

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [80]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 599
3189739

BETWEEN	PETER HYNES Applicant
AND	ONE PURE LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Rob Towner and Elizabeth Gambrell, counsel for the Applicant Chris Eggleston, counsel for the Respondent
Investigation Meeting:	23 – 25 May 2023 at Napier
Submissions received:	12 July and 2 August 2023 from Applicant 26 July 2023 from Respondent
Determination:	16 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Peter Hynes, was employed by the respondent One Pure Limited (One Pure) as the Procurement and Logistics Manager at its Napier factory. Mr Hynes had even taken over the running of the factory on occasion when needed. On 3 February 2022, an employee in the factory, Mr Andrew Costello, sent an email to One Pure’s human resources manager, Ms Monica Shan. He accused Mr Hynes, and three other staff, of a variety of serious offences, including racist comments, destruction of stock, theft of time, and variously undermining One Pure’s commercial operations. Ms

Shan forwarded this email to the General Manager responsible, Mr Gerry Bolmatis. Mr Bolmatis looked into the matter, and began disciplinary proceedings against Mr Hynes. The outcome was that Mr Hynes was summarily dismissed for serious misconduct.

[2] Mr Hynes strenuously denies that any of the allegations made against him were accurate, and he also points to what he says are fundamental flaws in One Pure's process. He raises a claim of unjustifiable dismissal, and seeks remedies.

[3] In response, One Pure defends its decision to dismiss Mr Hynes, and says it was justified in doing so, and no remedies should be awarded.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged, on behalf of Mr Hynes, from Mr Hynes himself, his wife, Mrs Lynn Hynes, Mr Phil Garside, Mr Grant Verry, and Mr Geralkis Bolmatis. Witness statements on behalf of the company were lodged by Mr Andrew Costello, Mr Louis Jia, Mr Max Yu, Ms Monica Shan, and Mr Geralkis Bolmatis. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[5] Mr Bolmatis is not a reliable witness, as shown by the fact that he provided two witness statements in these proceedings, one supporting the applicant, and one supporting the respondent. At the investigation meeting, Mr Bolmatis disavowed the comments made in his witness statement provided on behalf of the respondent, and said that he had prepared this document while still employed by One Pure, and had simply said what he thought One Pure would want him to say. He said he then felt he should give a second statement to put things right. In the event, Mr Bolmatis' in person evidence was not consistent with other evidence and contemporaneous documents, and I was not much assisted by it.

[6] 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.

The issues

- [7] The issues requiring investigation and determination were:
- (a) Was Mr Hynes' dismissal substantively and procedurally justified?
 - (b) If One Pure's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act;
 - (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Hynes that contributed to the situation giving rise to his grievance?
 - (d) Should either party contribute to the costs of representation of the other party.

Background

[8] Mr Hynes is an experienced manager, specialising in logistics, transport, and related fields. He had worked for One Pure for some years. His role was that of Procurement and Logistics Manager. Broadly put, there were two main aspects to his duties, first, to procure all the raw materials that One Pure needed to produce its bottled water products, and second, to make all logistical arrangements for the delivery of goods to customers as needed. Mr Hynes had two dedicated staff reporting to him.

[9] In late 2020, One Pure appointed Mr Max Yu to the One Pure factory, first as the production manager, and then as Plant Manager overseeing the entire factory. Mr Hynes was asked to report to Mr Yu.

[10] It is common ground that communication between Mr Yu and Mr Hynes was (or became) poor. Mr Grant Verry, the previous General Manager, gave thoughtful evidence about the plant, and the differing approaches that Mr Yu and Mr Hynes took to their work. He described Mr Hynes as someone who was very experienced in his field, who was used to working with the "Just In Time" model that One Pure was (at least, at that point) operating on, who was agile and flexible and willing and able to do what was needed to get the job done, even where resources were limited. He said that Mr Hynes had strong customer relationships, and would always try to keep the customer happy. He said in contrast, Mr Yu's background was in production planning, and it

was his understanding that Mr Yu had significant experience running larger scale factory operations, and his focus was on processes, procedures, and driving efficiencies through those means.

