Mr Bula said this may have influenced what he regarded as Aoraki's failure to adhere to proper process. Mr Bula said when Ms Foord was asked about this her evidence was to the effect that the processes in New Zealand and Australia "were exactly the same".

[48] Second, Mr Bula said there was a "secondary focus" to the investigation into his conduct because Aoraki were investigating the theft of the cash and dealing with the unexpected death of a staff member.

[49] Third, Mr Bula said Aoraki's investigation into his conduct was an example of "form over substance" because he said Aoraki focused the form of a proper investigation and lacked a commitment to proper fact finding and decision-making. Mr Bula pointed to the tight timeframes of the investigation and the initial refusal to grant his representative an extension to submit his response to the tentative conclusion letter as examples. Mr Bula also raised a number of procedural defects in Aoraki's investigation, which are discussed below.

[50] In response, Aoraki, relying on an established line of reasoning, said the focus of any inquiry into the justification for Mr Bula's dismissal must be one of substantive fairness, not minute and pedantic scrutiny.[1]

[1] See, for example, *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 and *A Limited v H* [2016] NZCA 419 (CA)

Mr Bula's specific criticisms of Aoraki's procedure

Initial meeting

[51] Mr Bula said Aoraki did not comply with the obligation contained in its employment handbook to advise him, at least, that alleged misconduct was being investigated. Mr Bula said he knew when called to the initial meeting on 28 December 2016 it was about the missing money, but he was not put on notice that his employer was investigating his role in relation to it or that he would be asked about cash handling procedures and CCTV footage.

[52] Mr Bula suggested he was, in effect, ambushed by Aoraki into answering questions about his actions on the day when other participants in the meeting had seen the relevant CCTV footage when he had not and about the company's cash handling policies and procedures – which he was not supplied with copies of during the meeting – and did not, upon further reflection, believe they applied in the circumstances.

Invitation letter to disciplinary meeting

[53] Mr Bula said the use of broad terms in the invitation letter of 5 January 2017 such as investigating "the security of cash and company property", "negligence" and "not exercising reasonable care in the discharge of your duties", meant he was not sufficiently put on notice of the allegations being made against him. Mr Bula said as a result he never had the opportunity to understand and comment on Aoraki's underlying concern about not putting the bag in the safe. Mr Bula also said the letter did not address Aoraki's concerns about a lack of staff training in his department in relation to cash handling or the development of new procedures and as a consequence he also did not have an opportunity to properly address these concerns. He said this was important because it was plainly one of the reasons why Mr Quinlan decided that dismissal was an appropriate sanction. Mr Bula said the lack of specificity created a reasonable belief the meeting was only about missing the money, of which he had not taken, and not wider issues and this contributed to his decision not to seek representation for the meeting.

[54] Aoraki said the letter plainly stated what the allegations against Mr Bula were and that Mr Bula was aware of the CCTV footage.

Insufficient time to obtain a representative or seek support

[55] Mr Bula said the letter advised him he was entitled to be accompanied and assisted at the meeting by a representative and also asked him to confirm he had sufficient opportunity to seek such. Mr Bula said a fair and reasonable employer knowing he was facing the possibility of dismissal should have been told it was "advisable" to seek advice, he had the right to do so in *advance* of the meeting, the representative could be *independent* of the workplace and should be appropriately *qualified*.

[56] Mr Bula said he did not want to get someone from the village based on the "news travels quickly" principle and there was a cost and time involved in getting someone from the nearest metropolitan area – Timaru. Further, in any event, Mr Bula said he was given insufficient time to review the material, instruct a lawyer in Timaru and have them attend a meeting the next day. Mr Bula said this was compounded by the likelihood that many lawyers would have been on holiday at that time of year. Mr Bula said the purported opportunity to obtain advice was not real.

Purported ability to postpone

[57] Mr Bula said he did not appreciate from his discussions with Ms Foord he could postpone the meeting and Aoraki should have advised him of this in its letter. Mr Bula said Aoraki should have proactively postponed the meeting itself having known that Mr Bula would have insufficient time to prepare for the meeting. Mr Bula said Aoraki, in effect, through haste failed to give him a proper opportunity to respond.

Failure to properly investigate

[58] Mr Bula said Aoraki was a well-resourced employer with access to internal human resources expertise and external legal advice. He said, despite this, it undertook a "once over lightly approach" and failed to sufficiently investigate in terms of s 103A(3)(a) of the Act. Mr Bula claimed Aoraki failed to investigate the role other staff and the lack of processes played in the circumstances giving rise to the theft of the money. He said this included the role of the Lodge Manager and the Assistant Accountant.

[59] Mr Bula said Aoraki failed to provide him with the notes from its interview with the night porter, Ms Ferguson, which took place after it had reached a tentative decision to dismiss him. Mr Bula said Ms Ferguson's interview highlighted the fact there was no procedures in place about what should be done with the Lodge money when it came to Reception and that Lodge staff knew the money was going to Reception without a clear requirement that it be placed in the safe. Mr Bula argued if he had been aware of this interview before any conclusions had been drawn, and given sufficient time to consider the matters raised, he could have highlighted that his job description did not require him to put finance policies in place, he was simply required to ensure internal controls were complied with, and that as the staff of the Lodge knew the money was not being put in the safe, they should have taken steps to ensure the security of their own money.

