

**Non-publication orders
are in place regarding
parts of the evidence
heard during the
Authority's
investigation.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 150
5432307

BETWEEN MELANIE ROSE CATANUTO
Applicant

A N D TE RUNANGA O
WHAINGAROA INC
Respondent

Member of Authority: Rachel Larmer

Representatives: Penny Swarbrick and Anamika Singh, Counsel for
Applicant
Emma Butcher, Counsel for Respondent

Investigation Meeting: 16, 17 and 23 January 2014 at Whangarei

Submissions Received: 21 February 2014 from Applicant
07 March 2014 from Respondent
13 March 2013 in reply from Applicant

Date of Determination: 16 April 2014

DETERMINATION OF THE AUTHORITY

**A Te Runanga O Whaingaroa Inc unjustifiably dismissed Ms
Cantanuto. It is ordered to pay her:**

- (i) Lost remuneration from 07 September 2013 to the date of
this determination;**
- (ii) \$12,000 distress compensation.**

Non-publication orders in place

[1] During the course of its three day investigation meeting the Authority heard sensitive and confidential information in respect of which non-publication orders were made. I am referring to the evidence given to the Authority during the closed parts of the investigation meeting. I confirm the non-publication orders made during the Authority's investigation are final orders that remain in force and must be complied with.

Employment relationship problem

[2] Ms Catanuto was employed by Te Runanga O Whaingaroa as the Chief Executive. She worked for 88 days before she was dismissed for serious misconduct. Ms Catanuto claims her dismissal was procedurally and substantively unjustified. Ms Catanuto withdrew her reinstatement claim at the beginning of the Authority's investigation.

[3] Ms Catanuto also claims her employer breached its statutory good faith obligations and she seeks that a penalty be imposed for those breaches with some or all of the penalty being paid to her.

[4] On joint application of the parties Ms Catanuto's claims for lost commission and loss of benefits are adjourned *sine die* to give the parties additional time to reach agreement on those claims.

[5] Te Runanga O Whaingaroa Inc is a small community organisation largely dependent on funding to enable it to deliver predominantly youth education and health services to the community of local marae. It is overseen by a Board of Trustees consisting of individuals elected from local marae. The Board of Trustees is governed by a Trust Deed and meets monthly.

[6] The Chief Executive is responsible for day to day operations of Te Runanga O Whaingaroa Inc whilst governance and strategy, as well as the employment of the Chief Executive, are the responsibility of the Board. For ease of reference I shall refer to Te Runanga O Whaingaroa as "*the Board*" because it was the Board which was responsible for Ms Catanuto's appointment and dismissal although I note the Board is in fact an entirely separate legal entity from Te Runanga O Whaingaroa.

[7] The disciplinary process which resulted in Ms Cantanuto's dismissal was run by what I shall refer to (again for ease of reference) as "*the disciplinary subcommittee*" which consisted of the Board's Chair Mr Tata Morgan, the Board's Deputy Chair Mr Rawiri Hemi and the Board's Kaumatua Mr Dave Henare. Mr Morgan and Mr Hemi gave evidence to the Authority but Mr Henare did not.

[8] On 28 August the disciplinary subcommittee presented Ms Catanuto with a disciplinary letter which raises thirteen serious misconduct allegations. However, many of the thirteen allegations had more than one concern associated with them which means the total number of specific disciplinary concerns raised in the disciplinary letter is twenty two.

[9] Ms Catanuto was dismissed by Mr Rawari Hemi (Deputy Chair) and Mr Dave Henare (Trust Kaumatua) during a meeting on 06 September 2013. Her dismissal was recorded in a letter dated 09 September 2013 which did not explain why she was being dismissed but merely recorded her immediate dismissal.

[10] The Board says dismissal was justified because it lost trust and confidence in Ms Catanuto for a combination of reasons during her short period of employment. The Board also claims that after dismissing Ms Catanuto it subsequently discovered further conduct by her which it says would amount to serious misconduct.

Issues

[11] The issues to be determined include:

- (i) Did the Board breach its good faith obligations?
- (ii) If so, should a penalty be imposed?
- (iii) If so, should some or all of the penalty be paid to Ms Catanuto?
- (iv) Was Ms Catanuto's dismissal justified?
- (v) If not, what if any remedies should be awarded?
- (vi) What if any costs awarded?

Did the Board breach its good faith obligations?