[11] This accorded with the evidence given by both Mr Yu and Mr Hynes as to their approaches. Mr Hynes said he was used to the factory manager always having a daily and monthly production plan, which would be shared with the team. In his role as procurement manager, he would then check the production plan, and ensure that the necessary stocks were on hand to meet the production needs. He found it very frustrating that Mr Yu did not produce production plans, as this made it difficult for him to anticipate what stocks to order and when they would be needed by.

[12] Mr Yu agreed that he did not produce a production plan. He said this was not needed. He said that instead, for all the various stocks and materials One Pure needed, he had set a “safety level”, and stocks were always to be kept at the relevant safety level at any given time. That way, it did not matter what product the factory was producing at any given time, there would be sufficient raw materials for any given product to be produced immediately. His view was that if something unexpected happened, for example, a machinery breakdown, then maintaining stock at the relevant safety level meant this would not impede production. Instead, production could always switch to an alternative product, even if this was not what had been originally intended, because there would always be sufficient or safe levels of raw materials on hand to allow for unexpected production changes.

[13] Mr Hynes said he was aware of Mr Yu’s required safety levels for stock, and that he did his best to ensure that they were met. However, he was not always able to achieve this for various reasons including funding/costs, global shipping delays, and warehouse and storage space, all of which needed to be juggled.

[14] In approximately December 2021, Mr Gerry Bolmatis, the plant’s then General Manager, became aware that Mr Yu and Mr Hynes were not communicating effectively on logistics issues. Mr Bolmatis decided to re-assign Mr Hynes’ procurement duties to Mr Yu. He urged Mr Hynes to accept this decision, and Mr Hynes did so, albeit reluctantly.

[15] There were some further disagreements between Mr Hynes and Mr Yu, particularly one where a customer had emailed Mr Hynes asking to make changes to

their next order. Mr Hynes was willing to implement this change immediately. Mr Yu objected to making changes in the middle of a production run, and took the view that it was important that the customer put in a proper change request to be implemented for the next production run. This serves to illustrate the differences in approach between Mr Hynes and Mr Yu.

[16] In addition, at this time, staff at One Pure were in the process of learning how to implement business management software referred to as the “BC system”. Previously, One Pure had used an in-house system, but wanted and needed to change to a more comprehensive system when the person responsible for creating and maintaining the previous system left the business. The purpose of the BC system was to give everyone an overview of the operations, and to enable proper tracking of raw materials, production, product, and delivery.

[17] Both Mr Hynes and Mr Yu explained to me that all areas of the business were linked, and were interdependent in the system. First, raw materials coming into the factory needed to be entered into the system.

[18] Then, the production team would input the types and volume of product produced each day using those raw materials. At the end of the day, the production team would be able to record the product created, and the relevant batch numbers.

[19] Then the logistics and dispatch team would pick and pack the product, and record it had been dispatched to customers, using the relevant batch numbers. They would also mark dispatched product to be invoiced, which invoices would be sent out by the relevant finance team.

[20] There were two potential vulnerabilities in this system. First, it relied on accurate manual data entry, ideally on a daily basis. Second, because the system was all interlinked, there was the potential for creating inadvertent backlogs, for example, if the system incorrectly recorded 100 bottle caps, and in fact 1000 bottles were produced, the system would not allow 1000 bottles of finished product to be entered into the system, only 100. Likewise, production needed to be entered almost on a real-time basis. When Mr Hynes and his team dispatched product to customers, the system would only let them record as dispatched batch numbers that were already in the system. So if there was any delay in entering a batch number for finished product, Mr Hynes and his team would not be able to mark that batch as having been dispatched to a

customer until the production team had entered the relevant product and batch numbers into the database. Mr Hynes and his team had manual records (eg hard copies of the relevant packing slips, or pink slips) which they retained so that they could be entered into the system when possible.

[21] One Pure was aware of the need to train up staff in how to properly use the BC system. Mr Louis Jia in particular was asked to assist. He gave evidence that he thought that Mr Hynes did not use the system enough, and relied too much on paper records. Although Mr Jia was able to succinctly explain the potential for delays when data was not entered in a timely manner, he did not demonstrate any awareness that Mr Hynes' continued use of manual records might result from the problems with the system, combined with the continuing requirement for Mr Hynes to dispatch existing product to customers in a timely manner, even if that product had not been recorded in the BC system in a timely way.

