

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 2
3128234

BETWEEN JAMIE DALLY
Applicant

AND FLUID CHEMICALS NZ
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Kirsty Petersen, advocate for Applicant
Margaret Robins, counsel for Respondent

Investigation Meeting: 31 March, 1 and 19 April 2022

Further information and
submissions 26 April, 10 May, 3 June, 11 and 31 August 2022

Determination: 6 January 2023

DETERMINATION OF THE AUTHORITY

- A. The dismissal of the applicant Jamie Dally was not justified.**
- B. He was not disadvantaged unjustifiably.**
- C. As remedies for the personal grievance the respondent Fluid Chemicals NZ Ltd is to pay the applicant compensation of \$4,500, and 4 weeks' pay as reimbursement of lost wages together with annual holiday pay and interest on the lost wages.**
- D. The respondent breached its duty of good faith and is ordered to pay a penalty of \$1,000, half to the applicant and half to the Crown.**
- E. The respondent did not breach the Health and Safety at Work Act 2015.**
- F. Costs are reserved.**

Employment Relationship Problem

[1] Jamie Dally was employed as Warehouse Manager by Fluid Chemicals NZ Ltd (FCL) between 1 August 2019 and 7 October 2020.

[2] He was dismissed immediately at the end of a disciplinary meeting held on 7 October to enquire into his conduct and performance, about which concerns had been raised with him by FCL at a meeting on 11 September 2020.

[3] Mr Dally applied to the Authority for an investigation and determination of several claims. They included unjustified disadvantage and unjustified dismissal personal grievances, and claims of breach of the Employment Relations Act 2000 (ER Act) and the Health and Safety at Work Act 2015.

[4] Personal grievance remedies of compensation and remuneration of lost wages including interest are claimed, and penalties for breach by FCL of the good faith requirements of the ER Act.

[5] In relation to the Health and Safety at Work Act, a determination is sought that FCL breached s 92(1) which, amongst other things, prohibits taking action, or threatening to take action, against a person with intent to coerce or induce that person to perform or not perform a function under the Act.

[6] A breach of s 92(1) the Health and Safety at Work Act is an offence and is punishable on conviction by a fine. The Authority cannot enter conviction or impose a fine, but it can give a determination as to whether elements of an offence are present in the circumstances, without determining that an offence has been committed. In some circumstances a breach of the 2015 Act, if established, might be relevant to the determination of a personal grievance claim.

[7] The parties undertook mediation but Mr Dally's claims remained unresolved.

[8] At an investigation meeting of the Authority, Mr Dally, his partner Lichelle Ngawini and a business associate Henare Manuel gave evidence and were questioned by the Authority, counsel Ms Robins and advocate Ms Petersen. For FCL, Kristen de Monchy and Ben Anderson, gave evidence and were questioned. They are directors, co-managers, and part-owners of FCL, a family business.

[9] Phone records were analysed and provided to the Authority after the investigation meeting. The parties gave the Authority every assistance, including written submissions from Ms Petersen and Ms Robins.

[10] This determination is issued outside the three month time frame of s 174C of the ER Act. An extension of time has been given by the Chief of the Authority.

[11] The determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

Issues with Mr Dally are raised by FCL

[12] After Mr Dally had been employed as Warehouse Manager for about a year, Mr Anderson and Ms de Monchy became increasingly unhappy with his performance and conduct. They experienced from him a negative attitude shown towards them and their business, and he seemed unreceptive and unresponsive to attempts made by them to understand his apparent issues and to get him and FCL working cooperatively. His position was key in a team in which there needed to be harmony, productivity, and respect shown for others Mr Dally worked with including his managers and staff.

[13] Another issue emerged after it came to the notice of Mr Anderson that Mr Dally had become a director of a company, Rapid Hire Ltd, incorporated in November 2019. Rapid Hire Ltd described itself on-line as providing equipment and labour hire within the Auckland region. Mr Dally and Henare Manuel were listed as directors and equal shareholders.

[14] FCL became concerned about whether Mr Dally was attending to other activities during the work hours for which he was being paid by FCL.

[15] Attempts by Mr Anderson and Ms de Monchy in September and October 2020 to get Mr Dally to be upfront about what he was doing, cease any activities that were not compatible with his employment obligations to FCL, and improve his attitude and approach, were unsuccessful ultimately and ended with the summary dismissal of Mr Dally on 7 October.

FCL's attempt to have Mr Dally address issues

[16] When Mr Anderson and Ms de Monchy first became concerned about Mr Dalley's performance and conduct they asked him to consider their concerns and address them.