[12] Section 4(1A) of the Employment Relations Act 2000 (the Act) requires an employer which is proposing to make a decision that may adversely impact on the continuation of an employee's employment to provide that employee with access to relevant information and an opportunity to comment on that information before it makes a final decision about the employee's ongoing employment.

[13] I find the Board breached its good faith obligations under s.4(1A) of the Act because:

- (i) It did not provide Ms Catanuto with access to any of the information it was relying on to support its disciplinary concerns. She was presented with the bare disciplinary allegations only;
- (ii) The Board failed to provide Ms Cantanuto with the information she requested in her email 29 August which she had sought in order to be able to respond to the disciplinary concerns;
- (iii) During the disciplinary meeting on 06 September Ms Cantanuto repeated her request for information but again no information was provided;
- (iv) During the disciplinary meeting the disciplinary subcommittee failed to respond to queries Ms Cantanuto had about the allegations;
- (v) During the disciplinary meeting the disciplinary subcommittee told Ms Cantanuto it would get come back to her about her information requests but it failed to do so. At the next meeting she was dismissed;
- (vi) The disciplinary subcommittee obtained information from Board member Mr Norm McKenzie which was never disclosed to Ms Cantanuto;
- (vii) Ms Cantanuto was never told about Mr McKenzie's considerable behind the scenes input into and influence on the disciplinary process. I do not accept Mr McKenzie's evidence that he had no involvement other than drafting the disciplinary letter because that evidence was contradicted by the two disciplinary subcommittee members. Mr

McKenzie raised concerns about Ms Cantanuto with the Board, he urged it to start a disciplinary process, he drafted the disciplinary letter (which I note included additional matters that had not been the subject of discussion with the Board), he liaised with the Board's legal advisor, he put forward the disciplinary process to be followed, he had a number of telephone conferences with the disciplinary subcommittee whilst it was deliberating, he influenced the disciplinary subcommittee by giving his view that Ms Cantanuto's explanations (which he had not personally heard) were unsatisfactory, he provided the disciplinary subcommittee with additional information about the disciplinary concerns which was never disclosed to Ms Cantanuto.

- (viii) The disciplinary subcommittee rejected information Ms Cantanuto supplied during the disciplinary meeting but failed to advise her of that. She was therefore unaware that it held a different view of information she had put forward or why it may have done so;
- (ix) It came out during the course of the Authority's investigation that the disciplinary subcommittee had incorrectly proceeded on the basis that allegation 7a said the opposite of what was recorded in the disciplinary letter. Ms Cantanuto was unaware of that;
- (x) The two disciplinary subcommittee members who gave evidence to the Authority were both unable to explain what one of the disciplinary allegations meant yet they had expected Ms Cantanuto to respond to it.

[14] Ms Swarbrick submits that the Board's conduct also breached its good faith obligations because:

- (a) It decided to deal with perceived issues as serious misconduct when they were not and it failed to comply with its own probationary clause in Ms Catanuto's employment agreement; and
- (b) It failed/refused to provide Ms Catanuto with proper information even when she had specifically requested it; and
- (c) The manner in which Ms Catanuto was dismissed on 06 September was insensitive, unprofessional and in breach of good faith.

[15] I find that item (a) is dealt with as a justification issue, item (b) is a breach of good faith but is covered in the findings I have made about s.4(1A) and item (c) is not a breach of good faith but is an issue to be considered when assessing remedies.

Should a penalty be imposed for breaches of good faith?

[16] A penalty may only be imposed for a breach of good faith if the requirements of section 4A in the Act are met. I am not satisfied that the Board's breaches of good faith were deliberate, therefore the requirements of s.4A are not met so I decline to impose a penalty.

Was Ms Catanuto's dismissal justified?

[17] The Authority is required to objectively assess justification in accordance with the s.103A justification test in the Act. This requires the Authority to determine whether *the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred.*¹

[18] Section 103A(3) of the Act requires the Authority to consider the four procedural fairness tests set out in that section when assessing justification. Section 103A(5) of the Act precludes the Authority from determining a dismissal to be unjustified solely because of minor process defects that do not result in any unfairness to the employee.

[19] In addition the four tests in s.103A(3) of the Act the Employment Court has observed in a number of cases that a fair and reasonable employer is expected to comply with its statutory obligations.

Compliance with statutory obligations

(i) Good faith

[20] The Board has breached its s4(1A) good faith obligations which undermines its ability to justify Ms Cantanuto's dismissal.

