

**Note: This determination includes an order prohibiting certain information from publication.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 308  
3079634

BETWEEN	JOHN DEWAR Applicant
AND	WECARE FINANCE LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Karina McLuskie, counsel for the Respondent

Investigation Meeting: 11, 12 and 13 November 2020 in Hamilton

Determination: 20 July 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. John Dewar was unjustifiably disadvantaged by the actions WeCare Finance (WCF) took to suspend him.**
- B. Mr Dewar was also unjustifiably disadvantaged by how WCF conducted its inquiry but WCF's decision to dismiss him was nevertheless substantively justified.**
- C. In settlement of his personal grievances for unjustified disadvantage, and within 28 days of the date of this determination, WCF must pay Mr Dewar \$8,000 as compensation for humiliation, loss of dignity and injury to his feelings.**

**D. Costs are reserved. A timetable for memoranda is set if a determination of costs is needed.**

**Employment Relationship Problem**

[1] WeCare Finance Limited (WCF) dismissed John Dewar on 13 June 2019 for serious misconduct. Mr Dewar had been employed as its managing director since 14 May 2015. He was also a director and shareholder of the company.

[2] WCF is in the business of providing consumer credit finance, primarily for purchase of second-hand motor vehicles but also debt consolidation. Its board chair Peter De Luca made the decision to dismiss Mr Dewar after an investigation found fault with how Mr Dewar had used and accounted for some funds paid by customers of the business.

[3] Mr De Luca did not accept Mr Dewar's explanation about why some WCF funds had been paid in Mr Dewar's personal loan accounts with the business. Mr Dewar had said this was done only for the purpose of holding funds then used to make cash payments to brokers or other people who referred customers to WCF. Mr De Luca concluded Mr Dewar had failed to properly record those transactions and had benefitted personally by using WCF funds as rolling credit. He decided what Mr Dewar had done amounted to serious misconduct that went to the heart of trust and confidence in the employment relationship.

[4] In his application to the Authority Mr Dewar sought findings that WCF had treated him unfairly during its investigation. He said the process the company followed in making its inquiries into his conduct was biased and had failed to adequately explore the factual basis of the allegation he had personally benefitted through the transactions made to pay brokers. He said WCF had breached its good faith obligations to him in how it carried out its investigation and the flaws in that process made its decision to dismiss him unjustified. While he accepted findings could fairly be made that he had failed to properly account for and record use of funds, Mr Dewar argued that the allegation he gained some personal benefit from the use of those funds was unproven and was therefore not a reasonable basis for dismissing him.

[5] WCF said it had acted properly in suspending Mr Dewar while investigating its concerns about the use of funds, had been open and communicative with him

throughout its investigation, had conducted a fair and full investigation using an external investigator and its finding of impropriety by Mr Dewar justified his summary dismissal.

### **The Authority's investigation**

[6] For the Authority's investigation written witness statements were lodged from Mr Dewar, his wife Louise Dewar, Mr De Luca, Jim Ellis and Dennis Parsons. Mr Ellis is a director of WCF and involved in the investigation of concerns about Mr Dewar's conduct. Mr Parsons is the independent forensic accountant engaged by WCF to carry out an investigation of transactions made by Mr Dewar using WCF funds.

[7] Each witness attended the investigation meeting and gave further oral evidence by answering questions under oath from me and, where asked, the parties' representatives. The representatives also gave oral closing submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. It has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.<sup>1</sup>

[9] The evidence included considerable detail about the operation of WCF's consumer credit business, how arrangements for loans and payment of fees were made with customers and brokers or other referrers of customers, and the functions and operation of the specialised business software used for recording loan and fee transactions. While considered carefully, it was not necessary to include all those details in this determination. Rather reference to this evidence has been limited to what will readily be understood by the parties, already familiar with the detail, and to what was useful in explaining the findings made.

### **Order prohibiting publication of certain information**

[10] Publication is prohibited in relation to or in any reference to these proceedings of the names and other identifying information of any customers, clients and businesses dealing with WCF and other individuals who are referred to in the pleadings and the

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<sup>1</sup> Employment Relations Act 2000, s 174(C)(4).

oral and written evidence given. Excluded from that prohibition are the names and identifying details of the witnesses who gave evidence and any other director or shareholder of WCF. This order is made under clause 10 of Schedule 2 of the Act.

### **The issues**

[11] WCF initially disputed whether Mr Dewar could raise an unjustified disadvantage grievance about his suspension from 18 February 2019 while it conducted its inquiries. During the Authority's investigation meeting WCF conceded the grievance was raised within the required 90 day period.

[12] The issues then remaining for determination were:

- (i) Was Mr Dewar unjustifiably disadvantaged by his suspension from 18 February 2019?
- (ii) Was WCF's decision to dismiss Mr Dewar, and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time (that is did it meet the requirements of the test of justification set by s 103A of the Act)?
- (iii) Did WCF breach its good faith obligations to be active and communicative in maintaining the employment relationship during the four month period of Mr Dewar's suspension?
- (iv) If WCF is found to have acted unjustifiably (to Mr Dewar's disadvantage or in dismissing him) what remedies should be awarded to him, considering:
  - lost wages (to the extent a loss is established and Mr Dewar made reasonable endeavours to mitigate his loss) and
  - compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings?
- (v) If any remedies are awarded, is any reduction required for any blameworthy conduct by Mr Dewar which contributed to the situation giving rise to his grievance, under s 124 of the Act?
- (vi) If WCF found to have breached its good faith obligations, should a penalty be imposed?
- (vii) Should either party contribute to any costs of representation incurred by the other party?

