IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 290
3009131

	BETWEEN	TITIIMAEA ELISARA Applicant
	AND	ALLIANZ NEW ZEALAND LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Catherine Stewart for Applicant Harry Waalkens, QC for Respondent
Investigation Meeting:	16 June 2017
Submissions Received:	30 June and 25 July 2017 from Applicant 18 July 2017 from Respondent
Determination:	20 September 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. Mr Elisara was justifiably dismissed.

B. Allianz New Zealand Limited did not breach its obligations of good faith.

C. Costs are reserved.

Employment relationship problem

[1] An earthquake in Wellington in November 2016 had serious ramifications for Mr Titiimaea Elisara. Mr Elisara worked as the Chief Executive Officer for Allianz New Zealand Limited, an Australian licenced insurer providing a range of insurance

products including commercial and corporate insurance in New Zealand. He was also a Director of the company.

[2] Mr Elisara has over 20 year of experience in the insurance and legal industries and has held senior positions including General Counsel for AIG where he built a legal team responsible for risk and compliance functions. In his curriculum vitae used to apply for the role in Allianz, Mr Elisara states that he has:

> Excellent understanding of underwriting, claims and risk assessment principles. High quality experience analysing and advising on Commercial and Personal Lines policies, agreements, claims and associated risk avoidance strategies.

[3] Earthquake risk is a significant issue for insurers in New Zealand. After the Christchurch earthquakes in 2010 and 2011, Allianz Australia introduced a new property underwriting instruction that allowed risks in two earthquake sensitive areas, (Canterbury and Wellington) to be written.

[4] The writing of policies in these two areas had to meet strict criteria. They had to meet specified build quality criteria and had to form part of a portfolio with no more than 50% of accounts to be written in those two areas.

[5] Any policies written outside this instruction had to be signed off by both Mr Nick Vernon, Property Product Manager, Technical Division, Allianz Australia and Mr Brian Coleman, the Corporate New Zealand National Underwriting Manager. Mr Coleman reported to Mr Elisara.

[6] Mr Elisara was responsible for assessing the commercial pricing aspects of accounts. This was separate to any underwriting sign off. Mr Elisara relied on Mr Coleman to review, escalate and agree on any relevant technical underwriting referral issues with Mr Vernon.

[7] Written policies do not become finalised until the underwriters have input the relevant data into the underwriting system to produce a quote. The deal is done if and when the broker agrees to the underwriter's terms at which time the account is bound.

[8] Allianz Australia suffered a $32 million loss from a Wellington property affected by the earthquake. The property was part of a group of properties referred to as the Prime Account. A compliance review of the Prime Account after the

earthquake identified concerns that underwriting instructions had not been complied with.

[9] After a disciplinary process Allianz concluded Mr Elisara failed to ensure the underwriting instruction was complied with and that this amounted to serious misconduct. Mr Elisara was summarily dismissed. He challenges that dismissal which he says was unjustified.

Issues

[10] To determine Mr Elisara's claims I must resolve the following issues:

a) Was the investigation by Allianz sufficiently fair and thorough?

b) Could Allianz have reasonably come to the view that Mr Elisara's conduct was serious misconduct?

c) Was the decision to dismiss open to Allianz?

d) Did Allianz breach its statutory obligations of good faith?

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Elisara and Allianz but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The Prime Account

[12] In 2016 Allianz was invited to pitch for the Prime Account portfolio through Aon Corporate. The Prime Account comprises 29 properties in Wellington at an asset value of $564m. This almost doubled Allianz's underwriting "book" for both Christchurch and Wellington.

[13] Because the Prime Account was based in Wellington and was over the 50% threshold the underwriting instruction required the sign off by both Mr Coleman and Mr Vernon. No dual signoff was obtained on the account.

Was the investigation by Allianz sufficiently fair and thorough?

[14] Following the Wellington earthquake, Allianz Australia arranged for a post loss review to be undertaken. The review found there had been a substantial breakdown in the underwriting controls by Allianz. The review was undertaken by two Australian based managers including Mr Elisara's manager, Mr Glen Drinnan.