¹ S.103A(2) of the Act

(ii) Section 103A(3) procedural fairness tests

[21] I find that the Board is unable to meet any of the four procedural fairness tests in s.103A(3) of the Act. In particular the Board;

- a. failed to sufficiently investigate its concerns before dismissing Ms Catanuto in breach of s.103A(3)(a) of the Act. The two disciplinary subcommittee members I heard from were unable to explain what information they relied on in support of each disciplinary allegation. I consider that was probably because they had just followed Mr McKenzie's recommendations without understanding the information he had based the disciplinary concerns on;
- b. did not fully or fairly raise its concerns with Ms Catanuto before dismissing her contrary to the requirements of s.103A(3)(b) of the Act. I find the disciplinary subcommittee considered and formed adverse conclusions about matters that had never been put to Ms Cantanuto to respond to;
- c. failed to give Ms Catanuto a reasonable opportunity to respond to its concerns before she was dismissed in breach of s.103A(3)(c) of the Act. The disciplinary subcommittee failed to follow the disciplinary process it has set for itself. It jumped the gun by proceeding directly to dismiss Ms Cantanuto before it had even responded to the matters it told her it would respond to. Ms Cantanuto was effectively deprived of the opportunity to respond to the Board's concerns because these were never fully or properly raised with her in a way that would have enabled her to understand what the Board was actually concerned about. I note that the two disciplinary subcommittee members I heard from struggled to explain at least some of the disciplinary allegations to me. I consider it unreasonable and unfair for an employer to discipline an employee for concerns it is unable to even explain itself.
- d. It also failed to consider Ms Catanuto's explanation before dismissing her contrary to s.103A(3)(d) of the Act. The two disciplinary subcommittee members I heard from could not adequately explain what Ms Cantanuto's explanation was to the disciplinary concerns. Nor

could either of them provide an adequate explanation as to why the information Ms Cantanuto had provided in support of her explanations was rejected. They also both failed to explain why her explanations were found to be unacceptable. The disciplinary subcommittee appears to have rejected out of hand Ms Cantanuto's explanations without properly considering them.

[22] The Board's failure to meet any of the four procedural fairness tests in the Act fundamentally undermines its ability to justify Ms Cantanuto's dismissal.

Section 103A(5)

[23] I find that the procedural flaws and process errors in this case were fundamental and serious. They were not minor and they resulted in significant unfairness to Ms Cantanuto. These errors went to the heart of the matter and effectively deprived Ms Catanuto of the opportunity to understand the Board's specific concerns or the information these concerns were based on. It follows that she was unable to properly respond because she was not clear about what she was supposed to be responding to.

[24] I find that s.103A(5) does not prevent the Authority from making a finding of unjustified dismissal. The failure of the Board to comply with its statutory obligations means it is unable to justify Ms Cantanuto's dismissal. However there are also a number of additional features that make Ms Cantanuto's dismissal unjustified which I now address.

Changing reasons for dismissal

[25] When the Board dismissed Ms Catanuto at the meeting on 06 September it did not tell her what findings it had made about each of the allegations it had raised as serious misconduct concerns with her. It merely told her that after considering her response she was dismissed. It did not explain exactly what behaviour she was being dismissed for.

[26] The written record of dismissal also makes no mention of the specific disciplinary concerns or about what findings the Board made and why. This evidence was also not included in the Board's Statement in Reply.

[27] When I initially questioned the two disciplinary subcommittee members who gave evidence, both of them started off by telling me that every disciplinary allegation was considered to be a matter of serious misconduct. However, they subsequently conceded that at least some of the allegations were not capable of amounting to serious misconduct. Neither of the two disciplinary subcommittee members could tell me what findings had been made in respect of each allegation or why. I find that different reasons have been relied by the Board on at different stages in the process.

[28] At the outset the Board appears to have dismissed Ms Cantanuto based on all of the 22 allegations raised in the disciplinary letter. When the Board's then lawyer² responded in a letter dated 17 September to Ms Cantanuto raising a dismissal grievance he identifies that Ms Cantanuto was dismissed for seven main reasons. During the Authority's investigation that was reduced to four reasons. That was reduced again in Ms Butcher's submissions to three reasons.

[29] I do not consider that is an approach that a fair and reasonable employer could take in all the circumstances. Twenty two specific allegations had been put to Ms Catanuto as serious misconduct allegations so a fair and reasonable employer is expected to deal with each allegation.