[60] Mr Bula said several important facts and documents relevant to his situation came to light during the Authority's investigation meeting. Mr Bula said Aoraki failed to provide him with the results of the investigation into the lodge bag and the notes of the interview with Lodge manager, Rodney Young, despite a disclosure request made by his solicitor on 23 January 2017.

[61] During the investigation meeting, it became apparent Mr Quinlan was not aware the Lodge bag was being taken to Reception during weekends. He understood Mr Young was delivering the takings to Accounts during the week and believed during the weekend the takings were being stored in the security box. Mr Bula had worked with Mr Quinlan and Mr Young in attempting to find a solution to the Lodge's broken safe through the use of "security boxes" several months earlier. In an email discussing the proposed solution, Mr Quinlan congratulated Mr Bula for potentially saving Aoraki "$1,000+".

[62] Mr Bula said Aoraki's investigation established there was no clear policy for dealing with the Lodge's cash and that responsibility for this should be shared equally among several staff members, particularly those working in the Lodge and likely including Mr Young. Indeed, Mr Quinlan said during the investigation meeting he never established who made the decision to bring the money to Reception but, notwithstanding, Mr Bula should not have accepted the money. Mr Quinlan said it was his expectation Mr Bula and Mr Young would develop a process for handling the Lodge's cash. Mr Bula said none of these matters were ever put to him during the disciplinary process.

[63] Mr Bula said Aoraki failed to put an additional matter to him during its investigation. As stated above, in the notes of the meeting of 10 January 2017, Mr Quinlan refers to past instances of cash handling issues. Additionally, the run sheet prepared for the meeting also referred to "previous instances". Further, Ms Foord said during her evidence at the investigation meeting, past issues were taken into account when deciding to dismiss Mr Bula. Mr Bula said these apparent past issues were never put to him during the investigation meeting and, as a consequence, he was not given an opportunity to deny or correct Aoraki's understanding.

[64] During the investigation meeting it became apparent Mr Quinlan was aware Mr A had accessed the safe. In an email subsequently disclosed, Mr Quinlan identifies the timing sequence for Ms Kafrda from the CCTV footage. The email refers, among other things, to Mr A being *in* the safe and also seeing the lodge bag (referred to as "banking") in the night audit tray atop the safe and retrieving it. Mr Bula said this was never disclosed to him.

[65] Mr Bula said his dismissal was predetermined by Aoraki. He said upon reviewing the tentative conclusion letter, he believed he was going to be dismissed. Reference was made to the decision of the Court in *Edwards v Board of Trustees of Bay of Island College*[2] where it was observed an employee confronted with a tentative conclusion of dismissal may conclude it is very difficult, if not impossible, to persuade the employer otherwise and that such an approach may risk offending s 103A for failing to maintain an open mind until the end of the investigation.[3] Mr Bula said his contention here was supported by the wording of the letter of dismissal: "… following consideration of the points raised in your letter we will not be reviewing our position with regards to Mr Bula's employment …". Mr Bula said this meant the tentative conclusion accurately reflected the position Aoraki had reached: his dismissal.

[66] Aoraki denied all of Mr Bula's arguments about its process. Aoraki said it put its essential allegations to Mr Bula and that its process was, in the circumstances, procedurally fair and it should not be subject to minute and pedantic scrutiny.

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[2] [2015] NZEmpC 6
[3] At [308] – [309]. See also, *Fox v Hereworth School Trust Board* [2015] NZEmpC 206 at [226]

[67] Aoraki said Mr Bula could have used his time in Timaru to seek advice. It said Ms Foord told him over the phone he could seek advice and in a subsequent email asked Mr Bula if he was bringing a support person. Aoraki said Mr Bula had, as a manager, been involved in disciplinary matters and knew the process. Aoraki also said based on the Court's decision in *Alofa v Aotea Centre Board of Management*[4] there is no duty on an employer to ensure an employee has arranged adequate representation. Aoraki said that if Mr Bula held concerns about the timeframe, he could have requested the meeting be postponed.

[68] Aoraki said if Mr Bula had requested an adjournment to seek advice, it would have agreed. However, he sought no such postponement and he confirmed in writing, in response to an email from Ms Foord asking if he was bringing a support person, that he would represent himself. Aoraki also said Mr Bula in his evidence said, in relation to bringing someone to the meeting and being assisted, that "[he] did not think he needed that".

[69] Aoraki said Mr Bula did not make any submissions to the effect he was confused or concerned about the answers he gave despite several opportunities during the investigation to do so, including in response to the tentative conclusion. Aoraki also said the transcript of the meeting of 28 December 2016 does not support his view that he was confused. Aoraki said Mr Bula's evidence about what he could or should have done with the money, despite earlier conceding he should have put it in the safe, was an afterthought and hindsight and was not available to it when the decision to dismiss him was made.