[17] Mr Dally was sent a letter on 4 September 2020 (mistakenly dated 8 September), headed 'Concerns about our employment relationship'. Details were given in the letter by Mr Anderson and Ms de Monchy of various matters, some of which were major issues that Mr Dally seemed to have, and some of which were labelled 'our major issues'.

[18] A meeting was requested with Mr Dally to provide 'an opportunity for us all to table any issues we consider relevant'.

[19] The meeting was proposed to be voice recorded, with a copy to be made available to Mr Dally if he wished. He was invited to have a representative attend.

[20] Near the beginning of the letter, and again at the end, it was stated clearly that a performance review or disciplinary process had not been commenced by FCL and its letter to Mr Dally and request for a meeting, was a genuine attempt by Mr Anderson and Ms de Monchy to table all their concerns.

[21] The 4 September letter concludes

Our desire is to engage in a respectful positive discussion with you and your representative with the ultimate aim of putting the train back on the track, so to speak.

The 11 September meeting

[22] The requested meeting took place on 11 September 2020 at FCL. Mr Anderson and Ms de Monchy attended with FCL's representative Ms Robins. Mr Dally chose to attend by himself.

[23] A recording was made of the discussions and a transcript of it was later given to Mr Dally.

[24] It was a long meeting. Mr Dally confirmed near the start that he had taken advice before attending. He asked if the meeting would be held *without prejudice* or would be turned into a disciplinary meeting. Ms Robins replied that it was not a without prejudice meeting and that FCL could commence a disciplinary process but that if it decided to do so, that process would start from the beginning.

[25] Mr Dally was assured that he would not be given a warning and no other disciplinary action would be taken, unless a disciplinary process had been commenced first.

[26] It appears from the transcript that Mr Dally was closed and defensive rather than frank and open in his communication style. He seemed to have been following a script, from the way he mechanically responded. Mr Anderson and Ms de Monchy found this frustrating and unhelpful.

[27] After the meeting of 11 September advice was given to Mr Dally by email on 14 September of a further issue brought to the attention of FCL. This was stated to be the approach Mr Dally had made to a person employed by a temp-staff supply firm and assigned to work at FCL. This person had been approached by Mr Dally to work in his business. He was asked by Ms de Monchy to respond with information relevant to that issue.

[28] Ms Petersen was by now representing Mr Dally and she wrote to FCL about the issues raised and the attempts made to resolve them. Her letter suggested a conciliatory and rehabilitative approach was favoured by Mr Dally

At the end of the day, a good working relationship in a healthy and safe working environment is what is really important to our client. He wants both parties to be able to work together in a cohesive and collaborative manner. He has taken on board your feedback from the meeting and indicates a willingness to hear from the company going forward and adopt more of a solutions focussed approach.

[29] There was further correspondence around the issues that had been under discussion since early September, until a shift in approach was advised by FCL in a letter from Ms Robins to Ms Petersen on 30 September 2020.

[30] Ms Robins advised that a genuine attempt made by Mr Anderson and Ms de Monchy to resolve issues in a constructive way had failed, leaving them with no reasonable alternative but to commence a disciplinary process. The start of that was her letter, Ms Robins advised.

[31] The issues FCL intended to address in that disciplinary process were set out with some detail. The first of these was external business interests which Mr Dally appeared to be occupied in, placing him in breach of his employment agreement.

[32] The second issue to be addressed was Mr Dally's attitude towards health and safety matters, and towards Mr Anderson and Ms de Monchy and FCL.

[33] Mr Dally was warned in the letter that FCL had grave concerns about his integrity in his dealings with Mr Anderson and Ms de Monchy, and that they were considering whether trust and confidence could be maintained in him as their employee.

[34] He was also warned that if it was found he had seriously breached his employment agreement in relation to external business interests and his attendance to those, or if FCL found it had lost trust and confidence in him, the likely potential outcome was his dismissal either with or without notice.

[35] He was further advised that in the event his employment was continued after the disciplinary process ended, a performance development process would be implemented. This was expressed to be a response to advice Mr Dally had given that he was finding the job too much and could not keep up. It was also a response to FCL's own observations of his performance.

[36] Mr Dally was requested to attend a meeting as part of the disciplinary process.

The 7 October disciplinary meeting

[37] Mr Dally attended with Ms Petersen. Mr Anderson and Ms de Monchy had Ms Robins with them. A recording was to have been made but unfortunately it seems technical problems thwarted the plan.

[38] Near the end of the meeting a short break of a few minutes was taken by Mr Anderson, Ms de Monchy and Ms Robins. When the meeting resumed Ms Robins

announced that Mr Dally was dismissed with immediate effect because Mr Anderson and Ms de Monchy had lost all trust and confidence in him.