[30] Whilst it is open to an employer to decide not to pursue a particular disciplinary allegation or to decide that there is insufficient information to make finding in respect of an allegation, it may also decide that an allegation of serious misconduct is not in fact serious misconduct it is fair and reasonable for it to inform the employee of that at the time that decision is made so the employee clearly knows where they stand in respect of each allegation made against them.

[31] Justification is to be assessed at the time Ms Cantanuto was dismissed. I find that the Board was not clear at the time it decided to dismiss Ms Cantanuto about exactly what she was being dismissed for or why. Rather than addressing the specific allegations the Board appears to have taken a global overview by deciding she had engaged in serious misconduct without directly linking that conclusion to the specific allegations it had made against her. I find that approach undermines the Board's ability to justify Ms Cantanuto's dismissal.

² Not Ms Butcher.

Predetermination

[32] I accept Ms Swarbrick's submission that Ms Catanuto's dismissal appears to have been predetermined. The disciplinary subcommittee made no independent inquiries in relation to Ms Catanuto's explanations, despite her identifying specific areas they needed to follow up. Nor did they make adequate attempts to understand Ms Catanuto's explanations and/or the information that she had provided or to reconcile it against the information the Board relied on in support of each allegation.

[33] The two disciplinary subcommittee members I heard from had little or no independent recollection of Ms Catanuto's answers to the allegations, why it did not accept the information she had supplied and why Ms Catanuto's responses were unsatisfactory.

Note taking

[34] Given the number of allegations made against Ms Cantanuto a fair and reasonable employer would have properly record her responses given in explanation to the matters of concern. That did not occur. The note taking was woefully inadequate. The Board's witnesses were not clear about what notes were taken, when or by whom. The notes produced were compiled from memory after Ms Cantanuto had raised her dismissal grievance. The extremely limited notes made during the disciplinary meeting were not an adequate record of Ms Catanuto's explanation.

[35] I consider this undermines the fairness of the process because it resulted in the disciplinary subcommittee being unclear about what Ms Cantanuto's explanation was or about how the information she produced supported her explanation.

[36] The Board blames Ms Catanuto for its inadequate notes because she declined to provide a copy of the notes she had prepared in advance of the meeting. Whilst it would have been preferable for her to have done so, that does not absolve the Board of its responsibility to take appropriate steps to ensure that it has properly understood her explanation. I am not satisfied that occurred which undermines the Board's ability to justify its dismissal.

Substantive justification

[37] This is a case where the process used was so fundamentally flawed and in breach of the most basic natural justice considerations that the conclusions the Board reached cannot be justified. I also find that a fair and reasonable employer could not have concluded based on the information available to the Board at the time it dismissed Ms Cantanuto that she had engaged in serious misconduct.

[38] I accept Ms Swarbrick's submissions that the disciplinary letter identifies conduct that is more properly categorised as performance concerns. The issues the Board relied on should have been dealt with in accordance with the probationary clause in Ms Cantanuto's employment agreement.

[39] Because Ms Butcher says the Board only relies on allegations 1, 2, and 5 as amounting to serious misconduct and therefore justifying dismissal I examine those allegations only. I am satisfied that none of these matters could be fairly or reasonably viewed by a fair and reasonable employer as serious misconduct.

[40] I now address the three specific allegations the Board claims substantively justified dismissal.

(i) Disciplinary allegation 1

[41] This allegation was:

1. Contract for Youth Co-ordinator/Operations Manager

(a) No Board approval obtained and this is outside the budget agreed for year end 30 June 2014

(b) In addition the contract sustainability is not assured i.e. monies are not guaranteed after year end 2014 which will render this position redundant

(i) The contract is a full time position which now places the Board at risk.

[42] The Board's concern in the disciplinary letter appears to be that the appointment of the Youth Co-ordinator/Operations Manager is outside budget and may not be sustainable. Ms Catanuto sought to understand which budget the Board was referring to in its disciplinary letter but was never provided with that information. Notwithstanding this she responded to the concern by advising that the appointment

was an operational issue and that there were budgeted funds for it. She provided the budget information which she says shows the new position was funded.

[43] The two disciplinary subcommittee members I heard from were unable to provide me with any answers about the budget information Ms Catanuto had provided so I consider it likely they did not consider her budget information at all. It is apparent that the disciplinary committee members interpreted the budget information differently from Ms Catanuto. However they did not understand or even attempt to understand Ms Catanuto's explanation for her use of budgeted funds.