[22] Mr Jia also gave evidence that he would help Mr Yu enter production data, and gave Mr Yu his account (with what appears to have been a type of administrator access) to assist Mr Yu. Mr Jia did not offer this level of assistance to Mr Hynes, even after the administrative assistant who was responsible for assisting Mr Hynes resigned.

[23] Beginning in about October 2021, One Pure hired EPS365 Limited, a consulting firm, to assist with auditing of the BC systems, staff training, and related matters. For the purposes of this determination, these matters have now been resolved, but these contemporaneous problems were a source of additional workload and stress for all involved, and contributed to One Pure's concerns that Mr Hynes was not performing appropriately.

[24] On 3 February 2022, a worker in the factory Mr Andrew Costello, emailed Ms Shan in her capacity as Human Resources Manager. Mr Costello had various complaints about Mr Hynes, and 3 other staff.

[25] It is important to record that all witnesses agreed that the complaints were very serious ones, if substantiated, involving both unacceptable racist attitudes and various activities which were described as "sabotage" of product and company goals.

[26] Ms Shan passed the email on to Mr Bolmatis, as the General Manager responsible for the One Pure factory. She gave evidence that she gave him advice to follow the proper legal processes, and offered her support as needed.

[27] It is not entirely clear what Mr Bolmatis did, as the records are sparse. It is clear that Mr Bolmatis spoke with Mr Costello who had made the allegations, the Quality Controller, who had had allegations made about her, and Mr Garside, who had had allegations made about him. Mr Bolmatis also took Mr Costello out to lunch at a local restaurant.

[28] Mr Costello gave evidence about the allegations he made. Mr Costello was employed on the labelling machine. By his own evidence, he was employed in a labouring capacity, and had no previous experience in either manufacturing or in food safety or food hygiene environments.

[29] He said that he had previously worked in the film industry in America, and had only reluctantly returned to Napier and New Zealand as his parents were ill. He took a role with One Pure as he needed a job. He said that he did not know either Mr Yu or Mr Hynes particularly well, and did not work closely with either of them. Mr Costello was not complimentary about the workplace or any of his colleagues. He said that he didn't like to listen to the talk in the breakroom, so would often sit in his car at break times, except when there was free food, and then he would come to get this and leave again.

[30] On 23 February 2022, Ms Shan emailed Mr Hynes a letter signed by Mr Bolmatis, setting out a series of disciplinary allegations. They may be summarised as follows:

- a. An allegation of “insubordination” in that Mr Hynes had been disrespectful to Mr Yu, and had disregarded Mr Yu’s work instructions, particularly an instance where Mr Hynes had allegedly refused to drink sparkly water after Mr Yu had allegedly ordered him to do so, an argument about a staff member who reported to Mr Hynes, a supposed failure to order labels, and allegedly using the phrase “it’s the Chinese way”;
- b. Failing to act in the best interests of One Pure by allegedly not supporting Mr Yu as a loyal employee, and making racist comments

including allegedly mocking Chinese accents and using the phrase “it’s the Chinese way”;

- c. Breaches of Mr Hynes’ employment agreement by allegedly not behaving in a courteous manner towards Mr Yu, and a general allegation of using language likely to cause offence on the grounds of race;
- d. Breaches of Mr Hynes’ employment agreement by allegedly not acting in the best interests of One Pure, by way of general statements that Mr Hynes did not comply with Mr Yu’s instructions, was not performing duties with reasonable skill and care, and was not using best endeavours to promote the company’s interests.

[31] These allegations closely follow the allegations made, and wording used, by Mr Costello. There is also a considerable amount of overlap in these 4 allegations, which broadly cover only three topics: the alleged use of racist language, the alleged failure to follow directions from Mr Yu, and the far more general allegations that Mr Hynes had somehow failed to act in One Pure’s best interests.

[32] Mr Hynes attended a disciplinary meeting, held via Zoom, to discuss the various allegations against him. He denied them all, and provided explanations as to the specific incidents as between Mr Yu and himself.

[33] The meeting ended with Mr Hynes’ counsel requesting that Mr Bolmatis carry out further investigation, particularly speaking with 5 or 6 people who might have been expected to be present during the incidents detailed in the letter of 23 February, and then relaying the notes of these interviews, so that Mr Hynes could consider and provide further comment.