[39] The Authority finds that FCL was driven to dismiss Mr Dally because he was believed to have been untruthful about his involvement in another business and could not be believed when he indicated he would absorb the concerns FCL had raised about him and would change his conduct.

[40] The root of FCL's belief that Mr Dally had been untruthful was the explanation he gave Mr Anderson about an email sent to the firm Hire Towers Ltd.

The Hire Towers email

[41] At the meeting of 7 October, Mr Dally was asked about an email he had sent to Hire Towers, asking the firm's charges for the hire of a skyjack scissor lift for 2 months. The request was made by Mr Dally ostensibly in his capacity of FCL Warehouse Manager, using FCL's email address. A copy of Hire Tower's terms and conditions of hire document was also requested.

[42] Mr Dally sent the email to Hire Towers barely two weeks after his company Rapid Hire Ltd was incorporated.

[43] When shown the email Mr Dally explained that it had been sent at Mr Anderson's request because of an interest he had expressed in FCL using skyjack scissor lifts.

[44] Mr Anderson quickly rejected that explanation because he believed, presumably from his own recollection, it was untrue and because FCL had no use for scissor lifts in its operations as forklift hoists were used. In their discussion Mr Anderson also recalled that Mr Dally had earlier mentioned he had a personal interest in scissor lifts and had bought several such machines with his business partner Henare Manuel.

[45] Mr Manuel confirmed in his evidence that four scissor lifts had been bought soon after Rapid Hire Ltd had been formed.

Mr Dally was considered to be untruthful

[46] In his evidence Mr Anderson said of Mr Dally's explanation

This was a lie and I told Jamie, at the meeting, that the only discussion we had about scissor lifts was when he told me he was wanting two scissor lifts to hire to a mate who owned a fire alarm installation business. Fluid Chemicals has no use for Sky jacks.

[47] This evidence was followed with

In the end I didn't believe anything Jamie said.

.....

At the end, I had lost all trust and confidence in him as our employee.

[48] In her evidence about the Hire Towers email, Ms de Monchy said

..... we knew he was not telling the truth when he claimed he told us he was running the Rapid Hire business. We knew he was not telling the truth when he claimed Ben told him to get a quote for a Sky jack.

[49] Further, she said

..... we did not believe him when he said he was now taking the information on board and would collaborate in future.

[50] Ms de Monchy in her evidence viewed Mr Dally as having failed to be open and honest, and as having been prepared to lie. She said his lies had influenced FCL to dismiss Mr Dally instantly rather than on notice, the period of which was four weeks under the employment agreement.

[51] Ms de Monchy confirmed she had not put it to Mr Dally that she did not believe him. He had not been expressly confronted with her view of him in this regard, which she said was 'part and parcel' of her assessment of his conduct overall because FCL attached 'high importance' to the honesty of its employees. She considered it would have been implicit from the discussion where Mr Dally's version of events had been disagreed with, that he was not to be believed.

[52] Mr Anderson confirmed that he had not regarded Mr Dally as a habitual liar but his 'unbelievability' had nevertheless played a major part in the decision to dismiss him. He confirmed that it was not put to Mr Dally that he was regarded as being untruthful.

[53] In his evidence Mr Anderson also said that if Mr Dally had been forthcoming, he might not have been dismissed.

[54] The Authority finds that during the 7 October 2020 meeting that ended with Mr Dally being instantly dismissed, it was not put to him that he was being untruthful and could not be believed.

[55] In her submission Ms Robins addressed the Authority's observation made during the investigation meeting, that at the 7 October meeting Mr Anderson and Ms de Monchy had not said words to the effect, as Ms Robins put it

We do not believe what you are saying and we have reached the preliminary decision to dismiss you without notice. Would you like to respond to that?

[56] Mr Robins described this as a 'tick box' approach which, she submitted, was neither necessary nor helpful.

[57] The Authority disagrees and finds that it was the view taken of Mr Dally's lack of truthfulness that led to his immediate dismissal. This was the precise reason for his dismissal, although he was given only the more general reason that his conduct had led to the loss of his employer's trust and confidence.

[58] The Authority accepts that loss of trust and confidence is likely to result from a belief being formed that an employee is being untruthful, particularly when that disbelief is great enough to extend to anything important the employee may say during a disciplinary process.

[59] It is a deep stain on the character and reputation of any employee to be found dishonest and untruthful. This is even more so with an employee such as Mr Dally who had been employed in management position carrying with it a higher degree of trust to be placed in the employee.