[70] Aoraki said Mr Bula's contention the investigation into his conduct was a secondary focus, was wrong and that it complied with each and every requirement of s 103A of the Act in arriving at the decision to dismiss him. Aoraki said it sufficiently raised the allegations with Mr Bula, provided him with a reasonable opportunity to respond to them and then genuinely considered those responses. Aoraki said it then took the additional step of consulting with Mr Bula over its tentative decision to dismiss him.

[4] [2001] NZEmpC 114 at [28]

[71] Aoraki said *Edwards* was clearly distinguishable as no outcome was clearly signalled in the tentative letter. In addition, Aoraki said the Court in *Edwards* did not say tentative conclusion letters should not be used but rather they should not clearly signal an outcome. Aoraki said Mr Bula's view that the words used in the final letter lend credence to his argument that his dismissal was predetermined was "minute and pedantic scrutiny" of its procedure because it was merely confirming the tentative conclusion would go ahead. In any event, Aoraki said Mr Bula engaged with the process and therefore it could not be said his actions fell within a "what's the point?" type of situation as observed by the Court in *Fox*.

Conclusions about Aoraki's procedure

[72] As is clear from the submissions summarised above, Mr Bula identified a number of criticisms about the procedure used by Aoraki to carry out its disciplinary investigation. Many of these were justified. While several could be regarded as subjecting Aoraki's process to minute and pedantic scrutiny, a majority were not minor and they did result in Mr Bula being treated unfairly.[5] Mr Bula's most powerful criticism, from which a number of ancillary points and examples emerge, is that Aoraki conducted a "form over substance" investigation into his alleged serious misconduct.

[73] I accept Mr Bula's criticisms of the initial meeting of 28 December 2016. In my view, Aoraki did not properly stage the transition from Mr Bula assisting with, along with several other staff members, a general inquiry into missing money to being a person of interest in relation to certain circumstances relating to it. Aoraki should have clearly put Mr Bula on notice the investigation had entered a new phase. It should have done so in writing to avoid any doubt and confusion and given Mr Bula an opportunity to consider his position. As it was, a factual dispute existed between Ms Foord and Mr Bula about what he advised in respect of advice/representation during the telephone conversation on 5 January 2017.

[5] Employment Relations Act, s 103(A)(5)

[74] While Ms Foord says Mr Bula did have notice of the meeting and she did not regard it as "disciplinary", some of the answers given by Mr Bula during clearly were used against him in subsequently justifying his dismissal. Mr Bula should have been provided with copies of the policies and procedures that Aoraki wished to discuss with him. A fair and reasonable employer does not believe or expect an employee to have company polices and procedures committed to memory. Further, when asking questions about such documents, an employer should provide these to an employee for reference and refreshment of memory. Aoraki did not do this for Mr Bula. Instead it asked Mr Bula questions about the policies and procedures it believed relevant and then held him to those answers even when he was obviously unsure or contradicted himself, as was evident from the transcript of the meeting, or subsequently sought to correct his answers in his response to the tentative conclusion letter based on further reflection. The policies and procedures were ultimately only provided to Mr Bula, through his lawyer, by Ms Kafrda on 11 January 2017 to "pre-empt" such a request.

[75] In my view, there are also elements of ambush in asking Mr Bula questions about events Aoraki's investigators already knew the answer to having had access to the CCTV footage. A fair and reasonable employer would have shown Mr Bula the CCTV first and then asked him questions about what he was doing and, if necessary, on a frame-by-frame basis. An employer's mind should be open during an investigatory process and it should not withhold vital material so as to achieve some type of "gotcha" outcome.

[76] I accept Mr Bula's criticism of Aoraki's letter of 5 January 2017 inviting Mr Bula to a disciplinary meeting. The letter lacks specificity as to allegations to be investigated due to the broad nature of the language used. I accept this may have contributed to Mr Bula's general confusion about the process and his decision not to seek representation. The letter should have plainly and simply put the allegation to Mr Bula that he failed to secure the cash in the Reception safe.

[77] I also accept the letter should have informed Mr Bula it was "advisable" to seek advice, not just that he could be accompanied and assisted at the meeting. The letter should have clearly advised Mr Bula he had the right to seek advice in advance of the meeting and any representative attending the meeting could be independent of the workplace. I reject Aoraki's view that Mr Bula could have used his time in Timaru to seek advice about the meeting. As it was, Ms Foord contacted Mr Bula on a day-off work during a traditional holiday period. His problem was compounded because initially he

would have been relying on what Ms Foord told him over the phone because she did not send through the letter she advised him she was sending until approximately 3.30pm and, even then, Mr Bula had no access to his email until he returned to the Mt Cook Village.

[78] It was simply unrealistic to believe Mr Bula could have obtained advice and representation in such a short timeframe. Even if Mr Bula had received the letter earlier in the day, and while he was still in Timaru, it is unclear how this would have assisted him much. The reason(s) for Aoraki's undue haste in the investigation of Mr Bula at this point, and throughout the entire process, was never properly explained.