## **Context**

[13] WCF was incorporated in 2015 as the legal entity to own and run a start-up business idea Mr Dewar had developed with a group of friends and associates. In the previous five years he had worked in a similar business, developing experience in that field of consumer finance and links with finance brokers and car dealers. While Mr Dewar ran and worked in the new business, others in the group became shareholders and contributed the funds which were in turn used for making loans to customers.

[14] Mr Dewar had become involved in this area of work after serving a period of 19 months in prison and being released on parole in 2009. Reference to this aspect of his personal history was relevant because it explained an aspect of the tension that developed between Mr Dewar and some WCF shareholders in later years. Some of those shareholders had known Mr Dewar for many years before then and had supported him and his family while he was in prison. They had seen the WCF business partly as a means of providing him with an ongoing employment and financial security.

[15] However, as apparent from Mr Dewar's evidence, he came to resent what he saw as a view of some shareholders that he should be more grateful to them. He considered the fees paid to directors were too high and his salary was too low. From his point of view some shareholders, including Mr Ellis, did not adequately appreciate the skills and experience Mr Dewar brought to the operation of the business and his hard work in achieving good returns to the shareholders on their funds invested in the loans business.

[16] Tensions between some shareholders and Mr Dewar about operation of the business and its governance led to a decision to appoint Mr De Luca as an independent director and chair of its board in 2016. The board comprised Mr De Luca, Mr Ellis and another director, Imran Raza. Mr Raza, as well as being shareholder in WCF, also worked for the firm that provided accounting services to the company at the time.

[17] While regular board meetings were held, discussions there tended to focus on financial results rather than Mr Dewar's management. Mr Dewar was clear with the other directors that matters of management should be left to him. As a result, a high degree of trust and reliance was placed in him and on how he operated the business.

[18] In his role Mr Dewar dealt with a network of finance brokers, car dealers and other people who referred customers to WCF. He approved loan applications, authorised payments of invoices and supervised three credit controllers who prepared loan documents and dealt with debtors. For this work WCF used a credit finance and administration software programme leased from Argos Solutions. Mr Dewar has used the Argos programme in his previous employment.

[19] As a third-tier finance lender WCF has a relatively high default rate and part of its business included repossession of vehicles over which it held security for loans taken out by the vehicle owners. For the purpose of reselling repossessed vehicles Mr Dewar registered WCF as a Licensed Motor Vehicle Dealer. He also dealt with applications WCF made to the Dispute Tribunal over loan and repossession issues and attended tribunal hearings as its representative.

### **The suspension**

[20] During the Christmas season in 2018 Ken Williamson, one of the founding group shareholders in WCF, passed on to Mr Ellis and Mr Raza a story he had heard from a finance broker. The broker was someone who frequently dealt with Mr Dewar. According to a written explanation Mr Dewar provided later during WCF's inquiry, that broker had felt he was unfairly treated when Mr Dewar turned down some loan applications the broker had submitted.

[21] The broker told Mr Williamson he believed Mr Dewar was benefiting personally from the use of cash cheques drawn on WCF's bank account.

[22] In the New Year of 2019 Mr Ellis and Mr Raza talked with Mr De Luca about this story and what to do about it. They resolved to engage a forensic accountant to review the company's accounts. After taking legal advice they also decided to consider suspending Mr Dewar while the accountant's investigation was carried out.

[23] On 18 February 2019 Mr De Luca and Mr Ellis went to WCF's offices to talk to Mr Dewar. While Mr Dewar disputed the accuracy of Mr Ellis' notes of their discussion, this determination has relied on those notes as that account alone was sufficient to establish Mr Dewar's claim that he had been unjustifiably disadvantaged by what happened that day.

[24] Mr De Luca and Mr Ellis began their meeting with Mr Dewar at 11.35am. By 12.05pm Mr Dewar had been told he was suspended, had spoken briefly to the office staff to explain he had been suspended and had left the building.

[25] Mr Dewar got no notice of the meeting. It began with Mr De Luca saying he and Mr Ellis were there “because there are irregularities around brokerage fees that appear to be fraudulent”. Mr De Luca said a full investigation was needed and “we are looking to suspend you on full pay”.

[26] Mr Dewar asked to be told the source of the allegation and offered to show Mr De Luca and Mr Ellis how payment of brokerage fees were made and recorded in accounts in the Argos software system. He also offered to open his bank account to them. Mr Ellis’ note said this was followed by a “calm discussion round why he should leave and allow proper process to be followed”. Mr De Luca then told Mr Dewar he was suspended.

[27] Mr Dewar asked for the suspension to be put in writing and Mr De Luca told him they did not have to put in it writing. Mr Dewar also asked how long he would be suspended. Mr De Luca said he was “not sure, maybe a couple of weeks, who knows”.

[28] Mr Dewar was subsequently given formal notice of his suspension in a letter dated 22 February but which he said he did not get until 26 February. Signed by Mr De Luca, the letter confirmed Mr Dewar was “suspended on full pay pending an investigation into serious allegations relating to potential fraud being committed by you against the company”.

[29] Mr Dewar’s employment agreement had the following term on suspension:

Where circumstances warrant it, we have the discretion to temporarily suspend you from your duties prior to a full investigation of the allegations surrounding the circumstances involving you. Before doing so we will give you notice in writing of our intention to suspend you and give you a reasonable opportunity to respond before making a final decision whether or not to suspend you. You will be paid your normal wages while you are suspended, unless the period becomes protracted as a result of undue delay caused by you.