[60] The Authority considers that a fair and reasonable employer could and should have expressed to Mr Dally its belief that he had been untruthful, inviting him to respond to that accusation if he wished. At the start of the meeting FCL had been looking to see if Mr Dally was able to express some sincere and genuine commitment to change his behaviour, but the belief that he was dishonest in his responses quashed any hope in that regard.

[61] The Authority was referred to the Employment Court decision in *Emmanuel v Waikato District Health Board*¹. The Court held that if an employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate². The Court concluded that untruthful or misleading statements made by the employee amounted to serious misconduct, leaving it open to the employer to dismiss.

[62] Upon giving an explanation to her employer for her conduct, the employee was told she was disbelieved. In the course of the disciplinary process the employer expressly alleged the employee had misled the employer by failing to provide a truthful explanation³. She was given an opportunity to respond to that particular allegation and others⁴. The employer's reasons for its decision to dismiss, included a finding that the employee's explanation was not credible and the employee had deliberately misled her employer⁵.

[63] The Authority considers the Court's decision turns on different facts, including the employer putting to the employee, during the disciplinary process, the allegation that the employee had failed to provide a truthful explanation. That step was missing in the disciplinary process conducted by FCL with Mr Dally.

Test of justification - s 103A of ER Act

[64] Part of the test of justification at s 103A(3) of the ER Act, requires the Authority to consider whether the employer raised the concerns the employer had with the employee before dismissing or taking action.

¹ [2019] NZEmpC 81

² Para [62]

³ Para [25]

⁴ Para [29]

⁵ Para [31]

[65] The Authority finds that a principal concern FCL had with Mr Dally, his untruthfulness, was not directly or expressly raised with him before Mr Dally was summarily dismissed.

[66] It follows that Mr Dally was not given the opportunity required by s 103A(3) to respond to that particular concern before dismissal was confirmed.

[67] The deficiency is not to be classed as a defect of process, and in any event it was not a minor defect and it was a defect resulting in Mr Dally being treated unfairly.

[68] The evidence of how the meeting of 7 October proceeded shows that at the beginning there was a distinct possibility that it may not have ended in the dismissal of Mr Dally. This possibility vanished once it was concluded by Mr Anderson and Ms de Monchy that he was being untruthful. It had been put to Mr Dally that the meeting was an opportunity for him to say he could have approached things differently and that he would do things differently in the future. The meeting was an opportunity for him to come clean that he had not told the truth about the Hire Towers email or about informing FCL earlier of the scale of his involvement with Rapid Hire.

[69] The test of s 103A of the ER Act is not met and the dismissal must accordingly be determined unjustified. Mr Dally has a personal grievance.

Contributing behaviour

[70] The Authority finds there was contributory conduct by Mr Dally. He did give Mr Anderson and Ms de Monchy reason to lose trust and confidence in him. Disciplinary action short of summary dismissal might have been justified in the circumstances.

[71] The Authority finds that Mr Anderson formed an honest and reasonable belief that Mr Dally had lied to him about the emailed request for a skyjack price. He formed that belief after a simple enquiry which required only a reliable memory and question and answer between Mr Anderson and Mr Dally, the two people who best knew the truth.

[72] On behalf of FCL, Mr Anderson was in a position to make the call about the truth of Mr Dally's explanation. FCL may have had grounds to dismiss for that single act of untruthfulness, had it been put to Mr Dally that he was lying.

[73] As well as giving an untruthful explanation, there was the conduct of Mr Dally sending the email to Hire Towers Ltd, and misusing his employers name and time for his own business purposes. He passed off FCL as the enquirer when it was really himself personally.

[74] The Authority also considers as contributory behaviour Mr Dally's own expressed lack of trust and confidence in FCL but without having any reasonable basis for regarding his employer in that light. It seems likely the employment would not have continued for many more months, particularly when Mr Dally was actively engaged in his expanding Rapid Hire business and, in his attitude, seemed to have set himself against Mr Anderson and Ms de Monchy.

[75] Mr Dally's views given in his evidence as to the motives and intentions of Mr Anderson and Ms de Monchy were delusional, the Authority finds. They indicate a very poor prognosis for the future of the employment if his judgement of FCL was so mistaken. The Authority considers from all the evidence given, that FCL was principally focussed on trying to help Mr Dally by 'putting the train back on the track', as it had earlier told him it wanted to do.

[76] Apart from one instance of an audio recording made of Mr Dally without his knowledge or consent, the Authority has found nothing underhand, deceitful, or misleading about the way FCL approached the concerns raised with him, or the way FCL tried to have them addressed at the lowest level without escalation to a disciplinary process.

