

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 232
5289564

BETWEEN MATTHEW FORD
 Applicant

AND TE AWHI WHANAU
 CHARITABLE TRUST
 Respondent

Member of Authority: K J Anderson

Representatives: S Scott, Counsel for Applicant
 D White, Advocate for Respondent

Investigation Meeting: 2 March 2011 at Hamilton

Submissions Received: 15 March 2011 for Applicant
 15 March 2011 for Respondent

Determination: 1 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Ford, claims that he was unjustifiably dismissed on 6th October 2009. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages and compensation. The respondent, Te Awhi Whanau Charitable Trust (the Trust), says that the dismissal of Mr Ford was justified because his conduct deeply impaired the basic trust and confidence between him and the Trust to an extent where his continued employment became untenable.

[2] The Authority received evidence from Mr Ford and his parents, David and Sylvia Ford. For the Trust, there is evidence from Mr David White, a consultant to the Trust, Ms Shirley Titoko, General Manager, and Mr Lloyd Togia, Project Team Manager. The parties have also provided written closing submissions. All of the

material available has been closely considered, albeit it may not be referred to in this determination.

Background Facts and Evidence

[3] Mr Ford commenced his employment in March 2007 in the position of National Administrator. His terms and conditions of employment were provided within an individual employment agreement signed by the parties on 2nd March 2007. This agreement was subsequently replaced by a later one signed on 17th June 2008. The job largely involved dealing with accounts payable, receivables, payroll, petty cash and file management. Prior to being employed by the Trust, Mr Ford had provided administration services to the Trust, as an independent contractor, for a period of seven or eight years.

[4] During his time as an independent contractor and for almost two years as an employee of the Trust, Mr Ford reported to the National Director of the Trust, Mr Edward Beattie.¹

[5] In March 2009, Mr Ford went on leave. Mr Lloyd Togia was employed on a temporary basis to cover Mr Ford's duties. Upon his return to work on 30th March 2009, Mr Ford discovered that Mr Togia had been employed on a permanent basis in the role of Project Team Leader, and that he was now expected to report to Mr Togia, rather than Mr Beattie. The evidence of Ms Titoko is that the Trust required a person with appropriate qualifications to oversee and restructure the financial systems and Mr Togia (who has an impressive academic record) was a suitable appointment accordingly.

[6] The evidence of Mr Ford is that between March and October 2009, there were several "incidents" that: "... occurred with a purpose of making my employment conditions difficult." Mr Ford says that he believes that the Trust wanted to "get rid" of him, or force him to resign, because he "stood up" to Mr Beattie in regard to the purported inappropriateness of what Mr Beattie required him to do in relation to certain administrative matters. Mr Ford was not particularly forthcoming in regard to the details of what he was referring to. Rather, he referred the Authority to a very

¹ Mr Beattie worked from the Whangarei (North) branch of the Trust.

lengthy and comprehensive letter dated 4th November 2009 from a lawyer whom had previously represented Mr Ford. This letter to the Trust raised a personal grievance pertaining to the dismissal of Mr Ford. Apart from raising a personal grievance it sets out, in extensive detail, the various events that are alleged to have occurred prior to Mr Ford being dismissed. It refers to the various events that Mr Ford appears to be alluding to in his evidence to the Authority. But I find nothing in the overall evidence that remotely suggests that the Trust was attempting to “get rid” of Mr Ford as he alleges.

[7] The overall evidence reveals that there were a number of matters that arose in 2009, culminating in the dismissal of Mr Ford on 6th October 2009. I do not intend to canvass all of these matters, only those that appear to have some possible relevance in regard to Mr Ford’s dismissal. On 7th January 2009, there was a telephone conversation between Mr Ford and Beattie regarding a deduction of a sum of money from another employee who was leaving the employment of the Trust. Mr Ford filed a *Complaints Procedure Form* dated 8th January 2009. This records an exchange between Mr Ford and Mr Beattie and that Mr Ford “hung up” the phone on Mr Beattie. The complaint form records that Mr Ford was unhappy about the way he was spoken to by Mr Beattie. Obviously Mr Beattie was unhappy about the discussion on 7th January too, as via a letter dated 9th January 2009, Mr Ford was required to attend a disciplinary meeting with Mr Beattie, as he considered Mr Ford’s actions during the phone call on 7th January, to be “insubordination.” There is no other evidence about this incident apart from a reference in the *Statement of Problem*. This informs that the disciplinary meeting took place on 12th January 2009 and that the Trust agreed not to take the matter further. However, it appears that from this point on, there was some tension in the working relationship between Mr Ford and Mr Beattie.