[15] The reviewers found that Mr Elisara's decision making in relation to the Prime Account showed a lack of business judgment that operationalised when the underwriting process broke down.

[16] Following receipt of the review report, Mr David Hosking, Chief General Manager of Allianz Australia, wrote to Mr Elisara on 23 December 2016 inviting him to attend a disciplinary meeting. The meeting took place on 24 January 2017.

[17] Mr Elisara says the disciplinary investigation and process was unfair because Allianz failed to:

a) put all of the allegations to him to ensure he was aware of their substance, nature and weight;

b) allow adequate opportunity to bring a support person/representation to the disciplinary meetings;

c) provide Mr Elisara with critical evidence or the opportunity to respond to the evidence;

d) provide a preliminary decision;

e) bring an open mind to the decision and the decision was pre-determined;

f) have the decision maker investigate and hear his explanations; and

g) treat Mr Elisara the same as Mr Coleman and Mr Chapman.

Were all allegations put to Mr Elisara to ensure he was aware of their substance, nature and weight?

[18] Mr Elisara says Allianz has made allegations in its statement in reply that his actions amounted to gross negligence but this was never put to him for his comment. He also says that Allianz relied on a finding that there was an inappropriate "sales culture" within the company and did not interview others in respect of this allegation but simply relied on what had been reported in the review report.

Gross Negligence

[19] Allianz does refer to Mr Elisara's conduct as amounting to gross negligence in its statement in reply. That is in the context that first and foremost, Allianz considered his conduct to be serious misconduct. Mr Elisara himself raised the topic of gross negligence during the disciplinary meeting on 25 January. The notes from the meeting show that Mr Elisara commented about the difference between negligence and gross negligence. He suggested that if gross negligence wasn't established he would like to talk about an exit.

[20] The Act requires me to test the employer's actions in all the circumstances "…at the time the dismissal…" occurred.[1] The statement in reply was written after the dismissal occurred.

[21] Allianz did not rely on a finding of gross negligence to reach its decision to dismiss. At the time Mr Elisara was dismissed Allianz had concluded that his actions constituted serious misconduct. This was conveyed to him in its letter dated 25 January 2017. The letter does not include a finding that his conduct amounted to gross negligence.

Sales culture

[22] Mr Hosking took into account as part of his consideration what he referred to as an "…inappropriate sales culture…". In the 23 December letter setting out the allegations Mr Hosking included concerns that Mr Elisara had created a culture which put a big push on sales. Comments made by Mr Coleman and Mr Chapman during their review interviews were set out in the letter.

[1] Employment Relations Act 2000 s 103A(2).

[23] Mr Elisara was given the opportunity to address the allegations and acknowledged in his written response that he had put an emphasis on sales, which he said was balanced with a need for profit and good underwriting. In his comprehensive written response Mr Elisara acknowledged that Allianz may or may not wish to look further into the sales culture.

[24] I have concluded that the issue about the sales culture was not a primary reason for the decision to terminate Mr Elisara's employment. It was conduct that informed the decision but I can see nothing in the documents or evidence that shows the sales culture was a prominent concern. Any failure by Allianz to investigate the allegation after receiving Mr Elisara's explanation is a minor defect and did not result in Mr Elisara being treated unfairly.

Was an adequate opportunity provided to bring a support person or representative?

[25] Mr Elisara says he was told by Mr Fearnley that Allianz would only bring a lawyer to the meeting if Mr Elisara chose to bring one. A lawyer from DLA Piper was present at the meeting when Mr Elisara arrived but he had elected not to bring a lawyer. He says this put him at a disadvantage.

[26] In the 23 December letter it was "recommended" that Mr Elisara bring a support person or representative with him to the meeting. The meeting was held at the offices of DLA Piper. Mr Elisara was aware DLA Piper acted for Allianz as its lawyers.

[27] At the disciplinary meeting on 24 January Mr Hosking checked with Mr Elisara regarding his decision not to have representation. Mr Elisara told Mr Hosking that a lawyer would not help him recollect the facts. This was after Mr Elisara was aware a lawyer from DLA Piper was present in the meeting. He raised no concerns at that time about DLA Piper's lawyer being in the room.