[77] The Authority has found that FCL made a mistake in the disciplinary process when it did not put to Mr Dally the concern held about his truthfulness. Apart from that mistake there was nothing to justify the vivid descriptions Mr Dally gave of the process or the sinister intent of FCL he claimed lay behind it. In this regard he fancifully likened FCL's process and intent to 'playing Gotcha' with him.

[78] The evidence shows that Mr Dally was engaged in his own business while he was supposed to be working for FCL. The full extent of that is unclear because Mr Dally was resistant to attempts by FCL to find this out.

[79] Recruiting temp staff working at FCL placed FCL in breach or potential breach of contract with the staff hire firm. Mr Dally is likely to have quickly been told this if he had sought permission from FCL to employ temp staff working there.

[80] A spreadsheet was found with the names of some 19 persons employed or engaged by Mr Dally's business to work at South Auckland covid testing stations. Mr Dally mentioned to an FCL employee that he had payroll responsibility for 19 staff.

[81] The Authority finds that Mr Dally was in breach of his employment agreement, which required him at all times to work for the benefit of FCL and, unless permitted by FCL, not to engage in any employment, paid or unpaid, which might adversely affect the performance of his duties and position with FCL.

[82] This behaviour was blameworthy and causally connected to the situation that gave rise to Mr Dally's unjustified dismissal.

Phone records

[83] These were supplied by FCL and Mr Dally at the request of the Authority. The records were analysed by the parties and submissions made about what they showed or did not show.

[84] As Ms de Monchy pointed out in her analysis, Mr Dally was not dismissed for using FCL's phone or his own phone to conduct his personal business. Reports to Mr Anderson and Ms de Monchy about Mr Dally being seen to be on the phone quite often, increased their suspicion that he was engaged in his own business during the time he was supposed to be working for FCL. That in turn led to FCL's attempts to have Mr Dally come clean and address the concerns. Mr Dally's unsatisfactory response to those attempts led in further turn to the disciplinary meeting of 7 October and the dismissal of Mr Dally at the end of it.

[85] Ms Robins submitted that the phone records are relevant to contribution and to the credibility of Mr Dally. The Authority agrees. The records substantiate other evidence that Mr Dally was engaged in his own business, Rapid Hire in particular, during FCL work time and in breach of the employment agreement.

[86] The degree of that engagement has not been established with any great precision largely because Mr Dally has avoided or obscured the issue. It is understandable why FCL lost patience with him and ultimately lost trust and confidence in him, through his evasive responses to reasonable enquiries.

[87] In matters of credibility the Authority has preferred the evidence of Mr Anderson and Ms de Monchy given for FCL.

[88] The Authority finds that the phone records add weight to other evidence that Mr Dally was substantially to blame for the situation that led to his unjustified dismissal.

Reduction in remedies for personal grievance

[89] Where there has been contributory behaviour, under s 124 of the ER Act the Authority must reduce remedies that would otherwise be awarded, if the actions of the employee require that.

[90] The Authority considers that Mr Dally's untruthfulness was blameworthy conduct and was conduct causally connected to the decision of FCL to dismiss him. The evidence of Mr Anderson and Ms de Monchy shows that Mr Dally's untruthfulness they perceived, drove their decision to dismiss.

[91] The Authority finds the contribution was substantial, as Mr Dally's behaviour in this regard struck at the heart of a relationship required to be founded on trust and confidence.

[92] In resolving an employment relationship problem by investigation and by making a determination according to the substantial merits of a case, the Authority, under s 157(3) of the ER Act, must act as it thinks fit in equity and good conscience. In doing so it may not act inconsistently with the ER Act or ER Regulations, or with the employment agreement.

[93] The Employment Court has interpreted the ER Act to exclude the reduction of remedies to the point of entire elimination. The Court also found that reduction by 50% or even 25% is significant. In the same decision it found that in some cases the absence

of any remedy may be determined as an appropriate exercise of the equity and good conscience jurisdiction under the ER Act⁶.

[94] The Authority determines that Mr Dally substantially contributed to the situation that gave rise to his unjustified dismissal. Section 124 of the ER Act requires the remedies to be reduced and his contribution should also, in equity and good conscience, be reflected in those remedies for his unjustified dismissal.

Remedies for unjustified dismissal

[95] The remedies of compensation and reimbursement of lost wages are sought for Mr Dally.

[96] The compensation sought for Mr Dally is in the region of \$20,000 to \$25,000. The Authority considers the reduction should apply at a lower starting point. It must be taken into account that Mr Dally was not dismissed from the only employment or occupational engagement he had, as many dismissed employees are. Mr Dally served another enterprise of his own, although he had resisted reasonable requests by FCL to disclose the extent of his involvement in Rapid Hire. He was not a person suffering a degree of humiliation and hurt feelings measured by the loss of his only source of work and potential income. He had also indicated to Mr Anderson that his private business was growing at a rate that might require him soon to resign from FCL.