[79] As outlined above, Aoraki relied on the Court's decision in *Alofa* in responding to this criticism. In my view that decision is clearly distinguishable. It is an appeal from a decision of the Employment Tribunal decided under the Employment Contracts Act 1991. The law has moved on. Section 103A imposes specific obligations on an employer seeking to justify a dismissal. Further, the Act, as an object, acknowledges and addresses the inequality of power in employment relationships and that also has some bearing on an employer's responsibility to an employee subject to a disciplinary process.[6] While any representation must be independent of the employer, it is not necessary, however, for the person to be independent of the workplace - union delegates, for example, can play an important, often vital, role in employment investigations.

[80] Mr Bula said a representative should also be appropriately qualified. Certainly an inexperience representative can often do more harm than good during a disciplinary process. While not relevant in the current matter because Mr Bula was eventually able to instruct competent representation, there is a very good argument to say an employer, in certain circumstances, should have regard to whether the employee's representative is appropriately qualified. Indeed, it would certainly be open to the Authority to find this to be a relevant factor for the purposes of s 103A.[7]

[81] Mr Bula said he did not want to have a representative from the Mt Cook Village due to the community dynamics. Mr Bula said he wanted to be seen to cooperate with his employer and clear the matter up as soon as possible. Both are understandable but for reasons already given, Aoraki should have delayed the meeting at its own motion to ensure Mr Bula was properly prepared.

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[6] Employment Relations Act, s 3(a)(ii) the Act
[7] Employment Relations Act, s103A(4)

[82] I find the failure to provide relevant information to Mr Bula during the investigation was a critical failure. Aspects of the evidence of Ms Ferguson and Mr Young were clearly beneficial to Mr Bula's position but he was denied the opportunity to consider it and rely on it as necessary because it was not disclosed to him. Of significant concern, is that Aoraki knew Mr A had access to the safe and this was not disclosed to Mr Bula. Aoraki knew Mr A had accessed the safe potentially as early as the day the money was found to have gone missing. This matter also goes to the substantive justification for Mr Bula's dismissal and is discussed further below.

[83] Ms Ferguson's evidence was there was no procedure in place to deal with Lodge funds nor was there a clear requirement it was placed in the Reception safe. Inexplicably, Ms Ferguson was interviewed after the tentative decision to dismiss Mr Bula was made. Aoraki said the reason for not interviewing her earlier was because it did not wish to disturb here while she was on leave. However, the interview notes disclose Ms Foord spoke to the Lodge staff member who brought the bag to Mr Bula at Reception on 24 December 2016 while she was on leave. Further, Mr Bula was contacted by Ms Foord while he was on leave to attend a disciplinary meeting. It appears Ms Ferguson was back from leave on 8 January 2017, so she could have interviewed before the tentative decision was made. Mr Young was not interviewed until 11 January 2017. It was unclear why he was not interviewed earlier. Aoraki's actions here were not properly explained, were not befitting of a fair and proper disciplinary investigation and resulted in unfairness to Mr Bula.

[84] In my view, the cumulative effect of Ms Ferguson and Mr Young's evidence was that there was no policy or procedure in place for dealing with Lodge cash when it came to Reception. However, Aoraki continued to hold Mr Bula to a policy that did not apply in the circumstances. It should clearly have reconsidered its position based on these presenting facts. In any event, Aoraki should have been aware of this information before it issued Mr Bula with its tentative decision and, certainly, put this information to Mr Bula before any decisions were made, tentative or otherwise.

[85] The failure to disclose key information, issuing a tentative dismissal decision before interviewing two key witnesses, referring to "previous instances" of cash handling incidents yet never properly putting these Mr Bula, thereby denying him a proper opportunity to correct Aoraki's (mis)understanding of these incidents, and informing other staff of his dismissal before he himself was advised, all point to a rushed and haphazard disciplinary process. These factors, in my view, lend significant weight to Mr Bula's argument his dismissal was pre-determined and so I find. Pre-determination of outcome is not the action of a fair and reasonable employer.

[86] Mr Bula raised the "Australia experience" of some of the Aoraki staff involved in the disciplinary process as a reason why proper process was not followed. It is difficult to assess what, if any, impact this may have had on Mr Bula's dismissal. However, it is clear, based on their evidence, one member of the investigation team believed employment investigatory processes in Australia and New Zealand "were exactly the same". This is clearly not the case. Australian procedural fairness requirements, in particular, are "sparse" and the emphasis in dismissal cases is placed on the substance of the matter. Suffice to say, it is vitally important that people undertaking employment and disciplinary investigation are appropriately trained in the requirements of New Zealand law.

[87] I find Aoraki's effecting of Mr Bula's dismissal was hasty and insensitive given his length of service. The failure to advise Mr Bula he was dismissed before informing other staff was inexcusable regardless of the circumstances. Aoraki said given Ms Kafrda advised Mr Bula's solicitor of an expected delay in the decision, and having regard to modern mobile technology, it reasonably expected he would have access to email so as to be able to tell Mr Bula he had been dismissed. However, it is clear Aoraki made no such inquiries that this was the case and, in any event, the email sent by Ms Kafrda was equivocal about whether there would be an answer that day.[8]

[8] Paragraph [42] above.