[8] On 8th January 2009, there was an incident involving Mr Ford and Mr David Hiroti. It appears that this matter was also discussed at the meeting on 12th January 2009. The *Statement of Problem* refers to this. Mr Ford states that it was agreed that: “... actions of other staff against me were inappropriate.” However, the evidence of Ms Titoko is that Mr Ford was required to attend some counselling² to address “communication deficiencies” that were causing “workplace issues” and he was

² The evidence of Ms Titoko is the Mr Ford attended three counselling sessions and then stopped attending, without advising management.

required to take some annual leave. An *Assistance Plan for Matt Ford* was a further outcome. This set out three “objectives” being:

1. Developing self-awareness of workplace interactions, with the overall aim of achieving satisfactory relationships.
2. More effective work-life balance.
3. Constructive stress-release mechanisms.

A number of other “goals” for Mr Ford to achieve are set out in the assistance plan.

[9] Between mid-April and late May 2009 there were discussions about one administration position being made redundant. The evidence of Mr Ford is that at a meeting held on 19th May 2009, he was informed that his position would be made redundant, or his hours of work would be reduced to 15 or 20 hours per week from the current 32 hours. However, via a letter dated 25th May 2009 from Ms Shirley Titoko, the General Manger of the Hamilton Branch of the Trust, Mr Ford was informed that the possible redundancy of his position was withdrawn but the alternative is that Mr Ford would be required to 40 hours each week (instead of 32) for the same pay. Mr Ford was informed that there would be further consultation about his job description, how the extra hours of work would be utilised and whether or not he would remain on a salary (as opposed to an hourly rate, presumably). On 26th May 2009, Mr Ford responded clarifying the nature of his proposal to increase his working hours and seeking a written proposal from the Trust regarding the relevant new terms of his employment. Mr Ford informed that he expected the status quo to remain regarding his employment conditions until he had the opportunity to consider the proposed changes. A proposal was presented to Mr Ford on 29th May 2009. It is unclear if any changes to Mr Ford’s terms and conditions of employment actually occurred.

Matters leading to the dismissal of Mr Ford

[10] On 13th August 2009, a meeting took place at the Hamilton office of the Trust. Mr Beattie was present along with Mr Ford, Mr Togia, Ms Titoko and Ms Debbie Skipper. The evidence of Mr Ford is that he was informed by Mr Togia, prior to the meeting (11th August), that Mr Beattie was unhappy with the accounts. Mr Togia denies this. Mr Togia says that the meeting was just of a “routine catch up” nature but he did notice that Mr Ford was uneasy about the meeting and informed him that Mr Beattie was going to blame Mr Ford “for financial problems.”

[11] The further evidence of Mr Ford is that at the meeting on 13th August, Mr Beattie expressed the view that: "... there were discrepancies and failures in the accounting records and suggested that it was my fault." Mr Ford says that the discrepancies and failures were never explained or elaborated on and he was never advised of what they were. Brief notes of the meeting were prepared by Ms Skipper and there is no reference in those to Mr Beattie expressing any concerns about the accounting records; nor has any concern or criticism been expressed by Mr Togia or Ms Titoko, about Mr Ford's ability to maintain the accounting records for the Trust.

[12] On 23rd September 2009, Mr Ford spoke to the Trust's accountant, Mr Renata Kahuroa. The evidence of Mr Ford is that he expressed to Mr Kahuroa that: "... the inadequate accounting records could result in suspicion that funds were being misappropriated." Mr Ford says that he suggested to Mr Kahuroa that "such matters needed to be investigated." Mr Ford also says that Mr Togia was present during this conversation and later warned him about making "such allegations."

[13] Mr Togia says that he was present when Mr Ford was speaking to Mr Kahuroa. Mr Togia's evidence is that Mr Ford began suggesting that Mr Beattie was "intentionally refusing to send down receipts" relating to money that had been spent for purchases made by the Whangarei branch of the Trust. Mr Togia says that: "Mr Ford got more and more wound up and he stood up and got really agitated as he repeatedly stated "Do I have to spell it out to you, he is misappropriating funds." He then continued to repeat, "He is misappropriating funds."³

The further evidence of Mr Togia is that he then intervened and told Mr Ford that he needed to be careful what he said. Mr Togia was concerned that Mr Ford was putting himself and the Trust "in a precarious position." Mr Togia says that he was also conscious that there were other people passing through the reception area during the incident. Mr Togia attests that Mr Ford ignored his caution and: "... continued his tirade. The situation was very tense. He was incensed and his body language indicated he was out of control – he was red in the face, his veins were prominent in his forehead and his movements were uncontrolled and stilted."