[30] Mr De Luca, Mr Ellis and their legal advisors had not located and checked Mr Dewar’s agreement before holding the suspension meeting with him. As their account of the meeting shows, the procedure set in his employment agreement was not followed. The meeting was a surprise. He got no written notice of a suspension proposal. The

meeting was brief with no adjournment for him to seek advice or for Mr De Luca and Mr Ellis to consider what he said about the proposal, so no reasonable opportunity to respond was given.

[31] A fair and reasonable employer in WCF's situation could have acted promptly to remove an employee suspected of improper use of funds and record keeping from having access to the office and computer system where those records were held. However such an employer had to do so within the terms of its employment agreement. The defects in the process WCF followed were more than minor and resulted in Mr Dewar being treated unfairly. For example, he had no real opportunity to consider or propose alternative courses of actions, such as allowing for him to return to work once necessary electronic and paper records were located and secured.

### **WCF's inquiry and its decision to dismiss Mr Dewar**

[32] On the day of Mr Dewar's suspension Mr De Luca also confirmed instructions to Mr Parsons to carry out an investigation of whether Mr Dewar had made transactions which personally benefited him. The transactions were described as falling in three categories: unauthorised payments using cash cheques, unauthorised transfers to his loan accounts and unauthorised payments for some goods and services.

#### *Mr Dewar's 6 March email*

[33] While the report was under preparation Mr Dewar sent Mr De Luca an email setting out a detailed explanation of his work. Dated 6 March 2019 his email ran to 21 pages and anticipated a number of the concerns WCF would later pursue with Mr Dewar. Mr De Luca put the email aside without reading it or referring it to Mr Parsons. Mr De Luca's reason for doing so was that he wanted to wait and see what Mr Parsons' report would say about the situation.

[34] Mr Dewar's 6 March explanation was of some importance for two reasons. Firstly, it gave a detailed account of how he developed the work methods he used to run the business. Secondly, Mr Dewar accepted, from the outset, that it was reasonable for the WCF to inquire into the concerns that had arisen. He wrote that he assumed that the allegation of "fraud" he was told about in the 18 February suspension meeting might relate to dealer pay-outs coded in the Argos system to his personal WCF loan accounts.

[35] He explained the system he had developed to pay people who referred potential customers to WCF. He described this as similar to a “slush fund” used in the business he worked in before setting up WCF. A potential customer who made a successful loan application was charged a fee, usually \$600, which WCF later paid to the broker or the referrer of that customer. Customers who applied directly to WCF were also charged this fee, referred to initially as a brokerage fee and later as a direct establishment fee. The structure of the Argos software, to paraphrase and simplify Mr Dewar’s explanation, did not easily accommodate the transfer of those fee amounts charged to a customer’s loan account as a payment to either the broker or the referrer or, in the case of direct customers, to WCF’s internal accounts. To deal with that difficulty Mr Dewar had those funds transferred into his own personal loan account with WCF. He said this was done only to hold the funds until payments needed to be made to brokers or referrers. Those payments would be made in cash or with a cash cheque.

[36] Mr Dewar also explained he made a weekly round of personal visits to all Hamilton car dealers. Those visits were for the purpose of fostering relationships with those dealers so they would refer their customers to WCF for financing of their vehicle purchases. He described gifting those dealers with wine, beer or spirits. Purchases of those gifts were coded as marketing expenses in the company’s records. He also said he followed a common practice in the used automotive industry of using cash or cash cheques to make most payments for “brokerage” or referring customers.

[37] He said his network had a growing number of individuals, clients, car dealers and salespeople enticed to make multiple referrals due to his use of “no strings attached” payments in cash with “no receipts or signatures required”. He also said he gave an undertaking to referrers who did not want any record of having received that income that he would not disclose their details. Those referrers included car sales representatives and some people on Work and Income benefits.

[38] He said he was “unable to provide the details of every recipient as there are a myriad of transactions over a long period of time”. He estimated there was around 15 loans a month made as a result of those “non-broker referrals”.

[39] Some existing customers also sought additional or extended loans on which they were then charged a brokerage or establishment fee. However there was no actual broker or referee to whom that fee could be paid so Mr Dewar transferred what he called

those “orphan” fees into one of his personal loan accounts. He said he later used those funds to pay fees in cash to brokers or referrers for bringing other customers to WCF.

[40] Mr Dewar denied benefiting from those business transactions through his personal loan accounts. He wrote that his system was “not pretty and in hindsight not good accounting practice” and it was “now apparent to me that better records could have been kept of the recipient of the brokerage”.

[41] He described his system of requiring borrowers who made direct applications to WCF to pay a ‘brokerage’ fee, generating the ‘orphan’ funds, and then using that money to pay referrers of the other customers as “a fiscally neutral incentivised scheme”. He described how he worked as “unconventional but ... not unscrupulous”. He also said he believed use of a “dealer slush fund” to encourage future referrals was “lawful and ethical” and “such inducements [were] common place and an expected part of doing business” in the motor vehicle finance industry.

*Mr Parson’s report*

[42] Given how Mr Dewar himself described his business methodology, it was unsurprising that Mr Parsons’ written report to Mr De Luca, dated 25 March 2019, reached clear and critical findings of those practices. Mr Parsons said it appeared Mr Dewar had made additional loan advances to himself with no approval from other directors. He said there appeared to be a fundamental conflict of interest as those advances should have been disclosed to the board and prior approval sought before any additional advance was made. Mr Parsons said he was informed no such disclosures or approvals had occurred.

[43] Mr Parson said the funds removed from WCF’s bank account, without the knowledge or consent of the directors, comprised:

- (a) Cash Cheques, supposedly for Brokerage Fees ... drawn in cash from the Westpac account [totalling] \$40,300 for the period 1 January 2018 to 13 February 2019.
- (b) Regular reductions of item amounts of \$600 in the loan account IR10290 for the benefit of Mr Dewar. Similarly, those appear to be represented as Brokerage Fees of the company ... [totalling] \$18,600 for the period 6 November 2015 to 27 November 2018.