[44] Nor did either of the disciplinary subcommittee members explain why Ms Catanuto as the Chief Executive who had responsibility for operational matters including the hiring and firing of staff was unable to appoint someone into a new role. The inference was that Ms Catanuto required Board approval to make appointments but no evidence was produced to show that was the indeed case or that Ms Catanuto had ever been made aware of that.

[45] The Board's view is surprising because Ms Catanuto had discussed her intention to appoint the new employee with the Board and had provided a draft employment agreement which she had discussed with some Board members. Those discussions resulted in her making some changes to the proposed employment agreement before she offered the new role to her preferred candidate. No evidence was produced by the Board to show it had ever instructed Ms Cantanuto not to make the appointment. The evidence showed that Ms Cantanuto had taken on board the comments made by the board members she had discussed the proposed appointment with.

[46] After hearing from the two disciplinary subcommittee members who gave evidence it was still unclear exactly what the Board considered Ms Catanuto had done wrong in respect of this allegation because neither of them were able to explain satisfactorily what the serious misconduct actually was.

[47] Mr Morgan appears to believe that Ms Cantanuto defied him by not following a recommendation he had made about the proposed new position. However that was never put to her to respond to. Mr Morgan's view is odd because the evidence established that Ms Catanuto had taken on board the comments that Mr Morgan had

made, she had amended the employment agreement and job description and had changed the title of the position in light of his feedback.

[48] As the Chief Executive Ms Catanuto should reasonably have been regarded as being entitled to make appointments to the staff without interference from individual Board members. The views of an individual Board member may not necessarily have reflected the views of the Board. If the Board was in fact opposed to the appointment to the new position Ms Catanuto had created then it could and should have issued her with an instruction making it clear that she had no authority to make the appointment. It did not do so.

[49] Ms Butcher's submissions on this allegation appear to raise a new concern which was never put to Ms Catanuto during the disciplinary process, namely that she had effectively carved out part of her role to be taken over by the new position she created. If this was a concern at the time then it should have been put to Ms Catanuto to respond to. The parties did have some discussions prior to Ms Catanuto offering an employee the new role which resulted in her adjusting the duties of the new role.

[50] A second new concern relating to the first disciplinary allegation also appears to be raised for the first time in Ms Butcher's submissions, namely that Ms Catanuto offered the employment agreement to a subordinate employee with a greater salary than that of her own. This was the first time this allegation had been raised. I consider it to be another attempt by the Board to change the reason for Ms Catanuto's dismissal after the fact.

[51] In the disciplinary allegation letter the concern is around funding the budget. It does not mention any allegation about Ms Catanuto supposedly altering the scope of her own role without the Board's approval nor does it mention a concern about Ms Catanuto allegedly defying guidance given to her by Mr Morgan. Neither of these matters were raised with Ms Catanuto during the disciplinary process so cannot fairly or reasonably now be relied upon by the Board to justify dismissal.

(ii) Disciplinary allegation 2

[52] Allegation 2 says:

2. *[X³] – we understand serious allegations of complaint under s.17 of the Children and Youth Persons and Their Families Act 1989:*
 - (a) *Placing our staff at risk [AB⁴].*
 - (b) *Placing the Board at risk by association:*
 - (i) *Not addressing the matter*

[53] This allegation was never properly explained to Ms Catanuto despite her requests about it. The allegation in the disciplinary letter appears to be that she somehow placed staff and the Board *at risk* yet how she had done that was never explained to her.

[54] This was explored during the Authority's investigation meeting and the evidence about that is that the Board became aware of information which appears to have caused it to believe that Ms Catanuto should disassociate herself and the Board from X while an outside agency investigated an issue that may have involved X.⁵

[55] The allegation that Ms Catanuto had not *addressed the matter* does not make sense in light of the information recorded in the Board report of 26 August.⁶ It was clear from the information recorded in the Board minutes that Ms Catanuto had taken action in respect of this issue and had reported to the Board about the action she had taken. Therefore the allegation in the letter of 28 August does not appear to make sense.

[56] It was not until the Authority's investigation that the Board suggested that the issue allegation 1 referred to was that Ms Catanuto had attended a hui with X which it considered was serious misconduct. If that was the concern then it was not put to Ms Catanuto. It also relied on speculation and assumption instead of reliable direct evidence.

[57] While Ms Catanuto and X may have been at the same hui along with many other people the Board made absolutely no inquiries as to the capacity in which X had attended the hui. Nor did it do anything to discover whether Ms Catanuto was associated in any way with X's attendance at a hui.