[34] Mr Bolmatis says that he did meet with these people, and he took hand-written notes which he then typed into emails and sent these emails to Ms Shan. He no longer has the hand-written or the electronic versions of these notes. Ms Shan is not aware of any such emails, and says she was never sent any notes (hand-written or electronic) by Mr Bolmatis, even though him taking notes and sending them to her was something she discussed with him. Ms Shan says that Mr Bolmatis’ laptop was returned to One Pure when he left the company, and no such notes were found saved on it. She says that in preparation for this investigation meeting, she asked a second IT person with “system level” access to look again at the laptop, and no notes or emails could be found. Mr

Bolmatis himself is unable to produce either the handwritten notes, or copies of the emails.

[35] The only further information of this type that was provided to Mr Hynes was contained in an email from Mr Bolmatis. In that email, Mr Bolmatis says that he has spoken with Mr Garside, and Mr Garside supports Mr Costello's allegations that Mr Hynes made racist statements.

[36] Mr Garside attended the investigation meeting to give his own evidence, as I have already indicated. He strongly denied that he had stated such things to Mr Bolmatis, said that Mr Bolmatis had first approached him in a threatening way, (which is consistent with Mr Bolmatis' own contemporaneous email correspondence) and then suddenly offered to take him out for dinner, which invitation he avoided.

[37] In the event, Mr Bolmatis emailed Mr Hynes on 7 March 2022 setting out a preliminary view that Mr Hynes had committed serious misconduct, and that dismissal was the appropriate penalty.

[38] Mr Hynes, through his counsel, responded. Despite Mr Hynes' protests, on 9 March 2022, Mr Bolmatis wrote again, summarily dismissing Mr Hynes.

[39] The email was sent at 2.05 in the afternoon to Mr Hynes' email address. It required Mr Hynes to complete certain handover tasks and depart One Pure by 3pm. Specifically, Mr Hynes was ordered to hand over all company property, including his boots and handover notes, to Mr Yu.

[40] Mr Hynes received this email to his work phone as he was on the warehouse floor, and points out that it was only by chance that he saw it. He then had to stop what he was doing, and go immediately to his office to complete the hand-over tasks assigned to him by Mr Bolmatis. He did this to the best of his ability, and went to Mr Yu's office to turn in all items of property, including his phone and boots.

[41] Mr Yu was not expecting him. In fact, Mr Yu gave evidence at the investigation meeting that he was surprised that Mr Hynes had left so suddenly and he thought Mr Hynes had resigned. He said that he had not been made aware that Mr Bolmatis had terminated Mr Hynes' employment, or that Mr Hynes had been asked to give certain items to him.

[42] In order to comply with the requirements of Mr Bolmatis' dismissal email, Mr Hynes was then required to walk through the factory in his socks, making what goodbye's he could along the way. He had to walk out into the carpark in his socks and wait to be picked up (as he had been asked to leave the company vehicle), and was seen like this by a supplier to One Pure, which he found to be a humiliating experience.

Analysis – was Mr Hynes' dismissal justified?

[43] The test of justification is set out at section 103A of the Act. The question is whether One Pure's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In reaching my conclusion, I must consider:

- a. Whether, having regard to the resources available to the employer, One Pure sufficiently investigated the allegations before dismissing Mr Hynes;
- b. Whether One Pure raised the concerns it had with Mr Hynes before dismissing him;
- c. Whether Mr Hynes was given a reasonable opportunity to respond before being dismissed;
- d. Whether One Pure genuinely considered Mr Hynes' explanations before dismissing him.

[44] I may also consider any other factors I think appropriate.

[45] I will first consider whether, having regard to the resources available to the employer, One Pure sufficiently investigated the allegations before dismissing Mr Hynes. As I have already stated above, the allegations against Mr Hynes, as set out in the disciplinary letter signed by Mr Bolmatis of 23 February, are a close and accurate reproduction of the allegations made against Mr Hynes – and it should be noted, other staff members including Mr Garside – by Mr Costello.

[46] These are the allegations that Mr Bolmatis found were made out, and deserving of summary dismissal, as Mr Bolmatis explains "I have decided that you are guilty of

serious misconduct based on accepting that allegations numbered in your disciplinary letter have substance and have not been satisfactorily explained by you”¹.