*The investigation process and decision*

[44] WCF's lawyers wrote to Mr Dewar on 5 April 2019 providing him with a copy of Mr Parsons' report. It included around 200 pages of background documents attached as appendices. Headed "Investigation into allegations of misappropriation of company funds", the letter called Mr Dewar to a meeting to respond to four allegations:

Allegation one - withdrawing cash from the company bank account where no broker was involved

Allegation two - depositing cash cheques and withdrawing company funds for your own benefit without the knowledge or consent of the directors

Allegation three - advances and withdrawals on personal loan account without the knowledge or consent of the directors

Allegation four - crediting brokerage fees to your personal account to reduce personal loan to the company

[45] The letter described allegations one, two and four as examples of behaviour amounting to "theft of our property", a category of serious misconduct listed in Mr Dewar's employment agreement. It described allegation three as behaviour, if proven, constituting serious misconduct that could undermine WCF's trust and confidence in him as an employee.

[46] The letter advised Mr Dewar that on each allegation, if proven, it was "possible" he would be subject to disciplinary action up to and including dismissal.

[47] WCF then held three investigation meetings with Mr Dewar – on 12 April, 8 May and 7 June 2019.

[48] The first of these started with Mr Dewar reading a further prepared statement. Mr De Luca and Mr Ellis then took a break to also read Mr Dewar's 6 March email before continuing with the meeting. New information from Mr Dewar included him saying he kept a paper record listing the original loan account number for each broker payment made to his WCF account. He said the record was on "a sticky note pad attached to the bottom left of my computer screen". He said he would cross out the relevant loan account number each time he made a payment to a broker or a referrer. He said he kept cash, withdrawn in lump sums, in his office drawer to make those payments. He said the 'sticky note' was not meant to be a proper accounting system but, as he put it, "to ensure that I did not pay out any of my credit in error".

[49] Mr Dewar referred to a number of named car dealers and said they would be able to confirm receiving cash payments “if they are going to be honest and open about it”. He also said WCF’s staff were also aware of cash payments being made because some of those referrers called in to the office and staff had seen him give them the money.

[50] During discussions on those issues Mr De Luca and Mr Ellis asked why clients who had come directly to WCF, not through a broker, were charged a \$600 fee that the company was not entitled to collect from them. Mr De Luca also described the system of cash payments to brokers and car dealers as deceitful.

[51] During the meeting Mr Dewar questioned the involvement of Mr Ellis as a decision maker in the investigation. He said Mr Ellis had a deep-seated dislike of him. He gave the example of a recent board discussion about the prospects for selling WCF’s business where Mr Ellis had said one benefit of such a change would mean Mr Ellis no longer needed to have a relationship with Mr Dewar.

[52] The next significant communication with Mr Dewar was a further letter from WCF’s lawyers dated 2 May 2019. It advised that, while WCF did not accept Mr Dewar’s concerns about Mr Ellis’ impartiality, WCF agreed to remove him from the process and give sole decision-making power to Mr De Luca.

[53] The 2 May letter also advised further investigations had been undertaken and asked Mr Dewar to comment on new information WCF was relying on in its investigation. This included some further information from the Argos software system, an example of a WCF payment made through the software’s brokerage pay-out process to a broker Mr Dewar said had asked to be paid in cash, and a summary of transactions showing further payments to Mr Dewar’s WCF loan account.

[54] At the second investigation meeting, held on 8 May 2019, Mr Dewar read out a further detailed written statement. He asked if the broker referred to in the example payment given to him had been interviewed and, if so, asked for a copy of the statement or notes of interview of that broker.

[55] He also offered an explanation of why he had transferred some WCF funds to his personal bank account. Mr Dewar said he had made some sales on TradeMe of appliances he and his wife no longer needed for a home renovation. From those sales

he accumulated some cash he did not need to use. He said he had hit on “a practical solution” of using that cash to make some WCF pay outs to dealers or referrers, sparing himself trips to the bank to cash cheques on WCF’s account for those amounts. Instead he made those cash payments from his own money and then transferred equivalent amounts from WCF’s bank account to his own bank account.

[56] In addition to making that statement Mr Dewar answered more detailed questions about why he said he could not have used WCF’s bank account or other parts of the Argos software to make payments, rather than through his own loan account. Ultimately he was unable to explain to Mr De Luca’s satisfaction how multiple transactions to brokers or dealers were reconciled with payments to his loan account but Mr Dewar repeated his offer to allow WCF access to his personal bank accounts.

[57] Mr Dewar also identified some individuals who he said could verify receiving cash payments but accepted this would not confirm that all amounts withdrawn had been paid to those people. He also accepted that checking his personal bank accounts could not resolve that question as cash withdrawals need not have gone into his bank account.

[58] A further letter sent to Mr Dewar, dated 17 May 2019, gave him another opportunity to comment on some additional information resulting from inquiries Mr De Luca had made about operation of the Argos software. The short point of the information was to challenge Mr Dewar’s explanation about using his personal WCF loan account for holding funds to pay out brokers and dealers. It said those funds could have been administered through other accounts.

[59] Mr Dewar replied in writing disputing the description of how the system could or should operate to deal with those funds.

[60] The next significant communication with him was a letter from WCF’s lawyers, dated 31 May 2019, advising him of preliminary conclusions of the investigation. The letter advised that Mr De Luca had decided not to make findings on allegations one and two – which each claimed Mr Dewar had misappropriated company funds by withdrawing cash from WCF’s bank account for his own personal benefit.