³ Name is subject to non-publication order.

⁴ Initials of an individual who is not involved in these proceedings.

⁵ Ms Catanuto's evidence was that X may have been identified as a result of mistaken identity.

⁶ This evidence is subject to non-publication order.

[58] The Board witnesses accepted that X was entitled to be at the hui and that if X had decided to attend the hui on their own accord that had nothing to do with Ms Cantanuto. I consider there is absolutely no evidence of any wrongdoing by Ms Cantanuto in respect of this issue. The mere fact she happened to attend a hui at which X was present cannot of itself amount to serious misconduct. The Board had never instructed Ms Cantanuto not to associate with X, although it now appears that was what they wanted or expected.

[59] More importantly concerns about Ms Cantanuto and X being at the same hui were never been put to Ms Catanuto to respond to, either at the time of the disciplinary process or in cross examination. Her queries at the disciplinary meeting about what this allegation referred to were also not responded to.

[60] There was no reliable evidence presented to the Authority that Ms Catanuto had an ongoing involvement with X after certain issues that had been brought to the Board's attention had arisen. The evidence suggests the opposite - that Ms Catanuto had taken steps to professionally distance herself from X.

(iii) Disciplinary allegation 5

[61] Allegation 5 says:

“NDHB submission on the preferred model of service – the submission was dispatched without the Board approval in regard to the content which was highly sensitive and confidential and would have been in the public domain had the submission not been withdrawn.”

[62] Ms Catanuto's response to that allegation during the disciplinary meeting was that she had been instructed by the July Board meeting to make the submission, and that is supported by the Board minutes. Ms Catanuto said the content of the submission was based on her discussions with Mr McKenzie. Ms Catanuto filed the submission on 14 August and by 20 August Mr McKenzie had told her *pull it back*, which she then did.

[63] The evidence of the disciplinary subcommittee members during the Authority's investigation was that the Board's concern related to the content of the submission, not the fact that she had completed and filed it. The Board's witnesses

accepted that at no stage had it been drawn to Ms Catanuto's attention specifically what content in the submission the Board objected to.

[64] This allegation is another one that appears to have changed in Ms Butcher's submissions from the allegation first raised in the disciplinary letter. The allegation appears to now be that Ms Catanuto sent the submission against the direction of Mr McKenzie. It also appears to assert that Ms Catanuto was not instructed to make the submission by the Board in the first place.

[65] I find that Mr McKenzie did not instruct or direct Ms Catanuto not to file the submission. Even if he had he did not appear to have the authority of the Board to give such a direction/instruction to Ms Catanuto. Mr McKenzie made certain comments to Ms Catanuto about what she proposed to file which she considered. However, ultimately Ms Catanuto made her own decision about finalising the content of the submission.

[66] Ms Butcher submits that Ms Catanuto engaged in serious misconduct by not putting Mr McKenzie or the Board on notice that she had finalised the content of the submission herself. I do not accept that because I cannot find any requirement for Ms Catanuto to do so.

[67] I find the Board did not give Ms Catanuto any specific instructions around the content or filing of the submission. The Board's minutes record *Melanie to complete submission to NDHB*. There was no evidence of any instruction by Mr McKenzie as to the content of the submission (although he did discuss the submission with Ms Catanuto) nor is there any evidence of any requirement for Ms Catanuto to follow Mr McKenzie's instructions.

[68] It is not clear why the Board rejected Ms Catanuto's explanation at the disciplinary meeting that she had taken into account the matters discussed with Mr McKenzie (which she had assumed were the views of the Board) before finalising the submission.

[69] It was only on the third day of the Authority's investigation that the submission was produced to the Authority. And it was only at this point in the proceedings that Mr Morgan identified for the first time that it was the content on page 4 of the submission that was in issue, not the fact that Ms Catanuto had prepared

and sent it. However, Mr Morgan was unable to point to any information in the submission which was *highly sensitive and confidential*.

[70] The wording used on page 4 of the submission on its face appears to be non-controversial and I find that a fair and reasonable employer could not view that content as serious misconduct in all of the circumstances. Once again the matters referred to in Ms Butcher's submissions⁷ were not put to Ms Catanuto at any time for her response.

Probationary clause

[71] Ms Catanuto had a 90 day probationary clause in her employment agreement. The probationary clause at 2.4 of Ms Catanuto's employment agreement specifically provides that during the probationary period *competency, behaviour and conduct shall be appraised and monitored*. That did not occur. The Board and disciplinary subcommittee do not appear to have turned their minds to the probationary clause, instead proceeding directly to a serious misconduct without properly considering the contractual provisions that applied.