[28] In his written response Mr Elisara acknowledged the seriousness of the matter and his right to have representation with him. He advised he had elected to attend on his own.

[29] Mr Elisara says that he was not provided with the opportunity to have a support person at the reconvened disciplinary meeting on 25 January and has referred me to Allianz's policy to support his contention that this was a procedural defect.

[30] Allianz's policy requires Allianz to remind employees that they are entitled to representation at the commencement of each interview. That Allianz did not do this on 25 January is a breach of its policy. However, I have concluded the defect in process was minor and did not result in Mr Elisara being treated unfairly.

[31] Mr Elisara had made it clear both at the disciplinary meeting and in his written explanation that he did not need a lawyer present. Allianz was aware Mr Elisara had extensive legal experience, albeit not in employment law. It was always open to Mr Elisara to ask for the meeting to be adjourned to allow him the opportunity to seek legal advice.

[32] In an email sent to Mr Fearnley after the meeting on 25 January, Mr Elisara raised concerns about the conclusions that his conduct amounted to serious misconduct, but he did not raise any concerns about not being reminded on 25 January that he was entitled to a representative. Unlike the day before, Allianz did not have a lawyer in the final meeting.

Was Mr Elisara provided with all critical evidence and did he have an opportunity to respond to that evidence?

[33] Mr Elisara says the following documents were not provided to him but were taken into consideration in the decision to dismiss him:

a) Mr Elisara's CV and pricing licence;

b) notes of Mr Chapman's disciplinary meeting;

c) an email about the aggregation spike in Wellington dated 21 October sent to Mr Chapman and Mr Coleman but not Mr Elisara;

d) the June and July board reports in which Mr Elisara notes the win of the Wellington properties.

<u>Mr Elisara's CV and pricing licence</u>

[34] Mr Elisara says aspects of his CV and the information included in his pricing licence was used by Mr Hosking when considering his decision to dismiss.

[35] Mr Elisara was aware of what was in his CV, he wrote it. There is nothing in the documents, including the 23 December and 25 January letters that demonstrate Allianz relied on either of these two documents to support its decision to dismiss. At best the content of the documents may have played a minor part in the contextual matrix. If this is a defect in the process it is minor and did not result in Mr Elisara being treated unfairly.

Notes of Mr Chapman's disciplinary meeting

[36] The notes of this meeting were not provided to Mr Elisara. Mr Elisara says the notes should have been provided because there were a number of matters that came out in Mr Chapman's disciplinary interview that needed to be substantiated in Mr Elisara's interview.

[37] This issue has been raised after the investigation meeting and only after Mr Fearnley told the Authority, about the reasons why Mr Chapman's disciplinary process became extended in time. It is not clear what specifically the matters were that had been raised in Mr Chapman's disciplinary interview and needed to be addressed in Mr Elisara's interview. The interview on 24 January was extensive and covered a large number of matters all of which pertained to the allegations raised in the 23 December letter. No references were made to matters raised by Mr Chapman in his discipinary interview.

[38] Mr Elisara has not established any breach by Allianz.

21 October email

[39] On 21 October the Reinsurance Administration Manager based in Australia emailed Mr Coleman and Mr Chapman asking why there had been an increase in the % of aggregates in Wellington.

[40] Mr Elisara says this email formed part of the information taken into account by Mr Hosking. He says the email was not provided to him during the disciplinary process.

[41] The email was not copied to Mr Elisara, there is no evidence that he was aware of the questions being raised by Allianz Australia and it is not clear what happened as a result of this email.

[42] The existence of this email came to light during my investigation meeting. It has not been referred to in any documents including the notes of the disciplinary meeting or review report. It has not been established that this email was taken into account by Mr Hosking when he concluded Mr Elisara's actions amounted to serious misconduct.

The June and July board reports

[43] During my investigation meeting Mr Elisara maintained he had reported on the Prime Account in his monthly reports. As a result, I requested and was provided with copies of the reports. Mr Elisara says he should have had copies of these reports during the disciplinary meeting.

[44] I have read the transcript of the notes from 24 January. Mr Elisara does not refer to these reports. Allianz was not aware he was relying on the content of these reports during the disciplinary process. Allianz could not have known the reports had to be provided to Mr Elisara.