[61] However the letter advised Mr De Luca had reached preliminary views upholding allegations three and four. It said Mr Dewar’s admitted practice of

transferring \$600 ‘orphan’ funds to his personal WCF account resulted in a “blurring of the lines” that was a conflict of interest and should have been disclosed to the board. It rejected Mr Dewar’s description that the practice was necessary within the software system used. It also said WCF had located the sticky note pad record to which Mr Dewar had referred earlier. It said “the piece of paper .. had four [loan] numbers on it”. This was insufficient for Mr De Luca to satisfy himself payments were made in the way Mr Dewar had described. Mr Dewar’s explanation about using personal cash to make some WCF payments and reimbursing himself with an electronic transfer from the company’s bank account was also rejected as there was “no record at all of where this money went”.

[62] The letter advised Mr De Luca’s preliminary view was that the absence of records about use or payment of the money into Mr Dewar’s WCF loan account meant those funds were probably used as a rolling credit facility without the board’s knowledge or consent.

[63] On allegation four the letter advised Mr De Luca’s preliminary view was that crediting regular amounts of \$600 to his own WCF account gave Mr Dewar the personal benefit of reducing his personal loan with the company. It also criticised what Mr Dewar had called a “slush” fund in this way:

Essentially you were gathering up a pool of money which was then paid for a different purpose other than anything to do with the initial loan. This practice was something that the Board was not aware of and in its mind was misleading.

[64] The letter said Mr De Luca had concluded Mr Dewar probably credited \$18,600 to his loan account in the period from 3 January 2018 to 23 November 2018.

[65] It advised Mr Dewar that summary dismissal could be considered and asked for Mr Dewar’s comments before Mr De Luca made a decision on what disciplinary sanction would be imposed if the allegations were finally upheld.

[66] At the third investigation meeting, on 7 June 2019, Mr Dewar said it had not occurred to him to advise the board about how brokerage was being changed on loans. He denied he intended to receive or did receive any personal benefit from using his own fixed loan account as “a staging post” for holding ‘orphan’ funds. He said it had not occurred to him that he could have used the suspense account instead. He questioned the inference of personal benefit in this way:

The inference you have drawn that a lack of records confirms your view that I have been the beneficiary of payments is ... a flawed inference. Poor record keeping does not make me a thief. I ask that you not read just between the lines but that you look at the loan applications generated and the number of repossessed vehicles sold, if as alleged I was paying myself, I could not at the same time attract deals and achieve the record results or the recorded results.

[67] He also referred to the car dealers and individuals he had asked WCF to talk to as part of its investigation. There was no information about any contact with or inquiry to them.

[68] He asked Mr De Luca to balance “obvious and acknowledged deficiencies” in his record keeping with the history of his commitment to WCF.

[69] Three days later a letter from WCF’s lawyers, dated 10 June 2019, advised that Mr De Luca had considered Mr Dewar’s most recent responses and decided to finally uphold allegations three and four. It said those matters were deemed to be serious misconduct going to the heart of trust and confidence in the employment relationship so Mr De Luca proposed summarily dismissing him. Mr Dewar was asked to provide any views he had on that proposal by the end of the following day.

[70] In a written response Mr Dewar said the allegations originally raised with him related to “potential fraud” but termination of his employment was now being founded on an allegation he failed to advise the board on a matter. He also asked why WCF had not spoken to people in a list he had provided of brokers and others who had received payments from him. He said a fair investigation would have included speaking to those people and considering any explanations they gave before reaching a conclusion about his employment. He also asked why he had not been told the source of the information that sparked the investigation.

[71] He then referred to an earlier offer he had made to resign and said he “would be prepared to resign on a negotiated basis”. He asked to meet Mr De Luca to discuss those matters before a final decision was made on the disciplinary sanction.

[72] Two days later WCF’s lawyers sent Mr Dewar a letter rejecting his offer to resign. It said the Board was not interested in that proposal and he had “been free to resign at any point during the disciplinary process”. He was told Mr De Luca had considered his responses to the proposal to dismiss him and not altered his view that Mr Dewar should be dismissed as Mr De Luca had lost trust and confidence in him.

[73] Mr Dewar promptly raised a personal grievance on the grounds which have formed the basis of his application to the Authority.

*Flaws in WCF's investigation and decision*

[74] In investigating a personal grievance application the Authority applies the statutory “test of justification” set by s 103A of the Act. The test asks whether WCF’s actions, and how WCF acted, were what a fair and reasonable employer could have done in all the circumstances at the time of carrying out its inquiries and making its decision to dismiss Mr Dewar. In addition to any other appropriate factors, the test requires the Authority to consider whether WCF:<sup>2</sup>

- (a) sufficiently investigated the allegations against Mr Dewar before dismissing him; and
- (b) raised its concerns with Mr Dewar before taking action against him; and
- (c) gave Mr Dewar a reasonable opportunity to respond to WCF’s concerns before dismissing; and
- (d) genuinely considered Mr Dewar’s explanation in relation to the allegations against him before dismissing him.

[75] In any particular case there may be a variety of ways for the employer to achieve a fair and reasonable result.<sup>3</sup> This requires an assessment of the substantive fairness and reasonableness of what the employer did and decided rather than pedantically scrutinising the process followed to identify any failing, however minor.<sup>4</sup> A dismissal may be determined to be unjustifiable only where any defects in that process were more than minor and resulted in the employee being treated unfairly.<sup>5</sup>

[76] Because there were allegations of “fraud” and “theft” made about how Mr Dewar managed the business and its money, it is useful to note that the law did not require WCF to apply any legal standard of proof in making its inquiries and reaching its decision. Its conclusions did not need to be made on evidence or information that met the criminal standard (of being beyond reasonable doubt) or even the wider civil standard (of the balance of probabilities). Rather WCF’s actions were required, throughout, to have met the statutory standard of reasonableness. It is only at the stage

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<sup>2</sup> Employment Relations Act 2000, s 103A(3) and (4).