Substance

[88] Mr Bula said that a proper investigation would have found there was no substantive basis for his dismissal. He said his action did not fall within, directly or by analogy, the examples of serious misconduct contained in Aoraki's team handbook. Mr Bula said his failure was one of performance and his actions did not justify Aoraki concluding it could no longer trust him.

[89] Mr Bula said not putting the money in the safe was an error of judgement but there was no clear written policy dealing with money coming to Reception in the manner it did and, in any event, he put the money in a secure place with restricted access and CCTV monitoring.

[90] Mr Bula said he was not solely, or at least solely, responsible for developing a policy to deal with the money coming from the Lodge. In his view, responsibility also lay with the Assistant Accountant and Lodge Manager. Mr Bula said his obligation was to follow financial policies and he said the only one relevant in the circumstances, which was recognised in the tentative decision letter, was to operate an effective night audit function to ensure all internal controls were maintained. He said he did this and the Lodge bag, which had just started arriving at Reception, had nothing to do with the night audit process.

[91] Mr Bula said his department was understaffed and the Lodge manager should have been more proactive in implementing a procedure (but no disciplinary action was taken against him). Mr Bula also said it was unfair for Aoraki to narrowly seize on his concession the bag should have been put into the safe, made without access to policy and procedures, and not consider the reality and totality of what he was saying including recognising English was his second language.

[92] Aoraki said Mr Bula's dismissal was substantively justified and open to it as a fair and reasonable employer having taken into account all the circumstances at the time.

[93] Aoraki disputed that Mr Bula's action(s) were performance related and said they constituted serious misconduct. Aoraki drew the Authority's attention to the decision of the Court of Appeal in *W&H Newspapers Ltd v Oram*[9] where it was found a single act of negligence by an employee could impair the relationship of trust and confidence with their employer to such an extent so as to justify dismissal. Aoraki said it maintained through the investigation the allegation against Mr Bula was not that he stole money but that his actions compromised security of company cash, he was negligent and failed to exercise reasonable care in the discharge of his duties.

[94] Aoraki said Mr Bula had to take responsibility for his own actions and not seek to shift blame onto it. Aoraki said Mr Bula had received sufficient cash handling training and even if he had not, which was denied, his actions in relation to the bag were not those of an experienced and senior employee. In this regard, it relied on the Court's decision in *Craigie v Air New Zealand Limited*.[10] Aoraki also observed that after the money went missing, Mr Bula directed his staff to develop new standard operating procedures. Aoraki said given Mr Bula's position within the company, it was critical it had trust and confidence in him. Aoraki said Mr Bula's assertions of understaffing were irrelevant and, in any event, he never raised understaffing in his department as a matter of concern.

[95] Drawing support from the decision of the Court in *Click Clack International Ltd v James*[11], Aoraki said it was not necessary, in justifying Mr Bula's dismissal, to establish the "impossibility" of a continuing employment relationship. Aoraki said Mr Bula had no excuse for failing to follow a process he said he should have followed, this was unacceptable and as a consequence, it had lost trust and confidence in him.

Conclusions about the substance of Mr Bula's dismissal

[96] While many of Mr Bula's concerns about his dismissal were directed at the procedure followed by Aoraki, he also questioned the substantive justification for his dismissal. In my view, this was with good reason.

[9] [2000] 2 ERNZ 448
[10] [2006] ERNZ 147
[11] See, *Click Clack International Ltd v James* [1994] 1 ERNZ 15

[97] I accept Mr Bula's submission that his actions did not directly, indirectly, or by analogy, fall within the examples of serious misconduct published in Aoraki's team handbook. While the handbook contained a non-exhaustive list of examples, the central problem for Aoraki was that it did not have a policy or procedure to deal with the very specific and time limited circumstances surrounding the bringing of the Lodge funds to Reception during weekends. In my view, Aoraki would have been confronted with this central problem no-matter how it sought to characterise Mr Bula's conduct.

[98] During its investigation, Aoraki appeared to seize on the fact Mr Bula directed his staff to develop a standard operating procedure to deal with the unusual set of circumstances giving rise to the theft of the money. In my view, the fact Mr Bula believed this was necessary to do so is supportive of his view that no current policy or procedure applied. As it was, the Lodge bag had only been coming to Reception for a few weeks and only at weekends. Mr Bula did not work every weekend and it was not unreasonable for him to seek to rely on that fact. As it was, Lodge staff knew, based on the evidence of Ms Ferguson, their money was not going into the Reception safe yet continued to send it. Further, this unusual set of circumstances was occurring within the context of Mr Bula having worked with Mr Quinlan to help the Lodge resolve its cash security issues.

[99] I also accept Mr Bula's submission that his conduct could be characterised as performance-related, but in the circumstances, unfortunately, Aoraki did not treat it as such. I find Mr Bula's actions were, at best, an error of judgement. While he had undergone training, this was in respect of a procedure that did not apply in the unusual presenting circumstances.