[14] Mr Togia says that Mr Ford continued with his "tirade" for at least 15 minutes, forcing Mr Kahuroa to leave, as he wanted to "de-escalate the situation." However,

³ An apparent reference to Mr Beattie.

Mr Ford continued “talking to anyone who was in earshot” with the affect that Ms Skipper left the area in an “agitated state” and later indicated that she did not want to continue working in the same area as Mr Ford as she felt unsafe, says Mr Togia.⁴

[15] Mr Togia reported the incident to Ms Titoko⁵ and she requested that Mr Togia gather incident reports from the witnesses. Mr Titoko instructed Mr David White, the Human Resources consultant for the Trust, to manage the issue. Mr White prepared a report dated 27th September 2009. On the basis of Mr White’s advice, Ms Titoko suspended Mr Ford from his employment pending an investigation of the events of 23rd September. Subsequently, via a letter from Ms Titoko, dated 28th September 2009, Mr Ford was requested to attend a disciplinary meeting on 2nd October. Among other things, the letter records that complaints had been received⁶ alleging:

1. Inappropriate communication/behaviour, in that you raised your voice for a number of minutes despite being spoken to in a calm manner. The manner of your communication upset a number of people and is regarded as unprofessional. This issue is on-going and was addressed at a disciplinary meeting in January 2009.⁷
2. You stated in a loud and repeated manner that “Do I have to spell it out? He’s misappropriating funds” in a comment about the director of the Trust. This is an issue of grave concern in that your actions may have brought your employer into disrepute to members of the public and as no evidence has been produced or charges laid, your accusations could be seen as defamatory. The allegation is a serious one and requires that you provide evidence to substantiate your claim. There are also more appropriate methods to address concerns you have and these have been previously outlined to you. This is now a trust and confidence issue for Te Awhi Whanau Charitable Trust.

The letter also informs Mr Ford that there was a belief that because he ignored Mr Togia’s request to desist with his outburst on 23rd September 2009, this amounted to insubordination and unacceptable behaviour. Mr Ford was also required to account for the possibility that the disciplinary section of his personnel file had been removed. Finally, Mr Ford was informed that:

In the light of the above and that you have already been subject to a disciplinary hearing this year on one of the issues complained of, this matter is being regarded as **serious misconduct**. If proven, this could result in your dismissal from this organisation.

⁴ There is evidence from Ms Titoko that Ms Skipper had some previous mental health issues.

⁵ Via a written report dated 25th September 2009.

⁶ From Ms Hiroti and Ms Skipper.

⁷ The evidence is that this matter was concluded then and it was decided that no further action was required.

[16] A meeting took place on 2nd October 2009. Mr Ford was accompanied by his parents. Mr White and Mr Togia were present for the Trust.⁸ There is some conflict between the evidence of Mr White and Mr Togia and that of Mr Ford (senior). Mr White and Mr Togia say that Mr Ford (senior) advised that he would be lodging a personal grievance for his son and he would also be advising Inland Revenue to investigate the Trust. Mr Ford (senior) denies that he said these things and while he appeared to be a credible person, I find it unlikely that Mr White and Mr Togia would fabricate such evidence, particularly in regard to the reference to Inland Revenue. But in any event, but I am not required to resolve the conflict in the evidence as it is not particularly relevant to the issues to be determined.

[17] Apart from the conflict referred to, the evidence about what was discussed at the meeting is reasonably consistent. The matters set out in the letter of 28th September 2009 were canvassed. Mr Ford acknowledges that he was given an opportunity to put forward his response to the allegations that had been made against him. The evidence of Mr White and Mr Togia is that Mr Ford failed to produce any evidence to support the allegations he had made that Mr Beattie had misappropriated funds. They also say that Mr Ford minimised or failed to acknowledge the extent of the incident on 23rd September 2009. Mr White says that Mr Ford's explanation had to be accepted in regard to the allegation that he had removed papers from his personnel file, albeit there is one document that the Trust does not have on its file. This is a handwritten summary compiled by Mr Ford relating to the incident involving Mr Hiroti on 8th January 2009. Apart from the fact that the Trust has previously accepted Mr Ford's explanation about his personnel file, there is no evidence to suggest that the document referred to was ever on the file.