[45] The report for July 2016 records as a win over $100,000 "Prime Properties $850,000 (Aon Corporate)". Mr Elisara says that this statement should have rung alarm bells in Australia but was ignored.

[46] The statement in the report does not put Allianz Australia on notice that the aggregation of properties in Wellington is outside the underwriting instruction. Nor does the report record the location of the properties covered.

Failure to provide a preliminary decision

[47] Mr Elisara was dismissed on 25 January following the disciplinary meeting the day before. He says Allianz was required to provide him with its preliminary decision and allow him an opportunity to respond.

[48] I have concluded there has been no unfairness to Mr Elisara regarding a failure to provide a preliminary decision. Mr Elisara was on notice from 23 December that his conduct may be considered serious misconduct and that dismissal was a possibility.[2] He was provided with, and took, an opportunity to comment on that

[2] Housham v Juken New Zealand Limited [2007] ERNZ 183.

possibility at the meeting on 24 January. Mr Elisara told Mr Hosking that he understood that a possible consequence was termination.

[49] After being told of the decision to dismiss on 25 January Mr Elisara made submissions to Allianz about the finding of serious misconduct and the penalty of summary dismissal. He requested payment in lieu of notice. These submissions were considered by Allianz and on 3 February it confirmed its original decision.

Was the decision to dismiss pre-determined?

[50] Mr Elisara says Allianz attempted to find justification for his disciplinary investigation and ultimately his dismissal which at all times was pre-determined.

[51] The test for pre-determination is whether an objective observer would conclude that the decision-maker had closed his/her mind and was no longer giving genuine consideration to the issues before him/her.[3]

[52] Mr Elisara says Aon's CEO told him on 26 January that he had been told much earlier that week that he would be leaving Allianz. He also says that before the disciplinary meeting was arranged Mr Drinnan advised senior managers of Allianz Australia (including Mr Hosking) that he was working with HR to have those identified in the review report terminated immediately and said steps had been put in motion.

<u>Aon CEO</u>

[53] Mr Hosking denied advising Aon's CEO, prior to making his decision, that Mr Elisara would be leaving Allianz. Mr Hosking acknowledged he met with the CEO on 25 January and when pressed, refused to comment on staffing matters.

[54] The CEO was not called to give evidence and I have accepted Mr Hosking's evidence on this point. From the evidence before me it is clear there were rumours circulating in the industry. It is likely the CEO asked about Mr Elisara during his meeting because of the rumours circulating about what might have been happening at Allianz.

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[3] *New Zealand Educational Institute v Board of Trustees Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 272.

Mr Drinnan's conclusions

[55] Clearly, Mr Drinnan had formed a view that the conduct of Mr Elisara, Mr Coleman and Mr Chapman warranted dismissal. However, he was not the decision maker and was not involved in the disciplinary process.

[56] Mr Hosking acknowledged at the investigation meeting that he did take into consideration the comments made by Mr Drinnan in his review report but denies taking into account Mr Drinnan's comments in his covering email. Receiving the email does raise the spector that Mr Hosking was influenced in his decision making by Mr Drinnan's comments. However, at the time Mr Drinnan made his comments in his email, HR had not been advised and no steps had been taken to terminate the employment of any of the three employees concerned.

[57] I am not satisfied Mr Hosking or Mr Fearnley approached the disciplinary process with a pre-determined view as to the outcome. Mr Hosking undertook his own investigations and the final decision was not made until after Mr Hosking had heard from Mr Elisara.

Decision maker

[58] Mr Elisara says the decision maker was not present to hear his explanations before making the decision to dismiss. He told me the decision was made by Mr Niran Peiris, Managing Director of Allianz Australia. Allianz says Mr Hosking was the decision maker not Mr Peiris.

[59] It is fundamental to a fair process that an employee has the right to be heard by the decision maker.[4]

[60] I find it is more likely than not that the decision maker was Mr Hosking and not Mr Peiris. Mr Hosking wrote the letter dated 23 December which set out all of the allegations against which Mr Elisara was to respond. Mr Hosking attended the disciplinary meeting on 24 January and wrote the dismissal letter.