[100] In justifying its position, Aoraki relied on *Oram*, however, in my ivew, that decision is distinguishable on its facts. In any event, it is questionable whether *Oram* even remains "good law" following the enactment of s 103A of the Act. I find Mr Bula's actions were not negligent. Indeed, even if they were found to be approaching that level of conduct, this is not one of those cases where a single act of such conduct can so irreparably destroy trust and confidence as to justify the summary dismissal of a long-serving employee.

[101] Mr Bula put the money in a secure place with restricted access and CCTV monitoring (which ultimately enabled Aoraki to identify the culprit). In my view, Aoraki failed to have regard to the fact the night audit tray was effectively secure and this should have been reflected in its level of criticism of Mr Bula. In any event, even if Mr Bula put the money in the Reception safe, which was arguably best practice, it could still have been stolen because Mr A had access to the safe. It would be difficult to find in such circumstances that Mr Bula actually compromised the security of Aoraki's cash. Mr Quinlan knew Mr A could access the safe very early on in the investigation yet did not see fit to tell Mr Bula. Mr Bula was entitled to raise this in his defence but was denied the opportunity through non-disclosure. This was clearly unfair and not the actions of a fair and reasonable employer.

[102] Finally, I did not accept Aoraki's submission Mr Bula did not take responsibility for his own actions and sought to shift blame onto others. Mr Bula never sought to disguise his actions and he fully cooperated with Aoraki's investigation. Mr Bula, in defending himself against allegations of serious misconduct is entitled to question the actions, or inactions, of others where the circumstances warrant, as they did here, and he should not have been unduly criticised for doing so.

Conclusion about Mr Bula's dismissal

[103] Drawing together all the factors detailed, discussed and analysed above and applying the test in s 103A of the Act, I find the substantive decision to dismiss Mr Bula and the process adopted to reach that decision were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The investigation conducted by Aoraki into Mr Bula was procedurally unfair and was not the action of a fair and reasonable employer. The defects in the process followed by Aoraki to dismiss Mr Bula were not minor and they did result in him being treated unfairly.[12] The dismissal of Mr Bula by Aoraki was procedurally and substantively unjustifiable.

[12] Employment Relations Act, s 103A(5).

Remedies

[104] Having found Aoraki was not justified in dismissing Mr Bula, he is entitled to an assessment of remedies to settle his personal grievance.

Reimbursement for lost remuneration

[105] Mr Bula claimed for reimbursement for lost remuneration in two tranches. First, he sought lost wages of $12,842.95 and $1027.44 holiday pay from the date of dismissal to the day of hearing. Second, Mr Bula claimed loss of earnings based on the difference between what he would have earnt at Aoraki and that which he was earning in his new employment for a period of one year: $5000.32 (or $96.16 per week).

[106] Mr Bula gave evidence about his attempts to find alternative work. He said he applied for over 50 jobs in New Zealand, Australia and Fiji without success.

[107] Aoraki said Mr Bula had not sufficiently sought to mitigate his lost. Aoraki also said Mr Bula was dismissed at the height of the tourist season and it was "staggering" he could not find a position at the same remuneration or higher than his job at Aoraki. In reality, Mr Bula, based on his evidence to the Authority, applied for over 50 jobs and, presumably, as part of that process he was also having to explain his dismissal. The effect of Mr Bula's dismissal on the perceptions of him by potential employers cannot be known but it is reasonable to conclude it was probably not regarded as his best selling point.

[108] Aoraki said Mr Bula should not be compensated for the first two weeks following his dismissal because he was paid out his holiday pay. Mr Bula rejected this view saying he was out of work, not earning any money and should be compensated for this period. I accept this submission. The fact Mr Bula was paid out his holiday pay upon summary termination has no bearing on the calculation of his lost remuneration claim.

[109] Aoraki also said Mr Bula should not compensated for a week long pre-planned holiday to Hong Kong because he would not have been able to accept work. In response Mr Bula said he would be prepared to reduce his claim by $396 to take account of this period. This was an appropriate concession by Mr Bula in the circumstances.

[110] Mr Bula said he had worked for Aoraki for ten years and there was no suggestion his employment may have otherwise come to an end. Aoraki rejected this. It said during the disciplinary investigation Mr Bula advised he would accept a warning. Aoraki said it had accepted this proposal, but further disciplinary action may have resulted in his dismissal and it could not, therefore, be said Mr Bula's employment would have lasted for a further 12 months. Mr Bula said there was no evidence before the Authority his employment would not last beyond 12 months. Unfortunately, such "counter-factual" submissions are very often speculation founded on subjective "if only" assessments. In reality, Aoraki did not issue Mr Bula with a written warning as he apparently suggested. Rather, and instead, Aoraki has been found to have unjustifiably dismissed Mr Bula.

[111] I am satisfied Mr Bula made sufficient attempts to mitigate his loss and, indeed, did so by securing alternative employment. Having regard to all the circumstances of the case, including Mr Bula's extensive attempts to find alternative work away from an already remote location (Mt Cook) saddled with a summary dismissal, I find it is appropriate to exercise my discretion under s 128(3) of the Act to award Mr Bula lost remuneration greater than that specified in s 128(2).