[18] Following the meeting on 2nd October 2009, there was a meeting between Mr White, Mr Togia and Ms Titoko. The evidence of Mr Togia is that they discussed "a series of incidents" that had involved Mr Ford. Mr Togia says that the incidents included:

- (a) The incident in January;
- (b) The forgery of the accountant's signature by Mr Ford on Trust cheques;

⁸ Ms Titoko says that she did not attend the meeting as her recent interaction with Mr Ford had not been "positive" and she did not want any perception that she might be biased.

- (c) The decision to stop attending counselling;
- (d) The repeated displays of anger and inappropriate behaviour;
- (e) The threats made to management during the disciplinary process;
- (f) The serious level of the misconduct including the length of time the incident occurred for and the failure of Mr Ford to desist when requested to by his manager, Mr Togia;
- (g) The lack of acknowledgement by Mr Ford of the serious nature of his comments about Mr Beattie; and
- (h) The likelihood, or otherwise, of continued “behaviour” by Mr Ford.

Mr Togia attests that in regard to the incident on 23rd September 2009, he felt that Mr Ford was unable to control his behaviour and respond appropriately to Mr Togia’s directions.

[19] The evidence of Mr White is that his advice to Ms Titoko and Mr Togia was that because Mr Ford was unable to give a satisfactory explanation for his “outburst” (on 23rd September), Mr Ford was “guilty of serious misconduct and the behaviour warranted dismissal.” Mr White adds that: “We were also cognisant of the fact that he failed to appreciate the significance of his actions.”

[20] Another meeting with Mr Ford took place on 6th October 2009. As Mr White was ill, Ms Titoko attended in his place, along with Mr Togia. The evidence about this meeting is sparse. The outcome being that Mr Ford was dismissed. The dismissal was confirmed via a letter of the same date from Ms Titoko:

From the meeting held between you and Te Awhi Whanau Charitable Trust on Friday 2 October 2009, we believe that the explanation you gave was insufficient to the statement you made openly alleging the misappropriation of funds with reference to Te Awhi Whanau Charitable Trust’s Director. We also believe that basic trust and confidence between you and Te Awhi Whanau Charitable Trust has been destroyed and a breach of confidence and insolence has occurred. Therefore, as of 6 October 2009 you are summarily dismissed.

Analysis and Conclusions

[21] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer’s actions, and how the employer acted, were what a fair and reasonable

employer would have done in all the circumstances at the time the dismissal or action occurred.⁹ The first issue that arises for consideration is:

Was Te Awhi Whanau Charitable Trust entitled to treat the actions of Mr Ford as serious misconduct?

[22] It appears that the incident which occurred on 23rd September 2009, regarding the outburst by Mr Ford alleging that Mr Beattie had misappropriated Trust monies, was viewed by the Trust as the “last word” in a chapter of incidents that occurred during 2009. This is manifested in the evidence of Mr Togia, as set out at para [18]. Therefore, it is appropriate to analysis the matters that appear to have been taken into consideration by the Trust, when reaching the conclusion that there was insufficient trust and confidence in Mr Ford, to continue his employment.

(a) *The incident in January 2009 and the decision to stop attending counselling.*

Clearly this incident was a matter of some concern for the Trust and the outcome was that an assistance plan for Mr Ford was agreed to. This included Mr Ford being required to participate in counselling and taking some annual leave. There is no evidence of any disciplinary action being taken and for all intents and purposes, the matter was dealt with then and concluded. It is not fair and reasonable for the Trust to now revisit that incident; or raise the matter of Mr Ford not completing the counselling, as the latter matter was never raised with him at the time, or subsequently.

(b) *The forgery of the accountant’s signature.*

This matter arose in March 2009 and an *Incident Report* dated 16th March 2009 was prepared by Mr Togia. The minutes of a Trust Board meeting held on 24th March 2009 also make reference to Mr Ford: “... duplicating another individual’s signature to sign off the wage schedule and cheques.” The term “forgery” is not used. The minutes also record that:

The Trustees indicated that providing Matt was spoken to and made to understand the seriousness of the matter, that this was not an acceptable practice, and that it never happened again, they would be satisfied with our proposed approach for dealing with him.