[61] Mr Hosking told me that he telephoned Mr Peiris after the disciplinary meeting so that he could update Mr Peiris on how the meeting had progressed. He

[4] *Irvine Freightlines v Cross* [1993] 1 ERNZ 424 at 224; and *Quinn v BNZ* [1991] 1 ERNZ 1060 at 1070.

then contacted him again after he had advised Mr Elisara of his decision to summarily dismiss him to update Mr Peiris of the outcome of the disciplinary process.

Disparity

[62] Disparity will arise in cases where different outcomes have been reached in similar circumstances and an employer has failed to differentiate one case from others.[5]

[63] When making a disparity assessment it is necessary to consider comparative conduct that is sufficiently similar. This requires consideration of all relevant circumstances including context.[6]

[64] Mr Elisara claims the decision to summarily dismiss him was disparate to the treatment meted out to others. For example Mr Chapman was allowed to resign and continue in his career as an underwriter and Mr Coleman continues to be employed by Allianz although he is currently on sick leave.

[65] Further, Mr Elisara says no employees were dismissed following losses arising from accounts not signed off by Mr Coleman after the Christchurch earthquake in 2011.

Mr Chapman

[66] Both Mr Chapman and Mr Coleman became subject to disciplinary processes and, like Mr Elisara, were advised that a possible outcome was dismissal for serious misconduct

[67] In Mr Chapman's case the disciplinary process never reached a conclusion because he "…fell on his sword..." and resigned from his employment with Allianz. The terms on which Mr Chapman's resignation was accepted are subject to a confidential record of settlement.

[68] In contrast Mr Elisara did not offer to resign during the disciplinary process. At the 24 January meeting Mr Elisara offered to talk about an exit if Allianz

[5] Wikaira v Department of Corrections [2016] NZEmpC 175 at [214].
[6] Nel v ASB Bank Limited [2017] NZEmpC 97 at [47].

concluded his conduct did not amount to gross negligence but Allianz were not comfortable having him working there.

[69] Allianz concluded Mr Elisara's conduct amounted to serious misconduct. Allianz cannot be criticised for not talking to Mr Elisara about an exit when the circumstances in which that discussion might have taken place did not arise.

[70] After he was advised that his employment was to be terminated for serious misconduct Mr Elisara asked to have his termination recorded as a resignation. Mr Elisara also raised the possibility that his termination could be made into a redundancy. Neither of these options were accepted by Allianz.

Mr Coleman

[71] At the time of my investigation meeting Mr Coleman was on long term sick leave. Mr Hosking told me that on his return to work the disciplinary process initiated before he went on sick leave will be continued.

Christchurch earthquakes

[72] Mr Elisara has provided no information about his claims that others were treated differently after the 2011 Christchurch earthquakes during which Allianz experienced a number of losses for business written out of Alliance Australia. I am unable to assess whether the circumstances are sufficiently similar to enable a determination about whether Mr Elisara has been treated differently from others.

Could Allianz have reasonably come to the view that Mr Elisara's conduct was serious misconduct?

[73] The terms and conditions of Mr Elisara's employment were set out in a written individual employment agreement. The employment agreement contained the following relevant provisions:

a) Responsibilities – to discharge his duties and exercise his powers, authorities and discretions, conform to, observe and comply with reasonable and proper directions, restrictions and regulations as required by Allianz. Mr Elisara agreed to comply with all legal requirements, statutory or otherwise, pertaining to his position and responsibilities.

b) Termination – Mr Elisara's employment could be terminated without notice or payment in lieu if he engaged in serious misconduct or gross negligence in the performance of his duties or acted in a way that undermined the trust and confidence with Allianz.

c) Position description – Mr Elisara was responsible for ensuring the Underwriters underwrote profitable business in line with company underwriting guidelines and within delegated authority limits. Two key components of his job description required Mr Elisara to ensure compliance requirements were met 100% of the time and to report any breaches in meeting compliance standards.

[74] Allianz bears the onus of establishing on the balance of probabilities that it held a genuine view based on reasonable grounds that Mr Elisara's conduct amounted to serious misconduct.