<sup>3</sup> *A Ltd v H* [NZCA] 419 at [46].

<sup>4</sup> *Angus v Ports of Auckland Ltd* (No 2) [2011] NZEmpC 160 at [26].

<sup>5</sup> Employment Relations Act 2000, s 103A(5).

of the Authority proceedings that WCF must be able to show, on the balance of probabilities, that it acted reasonably and had a sufficient and reliable evidential basis for concluding Mr Dewar was guilty of serious misconduct.<sup>6</sup>

[77] The Court of Appeal has explained the nature of those standards or evidential measures, and when they apply, in the following way:<sup>7</sup>

The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof. Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

[78] In a case involving consideration of this standard, in a tribunal of a similar but different nature than the Authority, the Supreme Court has acknowledged a natural tendency for serious allegations to require stronger evidence before being satisfied to the balance of probabilities standard.<sup>8</sup>

[79] An employer must satisfy the Authority on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. The employer's decision must be made out not only on the evidence known to it at the time, but also on the basis of information that could have been available after proper inquiry by it.<sup>9</sup>

[80] Bearing in mind those standards for measuring WCF's actions, the evidence examined in the Authority's investigation disclosed the following significant flaws in how WCF carried out its inquiries and what is decided:

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<sup>6</sup> *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [108].

<sup>7</sup> *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20].

<sup>8</sup> *Z v Dental Complaints Committee* [2008] NZSC 55 at [105].

<sup>9</sup> *Ritchies Transport*, above n 6, at [78].

- (a) It failed to interview brokers, car dealers and some other individuals identified by Mr Dewar as having relevant information about his dealings with them;
- (b) It failed to conduct formal interviews with WCF office staff who may have had relevant information about Mr Dewar's practices; and
- (c) It failed to remove Mr Ellis from the investigation process, contrary to what it said it would do; and
- (d) Those defects in the process WCF followed meant some conclusions reached about the nature of Mr Dewar's conduct went beyond the extent of information available to support those conclusions.

[81] Those four flaws, explained further below, meant WCF had not cleared the hurdle set by s 103A(3)(a) of the Act of showing it had sufficiently investigated its allegations.

[82] Section 103A(3)(a) includes a requirement for the Authority to have regard to the resources available to the employer in considering whether the employer did enough to look into its concerns. There was no doubt WCF had the resources necessary to conduct a full and fair inquiry. Its decision-maker, Mr De Luca, was a former commercial lawyer and experienced professional company director. Fellow director Imran Raza was an experienced accountant and business person. The board engaged Mr Parsons, an experienced forensic accountant and investigator. Mr Luca was assisted throughout the process by lawyers specialising in employment law.

[83] However, for the following reasons, the identified flaws amounted to defects in its process which were more than minor and which resulted in Mr Dewar being treated unfairly.

*(a) No interviews with brokers and dealers over cash payments*

[84] Throughout WCF's inquiry Mr Dewar's responses identified brokers, car dealers and other individuals he said could verify his account of how he dealt with them and, most importantly, being paid amounts of cash he said was paid to them and not diverted elsewhere for his own use and benefit. Mr Dewar did accept that the cash basis of those transactions would make some recipients reluctant to talk to anyone making inquiries from WCF. The company also, correctly, identified that conducting such interviews could not account for all the funds said to have been used for cash payments

because Mr Dewar's records of that process were inadequate or incomplete. However at least some interviews could have been attempted and carried out. They could have provided some corroboration of payments actually being made as Mr Dewar said they were. Verifying that aspect of his explanation was something that, reasonably, could have gone to the credibility of other parts of what he said had happened. It was unfair not to do more to check that possibility given Mr De Luca's conclusions, as expressed in his preliminary conclusions letter of 31 May, were based on his view that Mr Dewar's "overall behaviour in respect of these transactions" and responses during WCF's inquiry were "inconsistent and at times misleading".

[85] Related to this point, but not to the same strength, was the failure to disclose to Mr Dewar who had first provided the information that sparked the inquiry. However the extensive written responses Mr Dewar gave canvassed his interactions with that particular broker and the reasons his relationship with him had soured. This meant that, although the identity and source was not directly disclosed, Mr De Luca did have context relevant to whether the original complaint might have been motivated by some personal ill will. But, even if ill-will was an initial factor in bringing some concerns about Mr Dewar's business practices to the board's attention, the scale of what subsequent inquiries revealed made the individual motivation of one disgruntled broker irrelevant.

*(b) No formal interviews with office staff*

[86] This flaw is similar to the first. Mr Parsons, Mr Evans and Mr De Luca each garnered some information from one or more of the administrative staff in WCF's office. What those staff said about what they saw or heard in daily office practices was directly relevant to any reasonable assessment of Mr Dewar's explanation of what he did in running the business.

[87] It was not clear, for example, whether his account of openly handing cash over to some referrers when they visited the office was ever checked with office staff who Mr Dewar said would have known about him doing so. Again this could not have completely answered WCF's concerns but was potentially one aspect that could, fairly, have been weighed in assessing the reliability of other elements of Mr Dewar's explanations for what he did and how he did it.

[88] Some information sought from office staff was passed on to Mr Dewar during WCF's inquiry. In a letter on 17 May, for example, WCF's lawyers recounted what Mr De Luca said he was told by one employee about some aspects of the operation of the Argos software. As a matter of fairness all information or impressions that came from discussions with the office staff should have been fully and formally recorded and those notes put to Mr Dewar for comment or response.