While clearly (and appropriately), the Trust took issue with Mr Ford “duplicating” another individual’s signature, it was also accepted by the trustees that he was not

⁹ Because the dismissal of Mr Ford occurred before 1st April 2011, this test still applies.

doing this for any personal gain. And while it was obviously an unacceptable practice, it appears that Mr Ford was spoken to at the time and then the matter appears to have been concluded. I find that it is not fair and reasonable for the Trust to revisit this incident, attempt to escalate Mr Ford's behaviour to the level of forgery, and then consider the matter as something to be taken into account when considering Mr Ford's continued employment.

(c) *The threats made to management during the disciplinary process.*

As I understand it, the matters pertaining to Mr Ford indicating he would pursue a personal grievance and would involve Inland Revenue in the affairs of the Trust, were seen as threats by Mr Ford towards the Trust. On the weight of the evidence, it is probable that Mr Ford (senior) made these statements so Mr Ford (the applicant) can hardly be held responsible for them, albeit he has not disassociated himself. And in any event, under the circumstances, Mr Ford was entitled to exercise his legal right to pursue a personal grievance. The threat of involving Inland Revenue can only be viewed as a somewhat misguided attempt to influence the decision makers.

(d) *The repeated displays of anger and inappropriate behaviour.*

The overall evidence points to a propensity on the part of Mr Ford to overreact to relatively innocuous circumstances, as particularly manifested by his behaviour on 8th January 2009; the outcome being he was required to undertake counselling in regard to achieving better relationships with people. While a less accommodating employer may not have been so lenient, there is no evidence of any disciplinary action being taken against Mr Ford, such as a warning being given that any further displays of anger and/or inappropriate behaviour could place his employment in jeopardy. Then of course, there was the more serious incident on 23rd September 2009, but it seems to me that that Mr Ford's behaviour then, must be viewed in isolation when considering an appropriate sanction. This takes us to the substantive matter that the Trust, appropriately, took into consideration:

(e) *The serious level of the misconduct including the length of time the incident occurred for and the failure of Mr Ford to desist when requested to by his manager, Mr Togia. The lack of acknowledgement by Mr Ford of the serious nature of his comments about Mr Beattie and the likelihood of continued behaviour.*

It has to be accepted that given the behaviour of Mr Ford on 23rd September 2009, and the unproven allegation of misappropriation made against Mr Beattie, the Trust was

entitled to treat this behaviour as serious misconduct warranting a disciplinary sanction.

[23] The background to Mr Ford's outburst on that day is that Mr Ford had ongoing concerns about the failure of Mr Beattie to provide receipts for some of the expenses incurred by the Northern Branch of the Trust. Mr Ford was basically responsible for the regular allocation of funds to the Northern Branch and ensuring that receipts were forwarded to him in order for him to ensure that proper accounts were provided to the accountant for the Trust, Mr Kahuroa. Mr Ford had previously raised his concerns, about the failure of Mr Beattie to provide receipts from time to time, with Mr Togia and Ms Titoko. He had been assured by them that they were taking care of the matter. Indeed, at the investigation meeting, Ms Titoko acknowledged that she accepted and shared (to some extent) Mr Ford's concerns about the lack of receipts for the Northern Branch of the Trust. Nonetheless, that does not excuse Mr Ford's behaviour and/or the allegations he made on 23rd September 2009, for which he was required to give an explanation for at a meeting on 2nd October 2009. Indeed, as has been submitted for the Trust, while Mr Ford had a responsibility to act diligently in regard to carrying out his duties related to accounting for certain expenditure pertaining to the Trust, that did not extend to making unsubstantiated allegations of dishonesty.

Was Te Awhi Whanau Charitable Trust entitled to treat the actions of Mr Ford as a breach of trust and confidence warranting dismissal?

[24] While I accept that the Trust was entitled to impose a disciplinary sanction on Mr Ford, I conclude that the decision to dismiss him is fatally flawed. This is because the Trust took into consideration several matters that had previously been concluded and certain actions were taken (i.e. counselling), or it was decided that no further action was required. I find that taking into account the previous incidents, when deciding to dismiss Mr Ford, was not the action of a fair and reasonable employer in the circumstances; hence the dismissal was unjustified.