[47] There is no evidence that Mr Bolmatis assessed Mr Costello’s allegations critically, or that he weighed Mr Costello’s comments as against Mr Costello’s own knowledge, qualifications, and experience.

[48] Mr Costello’s allegations against particularly Mr Garside, and to a lesser extent, Mr Hynes, as to destruction of product and raw materials, impeding of production, and failing to fix machinery, are fundamentally unreliable, and I am satisfied they cannot stand. By his own evidence, Mr Costello lacks the requisite qualifications or experience to comment about such matters. Mr Garside in particular gave detailed and helpful evidence about when and how product and raw materials might need to be destroyed or disposed of, with reference to food safety and hygiene standards, and I accept his evidence.

[49] I am also not satisfied that Mr Costello was in a position to properly comment on either production matters or the repair of machinery. Mr Costello was not responsible for any production or maintenance matters in his labouring role, and there is no suggestion he had access to the in-depth details of how the factory was run in order to properly comment on Mr Hynes’ supposed shortcomings. There is no reason why Mr Hynes or Mr Garside should be considered responsible for the repair or maintenance of specialist industrial machinery, as Mr Costello suggests. The consistent evidence was that the plant machinery was serviced when needed by properly trained technicians, as might be expected.

[50] Turning to the allegations by Mr Costello that Mr Hynes made racist comments, the only firm comments that Mr Costello attributes to Mr Hynes are the phrases “it’s the Chinese way”, and “that’s how they do it [business] in China”. These are the phrases referred to by Mr Costello in his second communication with Mr Bolmatis dated 5 February 2022, in response to Mr Bolmatis emailing Mr Costello on 4 February, saying: “It would be better if you remembered dates and approximate times. Has Pete [Mr Hynes] ever made racist chirps about any race ? We need to know this for sure.” Mr Costello replied by email acknowledging that “It’s not overtly racist”².

¹ Email from Mr Bolmatis to Mr Hynes dated 7 March 2022.

² Email from Andrew Costello to Gerakis Bolmatis dated 4 February 2022 at 7.40 am.

[51] The other allegations and speculation that Mr Costello suggests he overheard being uttered in the break room involving others and without being specific about what was actually said, I chose not to repeat here further than I have already done. I have grave reservations about their reliability, as Mr Costello's apparent ability to overhear and recall all of this is inconsistent with his admitted practice of only coming into the break room when there was free food, and even then, promptly returning to his car to precisely to avoid engaging in conversation. In addition, Mr Costello referred to only 3 specific instances, in June and July 2021, which he did not mention at that time, despite his insistence on their apparent seriousness, although he himself said to Mr Bolmatis "It's not overly racist". He said he recollects these comments as he would sit in his car and write notes about his co-workers on scraps of paper, which notes he says he cannot produce now because he has disposed of them for reasons he did not explain.

[52] Fundamentally, Mr Costello's evidence was unreliable, as he was simply not in a position to make any informed comment about how Mr Hynes (or others) performed in their roles, or acted while at work. He did not have the knowledge, experience, or connections with his colleagues, to accurately make the comments and draw the conclusions that he did.

[53] As for the allegations that Mr Hynes did not accept Mr Yu's directions and/or leadership, although the letter of 23 February refers on several occasions to Mr Yu, and allegations that Mr Hynes had not followed orders from Mr Yu, Mr Yu was not a complainant, and he was not involved in the disciplinary process. He gave firm and convincing evidence that Mr Bolmatis had not advised him even that Mr Hynes had been dismissed, or that Mr Hynes would be leaving employment on 9 March 2022 (which evidence was not disputed). If there were genuine concerns about how Mr Hynes interacted with Mr Yu, then it would have been a simple matter to obtain Mr Yu's version of events, which he gave in a concise and professional manner at the investigation meeting. This did not occur. Mr Yu does say in his witness statement that some time after February 2022, Mr Bolmatis "asked me about some arguments between [Mr Hynes] and me. I said that [Mr Hynes] was disrespectful of me, and sometimes I shouted back."³ This falls far short of the careful and detailed evidence Mr Yu gave at the investigation meeting, and is far short of being able to advance matters, even were it put to Mr Hynes at the time which it was not. Instead, Mr Hynes

³ Paragraph 53 of Mr Yu's statement dated 19 July 2022.

was able to explain the identifiable incidents of dispute between himself and Mr Yu that were put to him during the disciplinary process.