*(c) Ongoing involvement of Mr Ellis in WCF's inquiry*

[89] Mr Ellis had a deep and legitimate interest in the company and the outcome of its inquiry. He had a substantial amount of money invested in WCF. He received rental income from WCF for use of a property he owned. Cars repossessed by WCF were stored there. After Mr Dewar was suspended Mr Ellis also stood in as managing director and ran the business.

[90] Early in its inquiries WCF agreed to a request from Mr Dewar to remove Mr Ellis as one of the decision-makers. Mr Dewar argued earlier disputes between them meant Mr Ellis could not be impartial. By letter on 2 May WCF's lawyers told Mr Dewar that its board did not accept that assertion but "out of fairness to you it has decided to remove Mr Ellis from the process and give the sole decision-making power to Peter De Luca".

[91] Mr Ellis' evidence confirmed however that he was not entirely removed from the process but remained involved throughout as what he called "a conduit for information". This included talking with the senior office staff member about operation of the Argos software system, contacting an Argos administrator with further queries, reviewing parts of a letter to Mr Dewar drafted by WCF's lawyers, compiling a spreadsheet of information later sent to Mr Dewar for comment and talking with Mr De Luca about what parts of a software manual would be sent to Mr Dewar for the purpose of allowing Mr Dewar to better respond to the company's allegations.

[92] Mr Ellis's ongoing involvement was not shown to have resulted in any actual detriment to Mr Dewar, in terms of the conduct or outcome of WCF's inquiry. It was however contrary to the undertaking WCF had formally given to Mr Dewar through its lawyers. WCF was therefore responsible for whatever doubt consequently arose about the effect of Mr Ellis' ongoing involvement.

*(d) Some conclusions reached were beyond the extent of the available evidence*

[93] Given the shortcomings in the extent of the inquiries conducted, WCF could not satisfy the standard of the balance of probabilities on whether it had conducted a sufficient investigation of its allegations.

[94] It was possible that inquiries of brokers, car dealers and office staff, if properly and fully made, would have confirmed Mr Dewar's account of how he went about various activities. In particular some corroboration of having actually made cash payments to some of those people could have gone some way to answer questions about what had happened to some funds that Mr Parsons' analysis could not fully trace.

[95] There was, of course, no doubt that the blame for that state of affairs largely rested with Mr Dewar. He was the managing director and master of the processes that he set up to run the business and to grow its customer base.

[96] His informal record keeping meant he could not verify his explanation that all funds used were deployed only for business purposes. On the other hand, this absence of sufficient records caused difficulties for WCF in considering whether what Mr Dewar did amounted to 'theft' and 'fraud'. WCF reached its conclusions on those points in a vacuum created by the shortcomings in Mr Dewar's business practices. In large part WCF conclusions were the result of inference only – that if clear records were not available of how the money was used, and to show it had all been used for WCF business only, it must have been stolen. However such a conclusion ascribed a level of intention or deliberation by Mr Dewar that WCF had to show could reasonably be established from information it knew at the time.

[97] In all the circumstances of this case, such a conclusion about what Mr Dewar did was possible but WCF needed stronger evidence to tip the balance of probability that such an allegation was reasonably established by its inquiry. In short, it could not. A conclusion of theft was a bridge too far given elements of Mr Dewar's explanation were not adequately explored by WCF's inquiry. This was more than a minor defect and did result in him being treated unfairly.

**Were those shortcomings sufficient to make the dismissal decision unjustified?**

[98] The shortcomings identified in how WCF went about its inquiry and reaching its conclusions show Mr Dewar was unfairly treated. Those actions were to his

disadvantage. Because they were not what a fair and reasonable employer could have done in all the circumstances at the time, he has established a personal grievance for unjustified disadvantage.

[99] Because matters of procedural and substantive fairness are often intertwined defects in process may result in the Authority concluding that an employer's substantive conclusion and decision to dismiss was also unjustified. But this is not always so.

[100] In Mr Dewar's case WCF's decision to dismiss him for serious misconduct did not rely solely on its allegations that his business practices amounted to theft. For reasons already given, that conclusion could not fairly and reasonably have been reached on the extent of the information gathered and examined.

[101] However there was another pillar to WCF's decision to dismiss Mr Dewar. From the outset of its inquiry the allegations WCF formally put to Mr Dewar by letter on 5 April raised the prospect that how he used his personal loan account, if proven, could amount to serious misconduct which so undermined the company's trust and confidence in him, he could be dismissed. And this, ultimately, was the ground on which he was dismissed. Mr De Luca concluded the allegations about how Mr Dewar used his personal loan account, including by crediting brokerage fees to it, were proven and was serious misconduct that went to the heart of the trust and confidence that WCF could have in the employment relationship.

[102] This was a conclusion within the range of responses open to a fair and reasonable employer in all the circumstances at the time.<sup>10</sup> It did not require a finding of any dishonesty or deliberate deceit by Mr Dewar. Rather it was a conclusion open largely on the basis of Mr Dewar's own admissions and descriptions of how he had run matters over a number of years.

[103] The business practices Mr Dewar had developed created at least three significant risks for WCF.

[104] Firstly, Mr Dewar's system of cash payments was inadequately recorded and could not be traced if needed for accounting and legal purposes. Mr De Luca and Mr Ellis said they did not know about this system until WCF conducted its inquiry. Mr

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<sup>10</sup> *Angus*, above n 4, at [40].

Dewar, in his oral evidence, admitted that the directors “probably didn’t know”. As he put it: “They did not ask and I did not volunteer it”.