[97] The Authority considers no more than \$18,000 to be the compensation he would have been entitled to if he had been unjustifiably dismissed without any contribution from him.

[98] Starting from \$18,000 under s 123(1)(c)(i) of the ER Act and reducing it by 75% for significant contributory behaviour, produces an award of \$4,500 compensation to be paid by FCL to Mr Dally.

[99] Starting from a period of 12 weeks as claimed for lost wages, four weeks is awarded, taking into account contribution and mitigation of loss. Four weeks is also the period of notice which could have been given with a justified dismissal for loss of trust and confidence resulting from untruthfulness as well as performance and attitude.

⁶ *Xtreme Dining Ltd trading as Think Steel v Leighton Dewar* [2016] NZEmpC 136, at paras [216] to [222]

[100] The wages are to be reimbursed to Mr Dally by FCL under s 123(1)(b), and they are to include annual holiday for the period of four weeks. Interest on the total of wages and holiday pay is to be paid from 31 August 2022, the date the investigation finished.

Unjustifiable disadvantage

[101] An employer is entitled to address concerns with an employee, provided the concerns are genuine and they are addressed reasonably. It is an important way in which parties to an employment agreement may discharge their mutual good faith obligations to be responsive and communicative.

[102] Such communications are not ordinarily privileged or protected from being brought up again or repeated later in a disciplinary context. Mr Dally asked and was told by Ms Robins that the 11 September meeting was not without prejudice. He was told that a disciplinary process could be commenced at a later point but that he would be clearly informed if that was going to happen.

[103] The Authority finds no unjustifiable action evident from the way FCL's interactions with Mr Dally moved from a reconciliatory approach to a disciplinary phase, culminating in the meeting of 7 October and the dismissal of Mr Dally at the end of it.

[104] The Authority finds that Mr Dally was not disadvantaged in his employment or conditions of employment, by the way FCL moved from trying to address concerns about him to conducting a disciplinary investigation based on those concerns. In advance of the 7 October meeting, Mr Dally was clearly advised in writing of the nature of that proposed meeting, by letter from Ms Robins to Ms Petersen on 30 September.

[105] Mr Dally had apprehended that the meeting might result in the loss of his job, so he should have been under no illusion about the disciplinary nature of it.

[106] The Authority finds no basis on which a grievance of unjustified disadvantage can be sustained by Mr Dally.

Breaches of good faith

[107] Three particular claims were made for Mr Dally in this regard, as follows

- (i) Mr Anderson voice recorded Mr Dally without informing him or asking him.
- (ii) FCL misled or deceived Mr Dally about the true purpose of a meeting held to discuss issues in the employment relationship.
- (iii) FCL misled or deceived Mr Dally about the existence of multiple emails sent by him to his private business Rapid Hire.

(i) Undisclosed audio recording

[108] A meeting took place in FCL's board room on 3 September 2020 to discuss a health and safety incident that had occurred in the warehouse about a week earlier. Mr Dally had become exercised by this incident and FCL's handling of it. To Mr Anderson and Ms de Monchy his responses seemed out of proportion to the circumstances. They described Mr Dally as 'steaming', displaying anger and emotion.

[109] Mr Anderson arranged an assistant, Bronwyn, to be present at the meeting and he told Mr Dally she was there to take notes.

[110] At the start of the meeting Mr Anderson switched on the record function of his phone. He did not tell Mr Dally the meeting was being recorded electronically as well as by note taking. It was many months before Mr Dally found out about the recording, which was not revealed until preparations were being made by FCL for the Authority's investigation.

[111] The Authority has been given no explanation as to why Mr Dally was not told the meeting was being recorded. Mr Anderson said he made the recording to have it available for Ms de Monchy to listen to. She had responsibility for the health and safety side of FCL's operations but was not at the meeting. This does not explain the need for a recording when a note-taker had been arranged to be present.

[112] The Authority concludes it was made partly for its potential to be used to Mr Dally's disadvantage, depending on what he might say or how he might say it. That is how it did get used, as evidence presented by FCL to show Mr Dally's audible agitation during the meeting and to show the way Mr Dally was behaving towards Mr Anderson and the company. It was not used, nor was it intended to be, to put Mr Dally in any good light.

[113] An audio-visual or audio recording made of interactions between employee and employer has the potential to become evidence or information the Authority may be asked to admit and take account of in an investigation. That is just one reason why good faith requires the making of the recording, whether by the employer or the employee, should be disclosed in advance and an opportunity given to all meeting participants to decide if they want to be recorded.