[25] I also find that the dismissal of Mr Ford was substantively unjustified. It is clear that Mr Togia and Ms Titoko were aware of Mr Ford's concerns about the failure of Mr Beattie to provide adequate receipts for the Northern Branch but the evidence is that they were somewhat reticent about resolving this issue. There is also some evidence that Mr Beattie was less than cooperative in regard to providing the

receipts that Mr Ford was requesting. These factors in no way excuse the behaviour of Mr Ford, but it is clear that he had a genuine (and probably legitimate) concern about Mr Beattie's lapses; and the failure on the part of management to have the situation rectified. I find that a fair and reasonable employer would have taken into account, as a mitigating factor, the ongoing concerns about the unreasonable failure of Mr Beattie to assist Mr Ford with the material he was entitled to, in order to carry out his role effectively.

[26] I am also cognisant of the finding of the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd*¹⁰:

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court's judgment in *BP Oil NZ Ltd v Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one that a reasonable and fair employer would have taken in the circumstances.

While I have accepted that the Trust was entitled to treat the behaviour of Mr Ford on 23rd September 2009 as serious misconduct warranting a disciplinary sanction, even up to a final warning, I do not accept that his conduct "deeply impaired" or was "destructive" of the basic confidence and trust that is essential to the employment relationship. This is particularly so given my findings on the matters that the Trust took into consideration, and that Mr Ford's managers were aware that there was a problem with Mr Beattie not providing receipts.

[27] It has also been submitted for Mr Ford that the dismissal was procedurally flawed because Mr Ford was not heard by the decision maker, Ms Titoko.¹¹ The evidence is that Mr Ford met with Mr White and Mr Togia on 2nd October 2009. Ms Titoko decided not to meet with Mr Ford because of previous negative experiences with him in the past and she did not wish to appear biased. Following this meeting, Ms Titoko conferred with Mr White and Mr Togia and a decision was made to dismiss Mr Ford. This decision was conveyed to him at a meeting on 6th October 2009 with Ms Titoko and Mr Togia present. The evidence about what was said at this meeting is

¹⁰ [1992] 3 ERNZ 483,487.

¹¹ With reference to *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424 and *Quinn v Bank of New Zealand* [1991] 1 ERNZ 106.

sparse but it seems that its purpose was simply to inform Mr Ford of the decision to dismiss him. There is no evidence of any submission being made by Mr Ford to Ms Titoko to consider any matter that she may not have been aware of. On the other hand, as the final decision maker, and General Manager, Ms Titoko does not appear to have made any attempt to satisfy herself that the information that she received from Mr Togia and Mr White was balanced with anything that Mr Ford may have wished to say to her, before she made a final decision. This in itself was unfair and unreasonable, particularly given that Mr Togia was actively involved in reporting the incident and Mr White was a consultant/advisor to the Trust. Having heard the credible evidence of both men, I do not suggest for one moment that they were biased or inaccurate in any way in regard to the information they reported to Ms Titoko. Rather, I conclude that Ms Titoko, as the decision maker and the person with the final responsibility for the actions of the Trust, had an obligation to allow Mr Ford a final opportunity to present any matter that he wished her to take into consideration. However, given that I have found that the dismissal was unjustified on other, and more substantial grounds, this matter is given less weight overall.

[28] In summary, I find that the dismissal of Mr Ford was unjustified substantively and procedurally. He has a personal grievance for which remedies may be awarded.

Remedies

[29] Having determined that Mr Ford has a personal grievance pertaining to his claim of unjustified dismissal; pursuant to s 123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for 1 or more of the following remedies.

Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s 128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

And at s 128(3):

Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

(a) *Reimbursement of wages*

[30] Mr Ford seeks reimbursement of wages from the date of the dismissal until the commencement of his new employment on 6th April 2010. However, the evidence of Ms Titoko is that while Mr Ford was dismissed effective from 6th October 2009, because he presented a medical certificate on that day, in recognition of his length of service and as a ‘good employer’ the Trust paid Mr Ford for a further two weeks. This is not disputed by Mr Ford. Therefore, it would seem that he was paid up to and including 20th October 2009 and hence his loss of earnings is from 21st October 2009 up to 5th April 2010: a total of 23 weeks and 3 days. At the time of his dismissal, Mr Ford was paid an annual salary of \$42,120. Therefore, the loss of remuneration is a gross sum of \$19,116.00.