[105] Secondly, the brokerage fee Mr Dewar charged direct customers, accepting Mr Parsons’ evidence on the point, was contrary to the requirements of the Credit Contracts and Consumer Finance Act 2003. The company had subsequently, after Mr Dewar’s dismissal, taken steps to repay the customers charged that fee.

[106] Thirdly, Mr Dewar mixed personal funds with business funds in both his personal loan account with WCF and in how he used WCF funds to reimburse his personal bank account for cash payments he said he had made for business purposes with his own money. He had not taken the steps that a prudent manager, carrying out his duties with reasonable skill and diligence, would have taken to ensure the company’s governors, that is the other directors, were informed of those various practices and had approved them.

[107] Mr De Luca also established, during WCF’s inquiries, that other and better ways were available within the Argos software system to organise payments and holding of funds.

[108] This situation occurred in circumstances where WCF, in its commercial activities, placed a high level of trust in Mr Dewar’s conduct of the business. Its directors and investors relied on him as the person who, on his own account of events, told them he knew what he was doing and should be left alone to get on with it.

[109] Having already put aside the allegation of deliberate financial impropriety as insufficiently investigated, the evidence otherwise established that WCF had fully and fairly investigated the basis on which it reached a conclusion that Mr Dewar’s business practices were inadequate to a degree that amounted to serious misconduct.

[110] It was a conclusion open to a reasonable employer from Mr Dewar’s own descriptions, given early and in further detail at several points throughout WCF’s inquiry, of his system of “no strings attached” cash payments and his inability to provide details of recipients in what he called “a myriad of transactions through a longer period of time”. In that respect WCF had also met the procedural requirements to give Mr Dewar reasonable opportunities to respond and had genuinely considered his explanations before making its decision to dismiss him.

[111] For the reasons given, Mr Dewar's claim he was unjustifiably dismissed is rejected. He does not have a personal grievance on that ground.

### **No breach of good faith obligations**

[112] As an alternative to his unjustified disadvantage claim over his suspension, Mr Dewar had also claimed WCF breached good faith obligations to him by failing to be active and communicative during the lengthy period of his suspension while it conducted its inquiry. This determination has found WCF acted unjustifiably in how it went about making the suspension but this did not entirely address whether it had acted consistently with its good faith duty throughout the duration of that suspension.

[113] The correspondence and notes of meetings held showed WCF had provided Mr Dewar with extensive information and extensive opportunities to participate in its inquiry, even if some fault has been found with the extent of what was done. Those activities were sufficiently responsive and communicative throughout to meet its good faith obligations.

### **Remedies**

[114] Mr Dewar was entitled to an assessment of remedies for the two personal grievances he has successfully established, that is for how WCF went about suspending him from his duties and for shortcomings in its investigation. The sole available remedy was compensation for humiliation, loss of dignity and injury to his feelings. As Mr Dewar had not also established a grievance of unjustified dismissal, he was not entitled to an award of lost wages for the period following his dismissal. His suspension, up until his dismissal, was on full pay.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[115] The award of compensation addresses the distress Mr Dewar experienced in his sudden suspension and from the shortcomings of WCF's inquiry. It does not compensate him for any upset he felt as a result of his subsequent dismissal as that action has been found to be one that the company was entitled to take.

[116] Mr Dewar had a deep personal commitment to the company. He described it as "my baby, my creation, it has my DNA". Those feelings contributed to his sense of shock and humiliation over how he was suspended and required to leave WCF's offices

on 18 February 2019. The level of compensation awarded excludes the degree of distress that Mr Dewar amplified by his own action of announcing to the office staff before he left the premises that day that he had been suspended and the reason for it.

[117] He also described himself as being left feeling utterly gutted and betrayed by the allegations that he wrongly took funds. He accepted in his evidence and submissions that he was “not without blame” and had “fallen short” in his “deficient” business practices. However he was distressed by the allegations of theft which were, in part, withdrawn and, as found in this determination, not sufficiently investigated.

[118] A medical note provided in evidence showed Mr Dewar experienced insomnia, loss of appetite, weight loss and anxiety during WCF’s inquiry. Those symptoms were indicators of the distress he experienced.

[119] The sum of \$8,000 was an appropriate amount to compensate Mr Dewar for the effects on him of WCF’s unjustified suspension and shortcomings in its investigation. This amount must be paid to him within 28 days of the date of this determination.

*No reduction for contributory conduct*

[120] The Act requires the Authority to consider whether the remedy awarded to Mr Dewar for his personal grievances should be reduced due to any blameworthy conduct by him that contributed to the situation giving rise to his grievance.<sup>11</sup> No such reduction was appropriate in this case for the following reasons.

[121] Mr Dewar, in his evidence, acknowledged a high degree of responsibility for the situation that led to his dismissal. He accepted processes he followed were deficient and that he “fell short” in how payments to brokers and referrers were made and not keeping adequate records. In closing submissions he said “it does come down to a breach of trust and confidence in how I carried out my role” but the allegation of theft had gone too far. He submitted that if his dismissal were found to be unjustified, any remedies awarded could fairly be reduced by at least fifty per cent.

[122] However his dismissal was found to be justified. The factors that led to that finding have already taken account of how he contributed to that situation for which he has not established a personal grievance. The remedy awarded is only for his other

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<sup>11</sup> Employment Relations Act 2000, s 104.

disadvantage grievances. Mr Dewar did not contribute to the shortcomings in how WCF decided and carried out his suspension or to WCF not making further reasonable inquiries of people he had suggested be interviewed.

### **Costs**

[123] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so has been sought and granted.

[124] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>12</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>12</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].