[114] The Authority finds that FCL failed to comply with its obligations of good faith at s 4 of the ER Act, in recording the meeting without first asking Mr Dally. If asked he may well have wondered why a recording needed to be made when a note taker was to be used. He may have consented, provided he was given access to the recording, or he may not have consented, but he was not offered the option.

[115] The Authority finds that FCL without reasonable cause was not open with Mr Dally about what it was doing. The employer acted in a way likely to deceive him by drawing attention to the presence of Bronwyn as note taker, implying that a record was to be made only in that form and not in some other way as well.

[116] Under s 4A of the ER Act, a party to an employment relationship becomes liable to a penalty only if, in failing to comply with the duty of good faith, the failure was deliberate, serious and sustained.

[117] The Authority is satisfied FCL's failure was deliberate. Mr Anderson intentionally turned on the recording device. Whether or not he had planned to in advance, he decided that is what he would do rather than take the alternative course of leaving it off, at least until he had asked Mr Dally what his wishes were.

[118] The breach was serious. The recording or parts of it could potentially be used against Mr Dally, as in fact happened. Secrecy was intentional, indicating the recording of Mr Dally was important to FCL. By keeping him in the dark Mr Dally was deprived

of a right to withhold consent to being recorded, if he had wanted to decline. There was some intrusion into the privacy of Mr Dally when, without his knowledge, others not at the meeting could later on listen to him speaking to Mr Anderson and becoming upset. Advantage was available to be taken of Mr Dally's unawareness the recording was being made.

[119] The breach was sustained. The recording device was left in operation for about an hour until the meeting ended, and the existence of the recording was kept from Mr Dally by FCL for many months afterwards. It was made and kept for a time when it might be of use to FCL, potentially to the disadvantage Mr Dally.

[120] It is not the point that a skilled notetaker using shorthand could have made an identical or very similar paper record to the electronic one. It is the lack of openness of the employer's actions that characterises the breach of good faith.

[121] Mr Dally has complained of the feeling he had later on before he was dismissed that FCL was trying to set him up. Secret recording after it has been revealed is conduct capable of arousing suspicion about a party's behaviour in that regard and lead to some deterioration in the employment relationship, where one still exists.

Penalty for breach of s 4 of ER Act

[122] The Authority concludes that the breach should be met with a penalty but one at the lower end of the range. The maximum for a company such as FCL is \$20,000 under s 135 of the ER Act. Under s 136, the Authority can order all or part of a penalty must be paid to any person.

[123] The principles for determining penalties have been set out recently by the Employment Court in *Shah Enterprise NZ Ltd and another v A Labour Inspector*⁷.

[124] Applying those principles, imposing a penalty in the circumstances will be consistent with the objects of the ER Act and the promotion of those. Employment relationships are required to be built on the legislative requirement for good faith behaviour; s 3(a) of the ER Act.

⁷ [2022] NZEmpC 177

[125] A breach of good faith strikes at the heart of the ER Act and its good faith underpinnings.

[126] A penalty will also aid the Authority to discharge its role to promote good faith behaviour; s 157(2) of the ER Act.

[127] The breach – using a recording device without informing Mr Dally - was intentional but was confined to a single episode and a single employee.

[128] There is nothing to suggest Mr Anderson had planned in advance of the meeting to act as he did and record Mr Dally. Neither was entrapment a motive, as the Authority accepts that Mr Anderson and Ms de Monchy were making considerable and sincere efforts to try and get through to Mr Dally their concerns about his attitude and behaviour generally and trying to get him to turn these around.

[129] The Authority accepts that Mr Anderson and Ms de Monchy genuinely felt challenged and confronted by Mr Dally in his interactions with them and were concentrated on bringing a change in his ways if they could. The recording was not a gratuitous or cynical action and there is no evidence that FCL habitually acted in this way.

[130] There is no suggestion that the breach led to any gain or loss financially, but a breach of this kind may cause harm to feelings, from a sense of privacy lost when others not present at the time the recording was made may later listen to it.

[131] FCL has acknowledged the circumstances in which it recorded Mr Dally without his knowledge but has not otherwise made amends in any way.

[132] A penalty will serve to deter others from this not infrequent behaviour in employment, indulged in by employers and employees alike, to make recordings without the knowledge of the person recorded.

[133] There is no issue with FCL's ability to pay the penalty of \$1,000 which is imposed by the Authority under s 135 of the ER Act for a breach of s 4A. The amount reflects a lower degree of culpability.

[134] In the circumstances it is just that half the penalty amount should be paid by FCL directly to Mr Dally or Ms Petersen his representative, under s 136 of the ER Act.