[31] Mr Ford has provided a comprehensive list of the applications (140) that he made to prospective employers. I accept that Mr Ford actively attempted to mitigate his loss. That then takes us to the discretion available to the Authority to award more than 3 months’ remuneration pursuant to s 128(3) of the Act and I am cognisant of the finding of Goddard CJ in *Davis Trading Company Limited v Lewis*:¹²

But once contributory fault is established, there seems no warrant for exercising in the respondent’s [employee’s] favour the discretion to award more than the minimum loss and even that requires to be reduced

Given that I find that there has been contributory fault by Mr Ford because his actions contributed to the situation that gave rise to the personal grievance, I decline to award more than three months’ loss of wages. Therefore, subject to a reduction, pursuant to s 124 of the Act, I award Mr Ford three months’ lost wages, being the gross sum of \$10,530.00.

(b) *Compensation*

[32] Mr Ford seeks the sum of \$20,000 under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Given the usual awards of the Authority (and the Employment Court), this is a substantial claim and it is not

¹² [1993] 2 ERNZ 272 at 288:

supported by sufficient evidence to justify such an award. The evidence of Mr Ford is that he was ‘totally devastated’ by the dismissal and upset that he had been “branded as a dishonest employee” because he spoke out against “incorrect and/or illegal procedures.’ I accept that Mr Ford was affected to a certain degree by his dismissal. This is corroborated by the evidence of his parents and while one could expect parents to be supportive and possibly a little biased, I found Mr and Mrs Ford to be reliable witnesses overall and I accept the evidence as to their observations of how their son was affected by the dismissal. But I do not accept that Mr Ford was made out by the Trust to be a dishonest employee because he spoke out about the failure of Mr Beattie to provide appropriate documents. Regrettably, it appears that Mr Ford still fails to understand that it was not his complaint that was at issue; it was the manner in which he expressed it and the unsubstantiated allegation of misappropriation, that led to his dismissal. Mr Ford’s honesty, in regard to his dealings with Mr Beattie, was never questioned by the Trust.

[33] Then there is the evidence of Mr Ford where he expresses the view that he was “initially relieved” to be away from working for the Trust and he was “excited” about making a fresh start. Nonetheless, this is balanced by any relief being short-lived when it came to finding alternative employment, particularly when he got to an interview and then revealed that he had been dismissed. I assess the effect of the dismissal on Mr Ford to justify an award of compensation that falls within the mid-range of such events. Subject to a reduction pursuant to s 124 of the Act, the sum of \$6,000 is awarded.

(c) *Contributory Fault*

Pursuant to s 124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided:

- (a) consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[34] I consider that the actions of Mr Ford did contribute towards the situation which gave rise to the personal grievance. The contribution by Mr Ford relates to his behaviour on 23rd September 2009 pertaining to the incident that led to his dismissal. I have accepted the position of the Trust that the actions of Mr Ford were untenable and

warranted a disciplinary sanction for serious misconduct and a final warning would have been appropriate. Mr Ford made a serious allegation; that Mr Beattie, as the Director of the Trust could have been, or was, misappropriating Trust funds. This allegation was heard by several employees of Trust and Mr Ford was unable to produce any evidence to support such a serious allegation. And then when he was asked by his manager, Mr Togia, to desist from the tirade, Mr Ford refused and continued without any acknowledgement (still) that his behaviour was inappropriate. The behaviour of Mr Ford also upset two other employees of the Trust to the extent that one of them removed herself from the environment and both employees subsequently filed written complaints.

[35] I find that the above factors were a substantial contribution by Mr Ford towards the situation that gave rise to the grievance to the extent that the remedies awarded to him are reduced by 50%.

Determination

[36] For the reasons set out above, I find that Mr Ford was unjustifiably dismissed and I make the following orders:

- (a) Pursuant to sections 123(1)(b) and 128(2) of the Act, Te Awhi Whanau Charitable Trust is ordered to pay to Mr Ford the gross sum of \$5,265.00 as reimbursement of lost wages (\$10,530 less 50%). Given Mr Ford's contribution, I do not see fit to award interest as sought.
- (b) Pursuant to s 123(1)(c)(i) of the Act, Te Awhi Whanau Charitable Trust is ordered to pay to Mr Ford compensation in the sum of \$3,000.00 (\$6,000 less 50%).

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions

K J Anderson
Member of the Employment Relations Authority