[75] Serious misconduct is conduct that fundamentally undermines the trust and confidence which is inherent in an employment relationship. The fact that consequences are very serious does not mean the act which produced or contributed to those consequences necessarily amounts to serious misconduct.[7] However, if the behaviour has got to the point of dereliction of duty then that must come close to or even amount to serious misconduct.[8]

[76] The allegations facing Mr Elisara included breaches of the Underwriting Instruction 13/2014, his employment agreement and his duty of fidelity.

[77] After the 2011 Christchurch earthquakes, Allianz updated its underwriting instruction, altering its earthquake underwriting structure to encourage business growth for the best seismically resistant structures while discouraging the lower seismically resistant buildings in high-risk areas.

[78] The Prime Account was written outside the rules set out in the underwriting instruction. When an account is written outside the underwriting instruction the

[7] *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 at 319.
[8] *Angel & Hutton v Fonterra Cooperative Group* [2006] ERNZ 1080 at [80].

account had to be signed off by both Mr Coleman and Mr Vernon, who was based in Australia.

[79] Allianz concluded that Mr Elisara's failure as CEO, to ensure the underwriting instruction was followed was a serious breach of not only the underwriting instruction but also his obligations under his employment agreement and his duty of fidelity.

[80] Mr Elisara says his only failure was to check that Mr Coleman had not obtained Mr Vernon's signoff and this action does not amount to serious misconduct.

[81] There is no dispute that the failure to have dual sign off on the Prime Account led to a significant loss for Allianz. The question is whether Allianz could conclude that Mr Elisara's action in failing to ensure dual sign off amounted to serious misconduct.

[82] Mr Elisara asked Mr Coleman to get sign off from Mr Vernon but acknowledges that he did not follow this up.

[83] In an email dated 12 April 2016 Mr Elisara told Mr Chapman that if there were technical reasons for not being in a winning position with Aon (for example only being able to write 45% of the risks) Aon would be advised as soon as possible. In response Mr Chapman advised Mr Elisara that he would advise Aon they would consider a reserve if the account fits within Allianz's risk appetite and capacity. Mr Elisara says the communications in April were not taken into account by Allianz when it concluded his conduct amounted to serious misconduct.

[84] The April communications were part of the disciplinary process. They were attached to the 23 December letter. Mr Hosking told me that the email was sent at a time when the Prime Account was only being discussed as a possible reserve and not about whether the properties should be underwritten. At that time there was no knowledge of what the Prime Account comprised, no work had been done, nor were any details disclosed. The quality of the property was not known.

[85] During the disciplinary meeting Mr Elisara was asked about two emails sent to him after the April communications. In particular he was asked why these emails did not raise "red flags" with him and why on receipt of the emails he did not escalate matters to Allianz Australia.

[86] The first email is dated 24 May 2016 from Mr Chapman requesting approval to offer a discount on the Prime Properties. Mr Chapman sets out in the email that the account includes 29 Wellington office buildings all within the CBD location.

[87] The second email is from another broker forwarded by Mr Chapman to Mr Elisara on 29 June. The email from the broker is critical of the decision by Allianz to support the Prime Account. The broker refers to comments made by Mr Chapman that Allianz will only underwrite risks in Wellington on hard ground, modern, an NBS of greater than 80% and only if they are part of a national schedule. The broker points out that the Prime Account does not meet Allianz's underwriting criteria.

[88] During the disciplinary process Mr Elisara acknowledged he had closed his mind and alarm bells didn't ring for him over these emails. He assumed the Prime Account had been signed off and could provide no explanation as to why he had not escalated the account at that time to Australia.

[89] I have concluded Allianz could conclude Mr Elisara's actions amounted to serious misconduct. Mr Elisara was employed in the most senior role in New Zealand. He had a strong risk management and compliance background and his job description makes it clear that he was required to ensure compliance requirements were met 100% of the time.

[90] Apart from the Prime Account, during the loss review interview Mr Elisara did not know whether other accounts in the Wellington aggregate were in breach of the instruction.