[112] I find, subject to contribution, that an award of $17,447.27 as reimbursement for lost wages under s 128(3) of the Act is appropriate. In addition, I find it is appropriate to award Mr Bula holiday pay of $1027.44 as claimed.

Other monies

[113] Mr Bula claimed $723.55 for removal costs (from Mt Cook to Christchurch) and $1150 for living costs in Christchurch and subsequently Dunedin. He also claimed storage costs in Christchurch of $910 and $1820 in Dunedin. Aoraki did not directly submit on these claims, however, it was clear from the tenor of its submission that any monetary and non-monetary compensation awards made to Mr Bula should be modest, if made at all.

[114] I am also satisfied that Mr Bula's claim for removal costs is fair and reasonable.[13] Aoraki must pay Mr Bula $723.55 as removal costs under s 123(1)(b) of the Act.

[13] See, *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310

[115] I find Mr Bula's claim for storage costs of $910 in Christchurch were sufficiently proximate to his personal grievance. However, I decline to order his claim for storage costs once he moved to Dunedin. In my view, these are too remote from his personal grievance. Further, Mr Bula's new position, for which he moved to Dunedin, would have enhanced his ability to find suitable accommodation.

[116] Aoraki must pay Mr Bula $910.00 for storage costs in Christchurch under s 123(1)(b) of the Act.

Loss of accommodation and associated benefits

[117] Mr Bula claimed living costs of $75 per week for 12 months totalling $3900. While employed by Aoraki Mr Bula was supplied with company housing for which he paid $165 per week including power and food. As a result of his dismissal he said his living costs had increased.

[118] Mr Bula's living arrangements at Mt Cook were specific to that locality and to those of his employer. However, as he is now resident in a metropolitan area it can be reasonably expected such arrangements would have "normalised". That being said, I accept he has lost a benefit and he is entitled to seek compensation for that.

[119] There is no exact science, and perhaps much art, in assessing the quantum of loss for the benefit of accommodation. However, standing back and considering the matter and all the relevant circumstances, I assess Mr Bula's loss as $50 per week for 12 months totalling $2600. Aoraki must pay Mr Bula $2600 for the loss of accommodation and associated benefits under s 123(1)(c)(ii) of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[120] Mr Bula sought $25,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Bula said he was totally humiliated by his dismissal. He said he was angry and upset about what had happened and that he had trouble sleeping due to worrying about money and paying his bills. Mr Bula said he was too ashamed to tell his family in Fiji, which was assisted by his remittances, about his dismissal or that his new position paid less.

[121] Mr Bula said he was a long serving employee. He said his job with Aoraki was the only one he had held since coming to New Zealand and given the remote location of Mt Cook he had developed strong links in the community. Mr Bula said because of his dismissal he had to move away to find work and this resulted in him losing some relationships.

[122] Mr Bula said the impact of his dismissal was intensified by finding out from work colleagues about his dismissal. He said some of these colleagues knew about his dismissal for about two and a half hours before his lawyer was advised via email after close of business (and which was not read until the next day). As Mr Bula believed he would not be getting an answer about the fate of his employment that day, due to a confusing exchange between Aoraki and his lawyer, this left him confused and embarrassed.

[123] Mr Bula said an email sent by Ms Foord to staff at Aoraki after he was dismissed to address the "rumour mill", as she described it during the investigation meeting, clearly signalled he had been dismissed and downplayed his contributions. The email suggested Mr Bula wanted to spend more time with his family and be warmer. Mr Bula said the email increased his sense of humiliation and became "a bit of joke" around the Mt Cook Village.

[124] Aoraki submitted that there was minimal evidence of the effect of the grievance on Mr Bula. It said it regretted that Mr Bula found out from a work colleague about his dismissal but said this was unintentional and the result of communication breakdown. In any event, Aoraki said Mr Bula should have made further contact with his lawyer to check his emails and would have found out via that means if he had done so.

[125] Aoraki said Mr Bula travelling to Hong Kong on holiday after being dismissed – albeit several months later – raised questions about the effect of the dismissal on him. Further, Aoraki said any award of compensation should be modest and based on principles expressed by, in particular, the Court of Appeal.[14]

[14] For example, *NCR (NZ) Corporation v Blowes* [2005] 1 ERNZ 932 (CA) and *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) and *Air New Zealand Ltd v Johnson* [1992] 1 ERNZ 700 (CA).

[126] Aoraki questioned whether recent views expressed by the Employment Court had sufficient regard to Court of Appeal decisions, particularly *NCR*.[15] In contrast, Mr Bula pointed to the Court of Appeal's decision in *Commissioner of Police v Hawkins*[16] saying this represented the more contemporary view.