[135] The \$500 balance is to be paid into the Authority for payment into a Crown Bank Account.

(ii) FCL's letter of 8 September and subsequent actions

[136] For Mr Dally it was claimed FCL's letter falsely represented that a performance review or disciplinary process was not being commenced by having the meeting on 11 September 2020. It was untrue, it was claimed, that the sole purpose of the meeting was for FCL and Mr Dally to discuss their respective concerns. It was claimed FCL had breached good faith in this way.

[137] Considering the letter against all the circumstances and events that led to the 7 October meeting, the Authority has been unable to conclude that FCL misled Mr Dally about its intentions towards the 11 September meeting.

[138] The Authority accepts that FCL approached that meeting in the hope that Mr Dally would show some willingness to address the concerns Mr Anderson and Ms de Monchy had, and that a way forward would be found to the mutual benefit of FCL and Mr Dally. The evidence satisfies the Authority that FCL did not approach the meeting with a closed mind towards rehabilitating and restoring the employment relationship. FCL had not planned all along to take disciplinary action. The change FCL did make to that course is fully explained by the resistance encountered from Mr Dally to the constructive and practical approach Mr Anderson and Ms de Monchy tried hard to take with him.

[139] The 11 September meeting was partly investigative, or fact-finding. An employer is always entitled to question an employee or seek information, provided the inquiry relates to the employment relationship and performance of that. An employer must usually investigate before it can properly be in a position to consider whether disciplinary action should be commenced.

[140] There was no breach of good faith arising from the letter.

(iii) Multiple emails sent to Rapid Hire

[141] It was claimed that FCL had stated on 18 December that 27 emails had been located which had been sent by Mr Dally to his business Rapid Hire in breach of his employment agreement.

[142] The Authority accepts that a genuine mistake was made by FCL after two emails bounced several times, giving the appearance of multiple emails concerning the same parties being sent and received.

[143] If a breach of good faith did occur in this regard, there was nothing deliberate or intentional on the part of FCL that could have supported a penalty under s 4A of the ER Act.

Breach of the Health and Safety at Work Act 2015

[144] The Authority was asked to determine whether FCL breached s 92(1) of the Health and Safety at Work Act 2015, by leading Mr Dalley to understand that FCL would retaliate against him if he continued to pursue issues he had raised about health and safety in FCL's workplace.

[145] The breach is claimed to have occurred in the following course of correspondence.

[146] On behalf of Mr Dally, on 17 September, Ms Petersen wrote to FCL a letter in which was the heading

Outline 'other issues' relevant to Mr Dally's working relationship with FCNZL (1)

[147] Under that heading was a paragraph apparently referring to the 'other issues'

7. Mr Dally intends to address these matters independently of this letter.

[148] In a letter responding to Ms Petersen sent on 18 September, Ms Robins wrote with reference to 'other issues', that Mr Dally had not presented them despite having had time to do so. Mr Dally was requested to state the other issues in writing by close of business Monday (21 September).

[149] Ms Robins wrote further

15. Ben and Kristen await receipt of Jamie's 'other issues' and will, on Tuesday, decide next steps based on the information they have received to that point.

[150] The Authority is unable to read any kind of threat of retaliation or of unlawful coercion, expressed or implied, within the words of paragraph 15 or anywhere else in the letter.

[151] The Authority finds no breach of s 92 discernible within FCL's response to Ms Petersen reproduced above.

Conclusion

[152] The Authority determines that Mr Dally has a personal grievance of unjustified dismissal.

[153] As remedies, after allowing for Mr Dally's substantial contributory behaviour, FCL is to pay him \$4,500 compensation and four weeks wages including holiday pay for that period. His weekly pay was \$1,276.92 gross.

[154] FCL is to pay interest on the four weeks wages and holiday pay calculated for the period from 31 August 2022 until paid in full, by using the Civil Debt Interest Calculator available at www.justice.govt.nz/fines/civil-debt-interest-calculator .

[155] The Authority determines that FCL breached the duty of good faith owed to Mr dally under s 4 of the ER Act and a penalty is to be paid under s 4A. FCL is ordered to pay \$1,000 under s 136 of the ER Act, half of which is to be paid to Mr Dally under s 136 and half to the Authority for payment to the Crown.

Costs

[156] Costs are reserved. Any application is to be made within 21 days of the date of this determination, and any reply within a further 21 days of any application made.

[157] The parties will be aware of the Authority's costs practice, although it is not an invariable one, and they will note that each of them had some measure of success in the outcome, when both contribution and liability are weighed up together.

Alastair Dumbleton
Member of the Employment Relations Authority