[72] I consider that a fair and reasonable employer would have invoked the probationary period clause by first advising Ms Catanuto that there were aspects of her competency, behaviour and conduct which it considered unsatisfactory. She should have been given an opportunity to improve her performance in those areas, the first step of which would have been for the Board to set out its expectations around her behaviour. That did not occur.

Non adherence to Trust Deed

[73] The Board is required under its Trust Deed to act in certain ways in order for its actions to be valid. The Trust Deed contains detailed provisions about the appointment of trustees and a quorum of not less than 60% of current trustees is required in order to transact any business. There appear to have been departures from the requirements of the Trust Deed and the decision to dismiss was made by a committee which did not have proper delegated authority to make such a decision.

⁷ Para.70(c)

[74] I accept Ms Swarbrick's submissions⁸ about the various departures from the Trust Deed that occurred and consider this further undermines the Board's ability to justify its decision to dismiss Ms Catanuto.

Summary

[75] The disciplinary letter contains numerous allegations, none of which I find a fair and reasonable employer could have viewed as amounting to serious misconduct, even if proven. The Board fundamentally breached its statutory good faith and procedural fairness obligations.⁹

[76] I accept Ms Swarbrick's submission that the Board was simply not in a position to make any findings on the various allegations because of the serious and fundamental flaws in its disciplinary process which included an inadequate and insufficient investigation into the disciplinary concerns, failure to consider Ms Catanuto's explanations, failure to understand or address the information she provided and failure to provide her with information on which the Board based its decision to dismiss.

[77] The disciplinary subcommittee knew Ms Catanuto had queries about the allegations and information supporting them and that she did not agree that the Board had properly authorised the disciplinary process in accordance with its rules. However the Board dismissed her without addressing these legitimate concerns.

[78] I find the Board is unable to justify its decision to dismiss Ms Catanuto because its actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances, contrary to the requirements of s.103A of the Act. Ms Catanuto's dismissal is procedurally and substantively unjustified.

What if any remedies should be awarded?

Subsequently discovered alleged serious misconduct

[79] The Board claims that after dismissing Ms Catanuto it discovered what it alleges were irregularities regarding her bank token use whilst employed. It says this is an example of subsequently discovered serious misconduct which should be reflected in any remedies.

⁸ See paragraph 64.

⁹ Section 4(1)A and s.103A(3) of the Act

[80] This allegation involves a concern that Ms Catanuto used two different bank tokens to access the Board's bank accounts when she had only been issued with one bank token to use. Ms Catanuto denies any wrongdoing and says it was the bank who assigned the second bank token to her to use after her first bank token could not be located.

[81] The Board's only evidence to support its bank token allegation was unsatisfactory hearsay evidence given by its accountant Mr Peter Byers. Mr Byers' evidence relies on assumption and supposition. He had no personal involvement in the matters in issue so I do not consider he is well placed to comment on what occurred and why.

[82] Mr Byers is not in a position to know what had occurred in the workplace on the day that Ms Catanuto's first token went missing, nor did he appear to be sure how the system of token use worked in practice. Mr Byers has some issues with Ms Catanuto and he also has a long standing professional association with the Board which may have however unwittingly coloured his evidence.

[83] I find that the limited evidence the Board seeks to rely on is unsatisfactory and falls far short of reaching the required standard of proof. No attempt has been made by the Board to investigate Ms Catanuto's explanation or to provide the Authority with any direct evidence to contradict her evidence about this matter. None of the evidence given by Mr Byers was put to Ms Catanuto in cross examination.

[84] I find that the Board has failed to provide reliable evidence to establish on the balance of probabilities that Ms Catanuto misused a bank token. I prefer Ms Catanuto's evidence that there was a problem with her original bank token and that it was the bank who allocated her user ID to another token to use as an interim measure to address the problem of the missing token.

[85] Ms Catanuto's evidence was that she was acting in accordance with the bank's instructions to her at the time and no evidence has been produced to contradict that explanation. I am therefore not satisfied on the balance of probabilities that Ms Catanuto engaged in subsequently discovered misconduct, so consider the bank token issue has no impact on remedies.

Mitigation

[86] I am satisfied that Ms Catanuto took appropriate steps to mitigate her loss.