[54] Finally, although Mr Hynes, through his counsel, asked on multiple occasions during the disciplinary process that other colleagues named in Mr Costello's complaint be interviewed and their comments shared with Mr Hynes, there is insufficient evidence that this occurred. Mr Bolmatis stated at the investigation meeting that he did interview other people, that he did take notes, and that he thinks he emailed those notes to Ms Shan. Ms Shan says she has no record of receiving such emailed notes, and gives evidence of detailed IT searches to find them which were unsuccessful. In any event, Mr Bolmatis took no action to share these notes with Mr Hynes or his lawyer, despite repeated requests that this occur.

[55] The one person it is clear Mr Bolmatis did speak to, Mr Garside, gave evidence rejecting the comments that Mr Bolmatis attributed to him in the strongest terms, and says that he felt intimidated by Mr Bolmatis during their discussion. Contemporaneous email correspondence from Mr Bolmatis to Mr Garside at this time, supports Mr Garside's evidence.

[56] The impact of all this on the disciplinary process, and its ultimate outcome, is significant. One Pure, through its agent Mr Bolmatis, did not sufficiently investigate the allegations set out in the letter of 23 February before dismissing Mr Hynes. The matters raised by Mr Costello were not assessed critically or with discernment. Mr Bolmatis did not speak with any sufficient detail with Mr Yu about the allegations concerning Mr Yu. Mr Bolmatis did speak with Mr Garside, but misrepresented or misstated what Mr Garside told him. Mr Bolmatis says he spoke with others, but there is no evidence of what those others said, and no statements or notes were ever put to Mr Hynes for him to respond to.

[57] Mr Hynes did respond to the allegations, but Mr Bolmatis rejected Mr Hynes' responses and explanations, without being able to show why.

[58] Overall, Mr Bolmatis and therefore One Pure did not have a proper basis for the allegations put to Mr Hynes, and there is insufficient evidence to show that Mr Hynes' explanations were genuinely considered. This lack of rigour is surprising given the serious nature of the allegations, and the equally serious nature of the sanction, that is, summary dismissal of a senior, experienced, and long serving employee. The decision

to dismiss Mr Hynes was not an action that could have been taken by a fair and reasonable employer at the relevant time. Mr Hynes' dismissal was unjustified, and he is entitled to remedies.

Remedies

[59] Mr Hynes claims for reimbursement of lost wages, for a period of 5 months until he was able to secure other employment. Mr Hynes gave evidence that he had taken steps to find a new job, had applied for a number of jobs and participated in interviews, and in the end secured new employment through his own professional contacts. During this time, he was able to earn \$3,000 through casual work.

[60] One Pure says that Mr Hynes did not take sufficient steps to mitigate his loss, and in particular points to his in-person evidence that he did not start applying for jobs until some weeks after his dismissal. Mr Hynes gave evidence that it took him "a couple of weeks" before he started looking for a new job, and gave evidence of a family health issue occurring at this same time which impacted his ability to do so.

[61] The Authority has the discretion to award a sum greater than three month's ordinary time remuneration, as set out at s. 128(3) of the Act. The court has commented that when assessing lost remuneration, the focus should be on what might reasonably have been expected from the employee, taking into account the employer's breaches and their impact on the employee at that time.⁴

[62] I accept Mr Hynes' evidence as to the steps he took to obtain further work following his dismissal. They were reasonable and practical steps for him to have taken, particularly as shown by his acceptance of transitory work for which he earned a relatively small amount of money. I am not persuaded that any delay in seeking new employment was unreasonably lengthy, either on an objective basis, or taking the circumstances into account, which included the shock of a summary dismissal after years of service, and the inability to provide references given the nature of the allegations leading to dismissal. Taking these factors into account, particularly that due to the nature of the allegations leading to his dismissal, Mr Hynes was unable to provide a good reference during his job search, and that in the end he had to rely on his own resources to secure new employment, my view is that it is appropriate to exercise my discretion and award a sum greater than three month's ordinary time remuneration.

⁴ *Pact Group v Robinson*, [2023] NZEmpC 173, at [55] to [61].

[63] Mr Hynes' evidence is that he was unemployed for 23.5 weeks, and his lost wages, after taking into account the \$3,000 earned, amounted to \$37,673.00. Orders are made for payment to Mr Hynes accordingly.

[64] In submissions filed after the investigation meeting, additional amounts for Kiwisaver, holiday pay, and an amount said to represent the value of Mr Hynes' personal use of his work vehicle were sought. These remedies were not pleaded in the statement of problem, and no evidence has been provided in support of the calculation of the sums claimed. On this basis, these claims are not made out.

[65] Mr Hynes is also "seeking interest on all monetary awards under clause 11.(1) of Schedule 2 of the Act".⁵ This clause gives the Authority the discretion to award interest calculated in accordance with the Interest on Money Claims Act 2016, "in any matter involving the recovery of any money". Although the remedies awarded to the applicant are money remedies, the applicant's claim is that of a personal grievance, and does not involve any claims for recovery of arrears of money. Accordingly, no interest is properly payable. No orders are made.

[66] Mr Hynes also seeks compensation of \$30,000 for humiliation, loss of dignity, and injury to the feelings in accordance with s. 123(1)(c)(i) of the Act. In this regard, Mr Hynes gave evidence of the embarrassment and distress he experienced, including being required to report to and surrender belongings to Mr Yu (who had not even been told what was occurring), the short notice given combined with being required to surrender his work vehicle meaning he had no way of leaving the work site after he had been told to absent himself as of 3pm, and the public nature of him having to exit through the factory in his socks without being given a chance to say goodbye, and being exposed to comment from the supplier in the parking lot as a result of him having no vehicle in the middle of the working afternoon. In regards to the on-going impact of the dismissal on him, Mr Hynes explained that he had been in constant employment since leaving school at the age of 17, and to suddenly be without a job was a shocking experience for him. This was compounded by his distress at the serious nature of the allegations of racism, which I have found were not supported by compelling evidence, and being unable to ask One Pure for a reference.

⁵ Paragraph 4.9 of the Applicant's Closing Submissions, undated.

[67] One Pure submits that this claim is “excessive” in all the circumstances.

[68] Mr Hynes’ evidence as to the impact on him was detailed and straightforward, and I accept it. I am satisfied he experienced harm of the type/s identified in s. 123(1)(c)(i). This included harms directly caused by One Pure’s failures to critically assess the allegations before putting them to Mr Hynes, and on-going failures to investigate and assess matters throughout the process, as well as failures to put evidence Mr Bolmatis says he obtained from speaking to others to Mr Hynes for comment. The harm experienced by Mr Hynes was exacerbated by the rushed and careless way his employment was brought to an end, and the experiences of Mr Hynes on his last day as required of him by Mr Bolmatis in the notice of termination.

[69] I consider an award of \$25,000 to be appropriate and in line with current practice⁶. Orders are made accordingly.

[70] Having awarded remedies, I must now consider if there should be any reduction in remedies for any blameworthy conduct by Mr Hynes that contributed to the situation giving rise to his grievance. One Pure submits that any remedies awarded should be reduced by at least 50%, on the basis that Mr Hynes was “obstinate” and unreasonable in refusing to accept responsibility for wrong doing or unacceptable behaviour.

[71] I have not found that any of the allegations made against Mr Hynes were made out, and to the extent that he admitted any actions that could fairly result in disciplinary sanctions, One Pure was not in a position to demonstrate that its conclusion to summarily dismiss Mr Hynes was one that was fairly open to it, due to its own failures to properly investigate and engage with Mr Hynes. Importantly, it was not Mr Hynes’ alleged misconduct that contributed to these failures by One Pure to conduct a fair process. Rather, I consider that the seriousness of the allegations against Mr Hynes should have prompted One Pure to consider matters, and conduct its processes, with even greater care. This is not a matter that can be laid at the feet of Mr Hynes. No reduction in compensation is made.

⁶ *GF v Comptroller of the New Zealand Customs Service*, [2023] NZEmpC 101.

Penalties

[72] The applicant is seeking a penalty against the respondent pursuant to s. 133 of the Act, for what is said to be an intentional breach of the applicant's employment agreement, and of the good faith provisions of s. 4 of the Act. It is submitted for the applicant that the respondent failed to be sufficiently active and communicative, and failed to provide relevant information and the ability to comment on it before the final decision to dismiss was made.

[73] There is no reference, in either the statement of problem, or in the submissions on behalf of the applicant, to what section or sections of the applicant's employment may have been breached, or what actions of the respondent made up the alleged breach. The submissions refer to "the respondent's misleading behaviour" and that, in the applicant's view, "the entire investigation process was nothing but a sham".⁷ The difficulty with these submissions is that they rely on the same facts as the applicant's personal grievance claim. This is a duplicate claim.

[74] I have found that the applicant has a personal grievance claim in respect of the respondent's failures in its conduct of the disciplinary process and the applicant's ultimately unjustified dismissal. I have awarded reimbursement and compensation in respect of this failure. In my view, it is not appropriate to also then award penalties in respect of this same conduct. I note that the court has found that this type of "doubling up" may be wrong in principle, and that where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of that same conduct⁸. I find that this is so in the present case.

[75] In addition, the threshold for awarding a penalty in respect of a breach of good faith is high. The applicant needs to show that either the respondent's failure was "deliberate, serious, and sustained", or that the failure was "intended to undermine" the employment relationship. By way of example, the court has found "egregious bad faith"⁹ was required for an award of penalties under section 4A(a) of the Act. The court has also found that even though an employer may have been wrong to conduct itself in the way that it did, this is not enough for a penalty award, as the failure must be

⁷ Paragraphs 6.2 and 6.7 of the Applicant's Closing Submissions, undated.

⁸ See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

⁹ *Waikato District Health Board v New Zealand Public Service Assoc Inc* [2008] ERNZ 80 (EmpC)

deliberate¹⁰. Although I have found that the dismissal of the applicant was unjustified, this does not lead automatically to these further conclusions. No orders are made.

Declaration

[76] The applicant is also seeking a “declaration that the counter-claim, now withdrawn, constituted an abuse of process”¹¹. It is submitted that the Authority has jurisdiction “to determine all matters before it and to made such decisions and orders, as in equity and good conscience it thinks fit (Section 189)”. This plea for declaratory relief was not set out in the statement of problem, and s. 189 refers to the court and not the Authority. Under these circumstances, this remedy can not succeed. No orders are made.

Non-publication – commercially sensitive information

[77] One Pure has asked that certain commercially sensitive financial and sales information, including names and details of certain customers and suppliers, as well as certain financial details, referred to by the witnesses in evidence and in the documents provided to the Authority, be subject to a non-publication order.

[78] The applicant objects to this order, as I understand it, on the basis that by choosing to bring a counterclaim against the applicant, the respondent has waived its rights to confidentiality over certain information relevant that counterclaim. The applicant responsibly accepts that there are grounds for non-publication in relation to client and customer identities.

[79] There is no public interest in including the names of customers and clients of the respondent in this determination. Those customers and clients were not the genesis of the employment relations disputes between the parties, were not involved in these proceedings, and I have not found it necessary to include their names when writing this determination. The same is true in regards to other information the respondent seeks to be protected, namely, details of prices paid and amounts charged for various goods and services. This is clearly information of commercial sensitivity to the respondent, has no public interest value, and I have not needed to refer to those matters in detail when writing this determination.

¹⁰ *Fleming v Attorney-General* [2021] NZEmpC 77.

¹¹ Paragraph 7.1 of the Applicant’s Closing Submissions, undated.

[80] Accordingly, the documents (or parts thereof) identified in Schedule A to the respondent's memorandum of 19 May 2023 are subject to a non-publication order.

Orders

[81] One Pure International Group Limited is to pay to Mr Peter Hynes within 28 days of the date of this determination:

- a. The sum of \$37,673.00 gross, being 23.5 weeks lost remuneration;
- b. The sum of \$25,000 without deduction as compensation for humiliation, loss of dignity, and injury to feelings;

Costs

[82] Costs are reserved (including issues of costs arising from the withdrawn counterclaim). The parties are encouraged to resolve any issue of costs between themselves.

[83] If they are not able to do so and an Authority determination on costs is needed the applicant 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 respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[84] 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.¹²

Claire English
Member of the Employment Relations Authority

¹² Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>