[127] While compensation under s 123(1)(c)(i) of the Act is not invariable[17], suggesting there is yet no generalised acceptance that a degree of hurt and humiliation is inherent in an unjustified dismissal,[18] it is now tolerably clear corroboration of evidence in support of such a claim is not required.[19]

[128] Mr Bula did not provide corroborative evidence or medical evidence confirming the psychological and/or physical effects of his dismissal upon him. However, Mr Bula did provide compelling evidence, and a painful narrative, to the Authority to warrant a significant award of compensation. I accept that Mr Bula suffered humiliation, loss of dignity and injury to feelings because of his dismissal. I doing so, I have, in particular, taken into account the following:

(i) his humiliation in the face of his friends and family;
(ii) the serious allegations made against him and the impact those, and the flawed disciplinary investigation, had on him;
(iii) his summary dismissal;
(iv) that some of his work colleagues knew of his dismissal several hours before he did (which is unacceptable in any circumstances);
(v) the loss of his long career with Aoraki, the only job he had known in New Zealand; and
(vi) the dislocation of his life including the loss of workplace, loss of home and loss of community.

[15] For example, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71
[16] [2009] NZCA 209 (CA)
[17] *Department of Survey and Land Information v New Zealand Public Service Association* [1992] 1 ERNZ 851 (CA) at p857 per Cook P.
[18] As observed, for example, by Thomas J in New *Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 (CA) at [44]
[19] See, *Maharaj v Recon Professional Services Limited* [2015] NZEmpC 61 at [11] and *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [57].

[129] There is a clear and unequivocal trend upwards in compensation awards in the Authority and the Court. The amount to be awarded to Mr Bula is consistent with recent awards by the Authority and Court and one made mindful of the Court's guidance on granting such remedies.[20] In doing so, I accept the Court of Appeal's decision in *Hawkins* represents the most contemporary view of that Court on the matter and the most realistic assessment of the legal position given compensation under s 123(1)(c)(i) of the Act is uncapped.

[130] Subject to a consideration of contribution under s 124 of the Act, which is outlined below, Aoraki must pay Mr Bula $20,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Contributory behaviour by Mr Bula?

[131] Having found that Mr Bula was entitled to remedies for a personal grievance for unjustified dismissal, I am required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

[132] For Mr Bula, it was submitted that while he made a mistake, remedies should not be reduced. Mr Bula said while he accepted there was an element of blameworthiness on his part, the fact Mr A could, and did, access the safe must cast doubt on whether Mr Bula's failure to put the money in the safe led to its disappearance. Mr Bula also said he was not responsible for implementing financial policies and any failure to do so on his part was not blameworthy. He said any culpable contribution was minor and too remote to be considered causative under s 124 when gauged against the actions of Mr A and Aoraki's unfair disciplinary process. In the alternative, Mr Bula said any reduction in remedies should be "very modest".

[20] *Hall v Dionex Pty Limited* [2015] NZEmpC29, *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 and *Archibald.*

[133] Aoraki said if the Authority determines Mr Bula has a personal grievance, he should be awarded no remedies in "equity and good conscience" as part of the assessment under s 123 of the Act. Aoraki said Mr Bula was a senior, experienced member of the staff who was aware of the company's cash handling procedures but did not comply with them. In the alternative, Aoraki said Mr Bula should be awarded no more than $7000 compensation under s 123(i)(c)(i) of the Act and this should be subject to a 75% reduction under s 124 due to "substantive failings". Aoraki said if such failings had not occurred they would have prevented theft and would have meant Mr Bula was not dismissed.

[134] Having considered the submission of the parties, I am not minded to award Mr Bula no or reduced remedies "in a manner that conforms with equity and good conscience".[21] Mr Bula has been found to have a valid personal grievance for unjustified dismissal as a result of Aoraki's defective disciplinary process and lack of substantive justification. In remedying that grievance, Mr Bula has not been fully compensated for the expenses and losses arising out of it. In such circumstances, it would actually be contrary to equity and good conscience for a deliberative process conforming to such principles to further reduce, wholly or partially, that which has already been effectively discounted.

[135] As to contribution, I accept Mr Bula's submission he was not responsible for implementing financial policies and any failure to do so on his part was not blameworthy. I also accept his submission that any contribution on his part was minor and too remote to be blameworthy. Indeed, while Mr Bula's mistake may have made it easier for Mr A to steal the money, in the sense, he was not required to enter the safe, it is difficult to see this as directly causative of the theft because Mr A had the means to access the money regardless because he knew the code. Taking these matters into account together with Aoraki's unfair disciplinary process, I find there is to be no reduction in Mr Bula's remedies for contribution under s 124 of the Act.

[21] *Xtreme Dining Limited v Dewar* [2016] NZEmpC 136 at [216]

Summary of orders

[136] In summary, Aoraki must settle Mr Bula's personal grievance by paying him within 28 days of the date of this determination:

(i) $17,447.27 as reimbursement for lost wages;

(ii) $1,027.44 as holiday pay;

(iii) $2600.00 for loss of accommodation and associated benefits;

(iv) $723.55 as removal costs;

(v) $910.00 in storage costs; and

(vi) $20,000 as compensation for hurt, humiliation and injury to feelings

Costs

[137] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Mr Bula has 28 days from the date of this determination in which to file and serve a memorandum on costs. Aoraki has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[138] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[22]

Andrew Dallas
Member of the Employment Relations Authority

[22] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.