[91] Mr Elisara knew he had ultimate responsibility and this was acknowledged by him during the loss review interview and the disciplinary process. He told Allianz he did not do enough to manage the risk of underwriting breaches and had no controls in place outside of the underwriting management process. He had assumed signoff's had been done but did not explicitly ask if the underwriting was signed off. He acknowledged he should have followed up the need for Mr Vernon's signoff, and shared the aggregation issue with Allianz Australia.

[92] Further, after the loss review interview he wrote to Mr Drinnan and acknowledged he had insufficient regard to the terms of the underwriting instruction.

He acknowledged a failure on his part to make due enquiries about the underlying risk and that all relevant components of the underwriting sign-off had been obtained. He acknowledged that through a lax process on his part he signed off an account that was not up to standard and took responsibility for his part in the process.

Was a decision to dismiss open to Allianz?

[93] There may be a variety of ways of achieving a fair and reasonable result in a particular case. The requirement is for an assessment of substantive fairness and reasonableness rather than minute and pedantic scrutiny to identify any failings.[9]

[94] The statutory test of justification is contained in section 103A of the Act. I am required to determine the question of whether an action was justifiable on an objective basis, having regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[95] In applying the test in section 103A I must consider the non-exhaustive list of factors outlined in section 103A(3):

> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
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> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
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> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[96] In addition to the factors described in section 103A(3), I may consider any other factors I think appropriate. An action must not be found to be unjustified solely because of defects in the process as long as those defects were minor and did not result in the employee being treated unfairly.[10]

[97] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell

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[9] *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295, (2016) 10 NZELC 79-065 at [46].
[10] Employment Relations Act 2000 (the Act), section 103A(5).

within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[98] As a full Court observed in *Angus v Ports of Auckland Ltd*[11]

> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[99] As already stated, I am required to consider the actions of Allianz at the time it made its decision to dismiss for serious misconduct. During the disciplinary process Mr Elisara took responsibility for the failure to check that the underwriting instruction was followed. Since his dismissal Mr Elisara has resiled from that view. He now says he alone was not responsible because he relied on the seniority and expertise of Mr Chapman and Mr Coleman and the oversight of Allianz Australia for ensuring the underwriting instructions were met.

[100] Mr Elisara says he did not have exclusive responsibility for the underwritings in his role as CEO. He says he was contrite and apologetic throughout the disciplinary process and this should count towards a favourable outcome for him.

[101] I have concluded that the decision to dismiss Mr Elisara for serious misconduct was substantively justified and within the range of reasonable responses Allianz could take. Mr Elisara was responsible for a substantial breach of his obligations as CEO which caused a significant loss to Allianz. He failed in his requirement to ensure 100% compliance with the underwriting instruction.

Did Allianz breach its statutory obligations of good faith and if so, what if any penalties should be imposed?

[102] Mr Elisara says the manner in which Allianz terminated his employment breached its obligations of good faith. He relies on s 4 of the Act, which requires employers to be active and constructive in maintaining a productive employment

[11] [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

relationship. Section 4 also requires employers who are proposing to make a decision that is or will likely have an adverse effect on the continuation of employment of an employee to provide access to information and an opportunity to comment on the information.

[103] Mr Elisara relies on his claim that Allianz did not put a preliminary proposal to him prior to issuing its decision to dismiss him.

[104] Allianz has not breached its obligations of good faith toward Mr Elisara. I have already found there was no procedural defect when Allianz issued Mr Elisara with its decision to dismiss without first putting it to him as a proposal on 25 January.

[105] Mr Elisara was provided with all information relevant to the possible termination of his employment and had a full opportunity to comment on that information. He was advised Allianz was proposing to terminate his employment if it found serious misconduct.

[106] The prospect of dismissal was discussed in the meeting on 24 January and Mr Elisara suggested they could discuss an exit package if serious misconduct was not established and if Allianz was not comfortable with Mr Elisara staying in his job. Mr Elisara did not express any concerns about the decision to dismiss on 25 January but did query whether serious misconduct could be established. This point was raised in respect of whether Mr Elisara should be paid in lieu of notice. Allianz considered what Mr Elisara had to say about that and confirmed its decision on 3 February that Mr Elisara's conduct amounted to serious misconduct.

Costs

[107] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Allianz will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Elisara will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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

Vicki Campbell
Member of the Employment Relations Authority