Lost remuneration

[87] I am satisfied that Ms Catanuto has lost remuneration from 07 September because she has not obtained work since she was dismissed. It is appropriate for her to be compensated for that loss. The Board is ordered to pay Ms Catanuto lost remuneration from 07 September 2013 to the date of this determination under s.128(2) of the Act. I decline Ms Catanuto's claim for future lost earnings.

Distress compensation

[88] I accept Ms Catanuto's evidence that she has been extremely stressed, humiliated and distressed by these events. She was still obviously distressed during the Authority's investigation. She has deposed to the effects of the dismissal on her in her affidavit and I accept that evidence. I do not traverse that evidence in detail here in order to preserve Ms Catanuto's privacy.

[89] Ms Catanuto's dismissal was unexpected. She was subject to a probationary clause which was not used. The first time she was formally made aware of concerns was when she was presented with a disciplinary letter containing 22 allegations which the Board categorised as serious misconduct, despite some of the allegations clearly not being capable of being viewed as serious misconduct. A week later she was dismissed and escorted off the premises.

[90] This was a major shock to Ms Catanuto who had moved her family to Northland in the expectation of ongoing employment with the Board. I accept that the manner in which she was dismissed was unprofessional, inappropriate and extremely humiliating to her. She has suffered financially, emotionally and career wise as a result of her unjustified dismissal.

[91] I consider this is a case in which it is appropriate to award a high level of distress compensation to reflect the actual humiliation, loss of dignity, and injury to feelings Ms Catanuto's has suffered. The Board is ordered to pay Ms Catanuto \$12,000 compensation under s.123(1)(c)(i) of the Act for the humiliation, loss of dignity, and injury to feelings she has suffered.

Damage to reputation

[92] Ms Cantanuto claims \$10,000 compensation for damage to her reputation. I decline this claim because the impact on her reputation is one of the factors considered when assessing distress compensation. It has therefore already been adequately reflected in that award.

Contribution

[93] Section 124 of the Act requires the Authority to assess whether Ms Catanuto has contributed to the situation which gave rise to her personal grievance, and if so to reduce remedies accordingly. In order to make a reduction to remedies on the grounds of contribution, I must be satisfied on the balance of probabilities that Ms Catanuto has engaged in blameworthy conduct which contributed to her unjustified dismissal.

[94] Ms Butcher identifies three matters which she submits were both causative of Ms Catanuto's dismissal and amounted to blameworthy conduct by her.¹⁰ I do not accept these submissions for the same reasons the Board is unable to establish serious misconduct to the required standard in respect of allegations 1, 2 and 5.

[95] For clarity's sake I also record that I heard evidence on all of the allegations as the Board indicated during the Authority's investigation that it intended to reply on them as examples of contribution if the dismissal was held to be unjustified. I find that none of the other disciplinary allegations have been proven to the required standard of the balance of probabilities. They therefore do not support a reduction in remedies on the grounds of contribution.

[96] I do not accept Ms Butcher's submission that Ms Catanuto behaved in a manner that was obstructive to the Board reaching a fair outcome during the disciplinary process. Ms Catanuto was unsurprisingly stressed and distressed by the manner in which the Board treated her.

[97] I accept Ms Swarbrick's submission that it is acceptable for Ms Catanuto to defend herself in a robust manner given that the allegations were so unclear, that there was considerable uncertainty as to the validity of the disciplinary panel, and that her requests for information were not adequately responded to.

¹⁰ See paragraph 90.

[98] Ms Cantanuto would have been entitled to insist that the Board provide her with all relevant information before she answered the disciplinary allegations. However instead of delaying matters she instead elected to respond as best and fully as she could in light of what had been presented to her. This included providing as much information as she could at the earliest stage to address the Board's concerns.

[99] Whilst I would have had issues with some aspects of Ms Catanuto's behaviour after the dismissal decision was communicated to her, it is not necessary for me to consider those issues given she has withdrawn her reinstatement claim.

[100] I do not consider that there was any conduct by Ms Catanuto prior to her dismissal which has been established on the balance of probabilities as blameworthy to the extent required to reduce the remedies which would otherwise have been awarded. Accordingly Ms Cantanuto's remedies are not to be reduced on the grounds of contribution.

What if any costs should be awarded

[101] The parties are encouraged to resolved costs by agreement. If that is not possible Ms Catanuto has 14 days within which to file costs memorandum, the Board has 14 days within which to respond, with Ms Catanuto having a further 7 days to reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority