

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 506
3223519

BETWEEN

MELE MOATAA
Applicant

AND

ISS FACILITY SERVICES
LIMITED
Respondent

Member of Authority: Natasha Szeto

Representatives: Peter Cranney and Kathleen Gawe, counsel for the
Applicant
Paul McBride and Natasha Reid, counsel for the
Respondent

Investigation Meeting: 7-9 February, 9-10 April, and 15 May 2024 in
Wellington

Submissions and information received: 15 May 2024 from the Respondent, and up to 3 June
2024 from the Applicant

Date of determination: 23 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mele Moataa was employed by ISS Facility Services Limited (ISS) as a Supervisor. She had worked in the cleaning department of Keneperu Hospital for 14 years in total, as a supervisor for three, when she was dismissed by ISS for serious misconduct.

[2] When Ms Moataa was on leave, text messages were discovered on her work phone that suggested she had logged cleaners in her team (known as “placemakers”) into ISS’s timekeeping system Kronos and punched them in and out of their shifts on 12 to 13 occasions over an eight month period. ISS commenced an investigation into whether Ms Moataa had falsified timekeeping records. ISS says after a full and fair investigation, Ms Moataa was justifiably dismissed on the basis she had demonstrated a serious breach of the ISS Code of Conduct and her employment contract.

[3] Ms Moataa says she was unjustifiably dismissed because her dismissal was not substantively justified or procedurally fair and reasonable. Ms Moataa says her actions were not serious misconduct, and the fair and reasonable outcome would have been a letter of expectation or warning. Ms Moataa seeks reinstatement, compensation and reimbursement of lost wages. ISS opposes all remedies and says reinstatement is not practicable or reasonable.

The Authority’s investigation

[4] Written witness statements were lodged from Ms Moataa, E tū union representatives Rachel Mahuika and John Ryall, and placemakers Fagasau Filipino, Vaeluaga Sinamaitai, Caterina Thompson, Luafale Tuala, and Gloria Wereta. A statement from another supervisor was withdrawn before the investigation meeting.

[5] Witnesses from ISS were Supervisor at Wellington Hospital, Kasi Agafili, National Operations Manager Health, Tim Auld (decision-maker), former Contract Manager Maurice King, Supervisor Colin Nalder, Contract Manager Wayne Petersen (former Operations Manager), Employment Relations Manager Tony Stone, Bed Discharge Supervisor Tai Tereni, and Contract Manager Cecilia Visan (former Operations Manager).

[6] All witnesses attended the Investigation Meeting and answered questions under oath or affirmation.

[7] At the first day of the investigation meeting, I made an interim non-publication order over the “Contract for Provision of Services” at the front of the Supervisors’ Guidebook to continue in effect until further order of the Authority. There was no objection to the interim order being made permanent, and I am satisfied the contract is and remains commercially sensitive and it is not in the public interest for it to be made

public. I therefore make a permanent non-publication order under clause 10 (1) of Schedule 2 of the Employment Relations Act 2000 (the Act).

[8] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[9] The issues the Authority is to investigate and determine are:

- (a) Whether Ms Moataa was unjustifiably dismissed from her employment on the basis of alleged serious misconduct, relating to use of the Kronos timekeeping system.
- (b) If so, whether Ms Moataa should be provided remedies including:
 - (i) Reinstatement under s 123(1)(a) of the Act;
 - (ii) Reimbursement of lost wages under s123(1)(b) of the Act;
 - (iii) Compensation under s123(1)(c) of the Act.
- (c) If Ms Moataa is provided remedies, whether they should be reduced on the basis of any contributing behaviour by her.
- (d) Costs.

Background

[10] Mele Moataa started working in the cleaning department of Kenepuru Hospital in 2009. At the end of 2019 Spotless Services lost its contract to ISS, and ISS took over the cleaning of several hospitals including Kenepuru and Porirua effective 9 December 2019. Around the same time, a supervisor in the cleaning department resigned and Ms Moataa was promoted to a supervisor position. She had limited training in her new supervisory role, but had significant knowledge and experience of working as a cleaner.

[11] Ms Moataa worked at Kenepuru Hospital from Wednesday to Sunday. She was one of a team of three supervisors that included Colin Nalder and had, on average, 20 to 25 people reporting to her with a smaller team on the weekends. On the weekends, Ms Moataa was the sole supervisor for Kenepuru and Porirua hospitals. One of the main parts of Ms Moataa's role was managing the weekly roster. She also trained the

placemakers, conducted audits, looked after equipment, pitched in with cleaning when required, and looked after staff with family problems.

[12] Ms Moataa reported to the ISS Contract Manager, Maurice King. Multiple people were involved in Ms Moataa's initial training and induction but she mostly trained in the supervisor's role through learning on the job from Mr Nalder. Contract Manager Wayne Petersen showed her how to do the auditing part of the supervisor's role. ISS offered a number of different training sessions to supervisors including supervisor mastery. Ms Moataa says she raised technology training with her manager Mr King, and later Contract Manager Cecilia Visan because technology was her weakest area.

[13] ISS held daily supervisors' meetings from Monday to Friday run by Mr King, which it required supervisors to attend. Ms Moataa only attended these on Wednesdays and Fridays. There were no operational meetings for weekend supervisors, mostly because weekends were much quieter at both hospitals. The daily supervisors' meetings were mostly about covering shifts for the day and issues specific to the cleaning operations.

[14] While Ms Moataa was relatively new to the supervisor role compared to Mr Nalder who was a "seasoned supervisor", she was also seen as a special case because of her long association with the cleaning operations at Kenepuru. Mr Nalder would often call on Ms Moataa about how to speak to and engage with placemakers.

[15] The main training and instruction materials for supervisors consisted of the Supervisor's manual, the Team Member Handbook and the ISS handbook.

[16] In relation to timesheets, the Team Member Handbook states:

Timesheets

Knowingly falsifying a timesheet is considered serious misconduct and could lead to termination of your employment.

[17] The Company Policy contains the following extracts:

Under "serious offences"

Fraud, deceit, falsification or misrepresentation of payroll, including using another employee's timesheet, or falsifying the sign on book.

Under "serious misconduct"

Falsification or being a party to the falsification of any company or client document or record. This includes wage, time, accident, leave, expenses, records etc.

Kronos timekeeping system

[18] When ISS took over the contract, it introduced a new time keeping system for supervisors and placemakers called “Kronos”. Kronos is an app-based system which is accessed from a phone or tablet. Kronos requires the person logging their time to enter their payroll number and password and click “logon”, select “punch” on the next two screens, then select “OK” to confirm the time they have punched. On the last screen, the person logging their time needs to press “Sign Out” so the app is ready for the next person to log in.

[19] Mr King said all placemakers, including supervisors, were given training on how to use the Kronos time keeping system. They were given a login, which was their employee number, and they were told to choose a confidential password. They had to ensure they could confidently punch in and punch out. A visual representation about how to use Kronos was posted on the walls at the hospital. The ISS-issued phones which were given to supervisors had the Kronos app loaded onto them.

[20] Contract Manager Cecilia Visan delivered some of the Kronos training for new employees that came on with ISS as part of their induction. She told them that their password was confidential and for their eyes only. This instruction was not written in the Team Member handbook or guidebook, or written down anywhere.

[21] Placemakers would “punch in” for their shift by entering their employee number and password to log in to the Kronos app from a tablet located in the basement at Keneperu Hospital or at the office in the main part of Porirua Hospital. At the end of their shift, placemakers would enter their employee number and password again and “punch out” of their shift. Placemakers’ pay depended on Kronos records, so accurate use of Kronos was vitally important from both an employer and employee perspective.

[22] Placemakers did, however, experience issues with using the Kronos system, many of which were known to management. The tablets were considered by some placemakers to be located an inconvenient distance from their actual location of work within the hospital campus. There was evidence the office at Porirua hospital where the tablet was kept was sometimes locked when placemakers went to log in, which appears to have been when supervisors were either not at work or had left to go on their

rounds. This meant placemakers arriving late to work could not access the tablet to “punch in” to Kronos. There were also not uncommon issues with the tablets being slow to load, not being charged, or losing internet connection. There were sometimes long queues of placemakers waiting to use the tablet when a number of staff arrived at work at the same time. In one example, an older placemaker had issues using the technology and had to be guided through how to log themselves in. The issues placemakers were experiencing gave rise to concerns Kronos was unreliable and not capturing the information to pay them correctly.

[23] Perhaps inevitably, some workarounds developed around the use of Kronos. At satellite sites where it was prohibitively expensive to provide a tablet for one placemaker, ISS allowed placemakers to download the Kronos app onto their personal phone. There was a geo-logging function to ensure the placemaker was at work when they logged in. Anecdotally, some placemakers working at Kenepuru or Porirua Hospital had also downloaded the app onto their personal phones, which allowed them to punch in and out for their shifts other than from the tablets provided by ISS at each hospital, even though it was generally understood to be a “company rule” that placemakers were not supposed to have the app on their personal phone.

[24] There were inconsistent accounts about the training and instruction placemakers received around the use of Kronos. Ms Moataa was shown how to log in and log out but she cannot recall any discussion about passwords being confidential. Ms Moataa was firm in her evidence no-one ever told her that supervisors were not allowed to log placemakers in or out on Kronos and she says she saw other supervisors doing so. Ms Moataa says she genuinely believed it was within the supervisors’ discretion to log people in, to run the cleaning operation efficiently and ensure it kept to time. She told the Authority about a specific incident she witnessed where another supervisor was in his office around 5 am, his phone was on speaker, and he logged in a placemaker who worked in a regional office and had just woken up. Ms Moataa said what she observed that day was enough for her to think it was permitted for supervisors to log placemakers in and out of Kronos.

[25] Several placemakers said they thought it was permitted to give their password to a supervisor, even if they accepted they were confidential to the placemaker. Witnesses for ISS on the other hand were adamant that it was never permitted to give

your password to anyone else. Custom and practice appeared to be variable between placemakers.

Exception sheets

[26] ISS expected any variances to the roster to be dealt with via the exception sheet process. Exception sheets are forms for supervisors to record situations where placemakers' work differs to their rostered hours for reasons including sickness, leave or other absences.

[27] The usual process was that the mail bag would arrive with an exceptions sheet pre-populated with the date and the placemakers who were rostered to work that day. Supervisors would fill in the sheet and it would go back to Wellington head office the next day. ISS says supervisors were given clear procedural instructions on the use of exception sheets. The Supervisor's Manual stated that all exception sheets were to be issued to the administrator by 0900hrs every morning. If supervisors had any discretion to alter hours (such as approving extra hours worked) it was recorded in the exception sheet. The Contract Managers and other senior support managers were largely responsible for processing the exception sheets and managing staff. ISS never raised any issues with Ms Moataa around her use of the exception sheets.

Incidents

[28] Between February and October 2022, Ms Moataa logged placemakers into Kronos, and punched them in or out, on 12 to 13 occasions. Ms Moataa had the list of employee numbers from payroll and rostering, and if she was to log someone in, she would ask them at the time for their password. The reasons Ms Moataa logged placemakers in and punched them in or out of Kronos differed, as she later explained to ISS.

[29] The issue came to ISS' attention when Ms Moataa went on sick leave around November 2022. The Operations Manager asked Ms Moataa for the supervisors' work phone for the relief supervisor to use. Ms Moataa told him she needed it for personal reasons. Two to three requests were made before Ms Moataa provided the phone to ISS. The relief supervisor discovered text messages between Ms Moataa and three placemakers that she found concerning, and she reported this to the Operations Manager at ISS.

Investigation process

[30] Mr King decided to start an investigation. He had been shown part of the text messaging, some of which was in English and some of which was in Samoan. Mr King asked Employment Relations Manager, Tony Stone, to work with him to gather information, and he informed his managers, including Tim Auld, National Operations Manager Health, about the concerns and investigation. The message that particularly concerned Mr King was from one of the placemakers asking Ms Moataa to log in for her because she is waiting for an uber.

[31] Mr King said the first step was to download all the messages and have them interpreted. The focus was on messages where passwords (or PINs) were provided. Mr King asked Ms Visan to check through the messages in Ms Moataa's phone because she knew Samoan, and to go back far enough to clearly see that something untoward was happening. Ms Visan read through messages and "red flagged" passwords. Based on Ms Visan's investigation of the messages, four individual placemakers had sent Ms Moataa their passwords over the period February to October 2022. Ms Visan cross-referenced dates and times with the punch in and punch out records from Kronos. Ms Visan passed the messages and translations on to Mr King and Mr Stone.

[32] The incidents of concern identified by ISS particularly related to three placemakers; Fagasau Filipino (seven incidents), Luafale Tuala (two incidents) and Vaeluaga Sinamatai (three incidents).

[33] It was particularly troubling to ISS that on 12 August 2022 Ms Moataa had sent a text message to Ms Filipino after she had logged her in, saying: "Don't say anything to anyone...".

[34] Once Mr King and Mr Stone received the information, they formulated initial allegations to put to Ms Moataa. On 25 November 2022, ISS invited Ms Moataa to an investigation meeting by letter. The allegation as stated in the letter was:

This investigation meeting will provide you with the opportunity to offer your explanation as to why it appears that you have been using Placemakers employee numbers and personal passwords to sign them into Kronos when they were not physically at work.

Details of these instances are contained in the attached documents

- These documents contain a transcript of text messages off the supervisor phone that was allocated to you, and where necessary a translation.

[35] The letter also advised Ms Moataa that the allegations, if upheld, could constitute serious misconduct and a breach of the Team Member handbook, specifically page 47 which provides:

Falsification or being a party to the falsification of any company or client document or record. This includes wage, time, accident, leave, expenses records etc.

[36] E tū, the union representing Ms Moataa, also received a copy of the allegation letter on 25 November. The attachments to the letter referenced 13 incidents involving four placemakers.

Disciplinary process

[37] A meeting was held on 21 December 2022 to discuss the allegations in the letter. Ms Moataa attended with two union representatives, Rachel Mahuika and John Ryall. For ISS, Mr King attended with Mr Auld, who was to be the decision-maker.

[38] To prepare for the meeting, Ms Mahuika emailed a request for all information that she might need for the investigation. She asked for the start and finish times of the four placemakers involved in the incident in order to get the whole picture for the meeting. ISS asked whether she needed all that information as it would be quite a lot of work. The parties mutually agreed to focus on the 13 incidents. The union also talked to the placemakers before the meeting to understand their stories.

[39] At the meeting on 21 December, the union had the investigative letter, copies of the texts, a copy of the Team Member Handbook and a copy of the collective employment agreement. The Supervisors' guidebook was not at the meeting.

[40] Mr Stone referred to the meeting as a preliminary meeting to get information. He started by saying the relief supervisor had discovered text messages on Ms Moataa's phone that showed she was logging people in when they were not at work, which was falsification of wage records. Ms Moataa admitted she did this, said she knows it is wrong, she knows about the policy and she promised it would never happen again. As to why she logged placemakers in, Ms Moataa said her role as a supervisor requires her to be flexible. She referred to the trust between herself and the placemakers and the hardships of individual families. Ms Moataa also said if placemakers were late, they would work through their breaks. The attendees at the meeting then went through the alleged incidents one by one.

[41] The explanations given by Ms Moataa were:

- (a) Fagasau Filipino was on the hospital premises before 5:00 a.m. Ms Moataa went to her work area and she was there. There was an issue with the Kronos machine being locked away and Ms Moataa had raised this with the supervisor at Porirua, Mr Nalder, and he was aware of it.
- (b) Both incidents with Luafale Tuala involved Ms Tuala running late. She worked in the dialysis unit and it was important to have that cleaned before patients started arriving. Ms Moataa considered it was more important for Ms Tuala to go straight to the dialysis unit to start cleaning rather than have her detour to log in to Kronos. Ms Tuala agreed to carry on with the cleaning and work through breaks. Ms Moataa considered the lateness was not really a good excuse, but Ms Tuala working through her breaks would be part of a cooperative approach.
- (c) In relation to Vaeluaga Sinamatai, the first incident related to when she agreed to come in to cover a shift with absent cleaners. Ms Moataa asked her to go straight to her work area, and she clocked in her from the office. On two other occasions, Ms Sinamatai's husband and children were waiting outside in the car it was only five minutes before her finish time that Ms Moataa logged her out. Ms Sinamatai had already done all her work, and Ms Moataa allowed her to go early to make the transition with her husband's work easier.

[42] There was discussion about whether Ms Moataa's actions were misconduct or serious misconduct. The union made a plea in mitigation that Ms Moataa's conduct was only misconduct because she had not benefited from it.

[43] On 27 January 2023 ISS issued Ms Moataa with a letter stating its preliminary decision was to terminate her employment for serious misconduct:

At our meetings on 21 December 2022 and 26 January 2023, we discussed the following allegations:

- That you logged Fagasau Filipino, Luafale Tuala and Vaeluaga Sinamatai into Kronos when they were not physically at work.
- During our meeting on the 21st of December 2022 you confirmed that you logged into Kronos using the personal identification (employee number and password) provided to you by Fagasau Filipino, Luafale

Tuala and Vaeluaga Sinamaitai and clocked them in or out of their shift.

- Falsification or being party to the falsification of any company or client document or record is serious misconduct and a breach of the ISS Code of Conduct and your Employment Contract.

I have taken your responses into account and on balance have determined that you have knowingly deceived and broken the trust of your employer. Therefore, I have reached the preliminary view that it is appropriate to terminate your employment without notice.

[44] On 31 January 2023, there was a further preliminary outcome discussion between ISS and the union, which Ms Moataa could not attend. Ms Mahuika and Mr Ryall attended the meeting on the understanding that dismissal was a possibility, but they also considered that even if ISS concluded Ms Moataa's actions were serious misconduct, there were a range of possible disciplinary options available to it.

[45] ISS took a break during the meeting, and when the parties came back, ISS confirmed its preliminary decision to terminate Ms Moataa's employment. After this decision had been communicated to the union, Mr Ryall asked for reasons.

[46] The union's notes record Mr Auld as saying Ms Moataa had admitted to using passwords to alter records, and this was clearly misconduct in the Handbook. Both sets of union notes record Mr Auld as referring to the "tip of the iceberg", in that there may have been more instances of Ms Moataa clocking placemakers in or out.

[47] The union notes also record the "exemption process" being raised towards the end of the meeting, and Mr Ryall asking "what is that"? Mr Auld's explanation is that it is a process in place for supervisors to get permission for logging out and as long as ISS knows it is "no trouble".

[48] At the close of the meeting, the union asked for a chance to put in a written submission and ISS said they would consider it if they received it by lunchtime the next day. Mr Stone told Ms Mahuika if the dismissal was to be confirmed, it would happen on the afternoon of 1 February. Ms Mahuika spoke to Ms Moataa after the meeting and told Ms Moataa the decision to dismiss her was confirmed, but ISS had agreed to accept a further written submission from the union the next day.

[49] On the morning of 1 February, the union provided a written submission to ISS. The submission raised the following points (summarised):

- (a) In most of the cases the workers were physically at work when Ms Moataa logged them in, and there was no evidence presented by ISS to the contrary.
- (b) Of the 12 occasions when Ms Moataa was alleged to have logged workers in or out when they were not on the premises, the evidence shows there were only four occasions relating to two workers who were not on the premises, although one of these workers was on the premises by her paid start time. On the other three occasions, the logging in or out was a matter of minutes rather than half an hour or more.
- (c) Ms Moataa thought she had the general discretion as a supervisor to take action to deal with staff shortages or the pressures of worker families providing the work was completed and the worker did something to resolve the conflict.
- (d) Ms Moataa continued to carry out her supervisory role even though the allegations were raised last year.
- (e) Given the low number of offences, the explanation, Ms Moataa's length of service and the lack of any personal gain, any punishment should be at the lower end of the scale.
- (f) ISS had considered other matters in its final decision to terminate: all of the incidents and not just the ones where the employees were or may have been at work; that the 12 incidents could be "the tip of the iceberg"; and that Ms Moataa did not use the ISS exemption process to get permission to log the cleaners in.

[50] There was no response from ISS to the submission from the union.

[51] Ms Moataa finished work on 1 February at 1:30 pm. She was advised someone from Kenepuru would come out with a letter for her. She contacted Mr Stone but he did not know about a letter. Ms Moataa called the union. Mr Auld rang Ms Moataa at home around 2:00 pm and confirmed her dismissal. He gave Ms Moataa the option of continuing to work and be paid for the next two weeks, but Ms Moataa said she did not want to return to work as she had already said her goodbyes and cleared everything in the office. Ms Moataa told Mr Auld she felt humiliated and could not face the staff. While there is a conflict in the evidence, it appears Ms Moataa was paid in lieu of notice and not paid sick leave as she had understood.

[52] On 2 February 2023, Mr Auld sent Ms Mahuika the final decision letter by email, and asked her to forward the letter to Ms Moataa. On 3 February Ms Mahuika declined to do so, as the union thought this was ISS's responsibility.

[53] Monday 6 February was a public holiday. Ms Moataa received her dismissal letter on Wednesday 8 February by post. The letter states:

We have considered your feedback received and confirm we have now terminated your employment with ISS Facility Services New Zealand, effective as of date 2 February 2 [sic], 2023.

This decision is based on the evidence that has been provided to ISS that has been substantiated during the investigation process, which confirms that your actions demonstrate a serious breach of the ISS Code of Conduct and your Employment Contract.

Your final payment will include payment in lieu of notice, any unpaid ordinary hours plus any accrued entitlements.

[54] On 10 February 2023, the union raised a personal grievance on Ms Moataa's behalf.

[55] On 28 April 2023 ISS issued Ms Sinamatai and Ms Tuala with letters of expectation in relation to providing Ms Moataa with their employee number and password.

The law – unjustifiable dismissal

[56] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether ISS's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[57] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.¹

[58] I need to assess whether the decision Mr Auld made on ISS's behalf to dismiss Ms Moataa for serious misconduct, and how he reached that decision were what a fair

¹ Employment Relations Act 2000, s 4(1A).

and reasonable employer could have done in all the circumstances at the time including whether:

- (a) ISS fully and fairly investigated the allegations against Ms Moataa before dismissing her;
- (b) ISS raised the concerns it had with Ms Moataa (including giving her relevant information) before dismissing her;
- (c) ISS gave Ms Moataa a reasonable opportunity to respond to its concerns before dismissing her;
- (d) ISS genuinely considered Ms Moataa's explanations before dismissing her (the decision was made without predetermination).

[59] The Authority may take into account other factors as appropriate, and must not find a dismissal to be unjustified solely because of minor defects that did not result in the employee being treated unfairly.² While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

[60] The Authority's task is to objectively examine the employer's decision-making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done. There may be a range of responses open to a fair and reasonable employer and the Authority is not to substitute its decision for what a fair and reasonable employer could have done in the circumstances. The requirement is for an assessment of substantive fairness and reasonableness, not minute and pedantic scrutiny to identify failings.³

Did ISS act fairly and reasonably in relation to Ms Moataa?

[61] Ms Moataa says the investigation and disciplinary process was flawed. While the allegations against her remained largely consistent between 21 December 2022 and 26 January 2023, they changed on 31 January 2023 at a meeting where Ms Moataa was not present. The comments made by the decision-maker after ISS had verbally

² Employment Relations Act 2000, s 103A(5).

³ *Cowan v Idea Services Limited* [2020] NZCA 239 at [18] and [40].

confirmed Ms Moataa's dismissal suggest the genuine reasons for her dismissal had not been put to her, and the dismissal was unfair.

[62] The union acknowledged on some occasions the placemakers were not on site when Ms Moataa logged them in or out. However, the union says Ms Moataa genuinely and reasonably thought she had discretion to log in to Kronos, and punch placemakers in or out, and she did not intentionally or knowingly deceive ISS. The union says ISS resiled from the view it put to Ms Moataa in the preliminary decision letter that she had "knowingly deceived" ISS, and instead relied on a serious breach of the ISS code of conduct and employment contract. Ms Moataa also says her actions were not serious misconduct, but even if they were, dismissal was a disproportionate outcome.

[63] While ISS accepts Ms Moataa did not commit fraud against ISS in the sense of stealing or improperly obtaining a financial benefit, ISS says Ms Moataa's conduct was dishonest because she falsified the payroll system by logging in placemakers when they were not there to log themselves in, and the lack of transparency suggested Ms Moataa was trying to conceal her actions. Ms Moataa admitted she had logged placemakers in and out. Even if Ms Moataa genuinely believed supervisors had discretion to log placemakers in and out of Kronos that was not correct and she had no reason to hold that belief. ISS further says supervisors are effectively the eyes and ears of the company on site and Ms Moataa's actions have completely eroded the trust and confidence ISS had in her as a supervisor.

[64] In analysing the procedure followed by ISS, based on the evidence before the Authority, I conclude it did not fully and fairly investigate the allegations and did not raise its concerns with Ms Moataa. It did not genuinely consider Ms Moataa's explanations before dismissing her. There were a number of procedural errors by ISS that were more than minor or technical. The defects in the process were serious and compounding because the allegations and the factual bases of the allegations were shifting and unclear. This deprived Ms Moataa of a fair opportunity to understand and respond to the allegations, and the explanations that she did provide were not genuinely considered. This has led to Ms Moataa being treated unfairly.

ISS failed to clearly state what aspects of Ms Moataa's conduct were of concern

[65] ISS submitted there were three issues: whether Ms Moataa logged into Kronos for the placemakers and then punched them in or out of Kronos; whether she had

discretion to do so; and whether this reasonably led to ISS losing trust and confidence in her.

[66] In its allegation letter of 25 November 2022, ISS asked for an explanation of why Ms Moataa used placemakers' employee numbers and personal passwords to sign them into Kronos when they were not physically at work. The focus of the investigative and disciplinary meetings and the union's responses on Ms Moataa's behalf was the location of the placemakers at the time they were logged in or out. Ms Moataa accepted there were three to four incidents (out of the 12 incidents identified by ISS) where the placemaker was not physically at work when she logged them in or out. Mr Auld could not categorically say whether placemakers were or were not at work and made no findings about that. Consequently, ISS did not reach any conclusions about whether workers were onsite or offsite, or whether they were physically at work.

[67] However, based on the evidence before the Authority, it became clear that the real issue of concern was Ms Moataa logging placemakers into and out of Kronos by using their employee numbers, and obtaining their passwords. The location of the placemakers at the time they were logged in or out was of secondary importance because from ISS's perspective, there was no justification for a supervisor or anyone else to obtain another placemaker's password.

[68] When ISS alleged "falsification" of records it linked this to the issue of placemakers being physically on site. The union even stated to ISS that if the placemakers were on site, it is not falsification of timesheets. But this was not the issue of concern for ISS. ISS was not clear that by "falsification" it meant the person entering the information into Kronos was not the person with that employee number and password and this created a false perception the placemaker had logged themselves in at a particular site. That position only became clear after Ms Moataa had been dismissed.

[69] Once Ms Moataa accepted she had logged in for the placemakers, the focus of ISS's investigation should have been on whether she had discretion to do so, and what the appropriate disciplinary outcome should be.

[70] However, based on the evidence before the Authority, ISS also never clearly put to Ms Moataa that supervisors do not have discretion to log placemakers into and out of Kronos. This was a matter which could reasonably be expected to have been

considered during the investigation and disciplinary process because it was the reason Ms Moataa gave for her actions. Supervisor discretion was a complicated issue because while supervisors had discretion to alter placemakers' hours by shortening or extending rostered hours, they did not have discretion to determine whether and how placemakers would be *paid* for any alteration to their hours.

[71] ISS's position is Kronos records were critically important for transparency of reconciling payroll and Ms Moataa's actions of logging placemakers into and out of Kronos had the effect of potentially allowing placemakers to be paid differently to what they should have been entitled to be paid. Supervisors did not have discretion over issues to do with placemakers' pay and that is why ISS says Ms Moataa falsified time keeping records. While I acknowledge that position, that is not the allegation put to Ms Moataa. The way ISS initially framed the allegation and then changed the substantive basis for the allegation has resulted in Ms Moataa being unfairly treated because Ms Moataa was not given the opportunity to respond to the real issues of concern for ISS.

ISS suspected Ms Moataa had tried to conceal her actions

[72] From the outset of the investigation, ISS suspected Ms Moataa had tried to conceal her actions from the company. No doubt this was partly driven by the way in which ISS had discovered the incidents after the text messages had been reported by the relief supervisor. It was also partly based on the text message Ms Moataa sent to Ms Filipino asking her not to say anything to anyone.

[73] At least two senior ISS managers also suspected Ms Moataa's reluctance to return her supervisor's phone to ISS when she was on sick leave was further evidence of concealment.

[74] In its preliminary decision letter, ISS alleged that Ms Moataa had "knowingly deceived" ISS. Based on the evidence before the Authority, ISS formed a view early on in the investigation that Ms Moataa's actions were dishonest, and she had tried to conceal them from ISS. ISS should have specifically and clearly put these concerns to her, but there is no record that it did so. Before the Authority, Ms Moataa's explanation of the "don't say anything to anyone" text was that she did not want other cleaners contacting her about all supervisory matters when she was not their supervisor, but there

is no evidence ISS specifically asked Ms Moataa to explain the text in the investigative or disciplinary meetings.

[75] The allegation of “knowing deceit” was only raised in the preliminary decision letter on 27 January 2023 and appears to have been abandoned by the final decision letter, even though suspicions held by ISS managers about Ms Moataa’s dishonesty clearly persisted before the Authority. Despite Mr Auld’s evidence to the contrary it is difficult not to conclude that senior managers at ISS strongly suspected Ms Moataa had concealed information. These suspicions did not have a secure factual basis but they nonetheless tainted the investigation and ISS’s views as to the appropriate disciplinary outcome.

ISS did not sufficiently investigate the incidents

[76] The exception sheets specific to the 12 to 13 incidents were not obtained or reviewed prior to Ms Moataa’s dismissal. ISS says this is not a case about exception sheets. Mr Auld said the exception sheets could have gone either way, but irrespective, the exception sheet process and Ms Moataa’s familiarity with the process was raised and discussed through meetings.

[77] The union says it had not heard of exception sheets until the end of the 31 January meeting because they had not previously been raised by ISS, or put to Ms Moataa for an explanation. I accept the union’s evidence the exception sheet process was not raised until after Ms Moataa’s dismissal because the process was not mentioned in ISS’s written communications to Ms Moataa and it came as such a surprise to the union that it was recorded in the union notes, and specifically raised in the union’s post-dismissal written submission.

[78] I also find the exception sheets were potentially relevant to the investigation because ISS alleged Ms Moataa had not followed the correct process, which would have involved transparently recording changes to the roster using the exception sheet process. It is also apparent that with reasonable diligence, the majority of the relevant exception sheets could have been obtained by ISS during its investigation because ISS was able to locate most of the exception sheets during the Authority’s investigation.

[79] ISS did not attempt to obtain the relevant exception sheets, raised the exception sheet process as a potential issue after it had made the preliminary decision to dismiss, and then post-dismissal relied on Ms Moataa’s failure to record anything on the

exception sheets to support its position that she had concealed her actions. These were not the actions of a fair and reasonable employer. It also suggests information in the contemplation of the decision-maker was not put to Ms Moataa until after the decision to dismiss had been made, by which time it was too late.

[80] There was other information in the contemplation of the decision-maker that was not put to Ms Moataa, relating to her relationships with the placemakers she had logged in to Kronos. Based on the evidence before the Authority, ISS observed Ms Filipo referred to Ms Moataa as ‘Aunty’ in her text messages, leading several ISS witnesses to suspect Ms Moataa was showing favouritism to certain placemakers. Mr Auld acknowledged the relationships issue was a reasonable question to be asked and understood because of the use of the word ‘Aunty’.

[81] Ms Moataa’s motivation for logging placemakers into Kronos was clearly a relevant issue for ISS. Despite this, ISS did not raise this matter with Ms Moataa, nor did it speak to the placemakers involved in the incidents until after Ms Moataa had been dismissed. The placemakers’ evidence was also relevant to ISS’s allegation they were not physically at work at the time Ms Moataa logged them into or out of Kronos. The placemakers’ belief that Ms Moataa had discretion to do so (which later appears to have been accepted by the company as genuine) also supports the genuineness of Ms Moataa’s belief she had that discretion. Looked at objectively, the placemakers involved in the incidents had information clearly relevant to the allegations against Ms Moataa and the appropriate disciplinary outcome, and ISS did not take steps to obtain this information prior to dismissing Ms Moataa.

[82] For the reasons given above, I conclude ISS did not sufficiently investigate the allegations before dismissing Ms Moataa. ISS had suspicions which it did not take steps to confirm or refute, and the suspicions were not put to Ms Moataa to consider and respond. These defects have tainted the decision-making process.

ISS had concerns there were more incidents than what had been discovered

[83] The union relies on the number of alleged incidents (12 to 13) being relatively small given how many placemakers Ms Moataa was in charge of and how many times placemakers would have logged into Kronos and punched in and out over the period February to October 2022. The union says Mr Auld referred to the incidents as being potentially the “tip of the iceberg” in the 31 January 2023 meeting, and says it was

“grossly unjust” for ISS to consider more incidents than what it had put to Ms Moataa, when it had expressly agreed not to.

[84] Mr Auld emphatically denied saying this and says the term was used by the union and not him. Mr Auld is a human resources professional, and he says there was no reason for him to consider anything prior to the incidents other than what was in front of him. He says in any case, the actual number of incidents was immaterial to his decision to dismiss. ISS also says the expression has been misconstrued and taken out of context.

[85] Based on the union’s notes of the meetings, the union’s submissions to ISS immediately following the 31 January 2023 meeting, and the lack of response or denial from ISS about matters raised in that submission, I conclude words to the effect of the 12 to 13 incidents being potentially the “tip of the iceberg” were used in the meeting. While I accept Mr Auld’s evidence that the actual number of incidents was immaterial to his decision to dismiss, it was not immaterial to Ms Moataa because she says the number of incidents was relatively small. The use of the phrase suggested more information was in the contemplation of the decision-maker than what was put to Ms Moataa.

[86] For the reasons given above, I conclude ISS did not raise the concerns it had with Ms Moataa before dismissing her.

Key aspects of Ms Moataa’s explanations were not investigated or considered

[87] Ms Moataa’s explanation for logging placemakers in and out on Kronos was she thought she had discretion as a supervisor to do so, based partly on her observations of other supervisors’ actions. Some placemakers also thought supervisors had this discretion. Ms Moataa raised additional issues relating to her training, induction, and instructions all in support of her genuine, albeit mistaken, belief in the ambit of a supervisor’s discretion.

[88] Mr Auld said he was not satisfied Ms Moataa’s claim of not having been shown what to do, or not knowing the accepted process after three years of being employed by ISS was correct. He referred to Ms Moataa’s “inconsistency between treatment of staff, messages about not telling others, selective use of exception sheets and failure to ask her manager” as being “signposts” of that.

[89] Based on the evidence before the Authority, ISS did not investigate Ms Moataa's explanations further because it relied on Ms Moataa's statement in the 21 December 2022 meeting: "I made a mistake, I know what I did is wrong". ISS saw Ms Moataa's statement as an admission she had acted dishonestly and knowingly deceived her employer. ISS saw this as proof of intent and concluded Ms Moataa knew logging placemakers in and out was wrong before she did it, and she did it anyway. Mr Auld says it was to Ms Moataa's credit that she took responsibility relatively early on in the 21 December 2022 meeting, but as there was still something to answer for the process needed to continue. ISS says it appropriately relied on Ms Moataa's initial acceptance she had acted wrongly, and categorises the union's later interpretation as an attempt to re-write history.

[90] Ms Moataa says ISS misunderstood what she said in the 21 December meeting. She did not think it was wrong to log in to Kronos for placemakers at the time she was doing it, but once ISS put the allegations to her and informed her it was wrong, she accepted that and would not do it again.

[91] Looked at objectively, it is apparent there are two ways to interpret Ms Moataa's statement. However, I conclude ISS has not acted as a fair and reasonable employer could because it accepted Ms Moataa's statement as being proof of knowing deception or deliberate dishonesty without clarifying. Given the gravity of what Ms Moataa had allegedly admitted to, a reasonable employer could have been expected to clarify what Ms Moataa meant.

[92] Once Ms Moataa admitted she had logged in to Kronos for placemakers and punched them in or out, and once she had admitted (on ISS's view) she knew it was wrong, there was an element of predetermination as to the disciplinary outcome.

[93] When the investigation started, Ms Moataa thought she would tell the truth about what really happened and say she did not know supervisors had no right to log others in. She says she was never told supervisors were not allowed to do so, and she believed she was helping the work to be done on time. She used her discretion when it was a fair thing to do. However there was no evidence before the Authority that ISS further investigated or genuinely considered Ms Moataa's explanations about supervisor discretion, supervisor practice, or the reasons she logged placemakers in.

[94] Another example of Ms Moataa's explanations not being considered is after the 31 January 2023 meeting, when ISS agreed to receive a further submission from the union. There was no response to the union's submission even though ISS told the Authority it had been taken into account. The decision to dismiss was confirmed a short time later. Months later, ISS took issue with some of the allegations raised by the union in its submission, although ISS did not say anything to the union at the time. These factors raise some doubt as to how genuinely and thoroughly ISS considered the union's submission before dismissing Ms Moataa.

[95] For the reasons given above, I conclude ISS did not genuinely consider Ms Moataa's explanations before dismissing her.

ISS did not consider any alternatives to dismissal

[96] Based on the evidence before the Authority, ISS did not consider any alternatives to dismissal. The union attempted to raise factors in mitigation, relating to the lack of financial gain for Ms Moataa, her belief that her actions were within the scope of her authority as a supervisor, and her lack of intention to falsify documents or deceive her employer.

[97] Although ISS accepts Ms Moataa had a good record and no prior instances of disciplinary action, it says summary dismissal was both necessary and justified because of the serious breach of trust and confidence.

[98] While an employer is not required to consider alternatives to dismissal, evidence they have done so will support the outcome was not predetermined. There is no evidence before the Authority that ISS considered alternatives to dismissal despite the Company Policy in the Team Member Handbook covering both misconduct and serious misconduct and providing a range of disciplinary options. I conclude that once Ms Moataa had admitted to the actions of logging in to Kronos for Placemakers, and once ISS considered she had admitted knowing it was wrong, ISS closed its mind as to whether there were options available other than summary dismissal.

[99] Alternatives to summary dismissal objectively should have been considered. I find additional support for this view because the two placemakers involved in the incidents who were still employed by ISS after Ms Moataa's dismissal were issued letters of expectation for their conduct in sharing their passwords with their supervisor. While a more serious disciplinary outcome could logically have been anticipated for a

supervisor in Ms Moataa's position, ISS seems to have accepted the placemakers' explanations they believed it was within a supervisors' discretion to log them in to Kronos. The same benefit of the doubt was not afforded to Ms Moataa. I conclude in all the circumstances, ISS did not act as a fair and reasonable employer could, and Ms Moataa was unjustifiably dismissed.

Conclusion

[100] The employer must be able to show it had a reasonable belief of misconduct warranting dismissal and it carried out a proper inquiry to enable it to form such a belief.

[101] While a range of responses is open to a fair and reasonable employer when investigating and making decisions, I find ISS's investigation and disciplinary processes were characterised by a lack of transparency. ISS failed to sufficiently investigate the concerns it had about Ms Moataa's conduct, to raise its concerns with Ms Moataa and to genuinely consider her explanations. These defects were more than minor technical matters, they were significant and resulted in unfairness to Ms Moataa. The failure of ISS to comply with its procedural fairness obligations fundamentally undermined its ability to justify Ms Moataa's dismissal including on the basis she had broken the trust of her employer.

[102] ISS has not met the test of justification, in that it has not acted as a fair and reasonable employer could. As a result, Ms Moataa has established a personal grievance of unjustified dismissal and an assessment of remedies is required.

Remedies

[103] Ms Moataa seeks:

- (a) Reinstatement.
- (b) Compensation under s 123(1)(c) of the Act.
- (c) Reimbursement of lost wages (ongoing) under s 123(1)(b) of the Act.

Reinstatement

[104] When a worker is found to have a personal grievance and seeks reinstatement, s 125(2) of the Act requires the Authority to "provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy".

The following relevant principles drawn from case law assists the Authority in assessing the practicability and reasonableness of ordering reinstatement in Ms Moataa's case.

Principles

[105] The criteria of practicability and reasonableness are separate. Both must be established for a reinstatement order.⁴

[106] The Employment Court in *Christieson v Fonterra Cooperative Group Limited*,⁵ distinguished between the components of reinstatement as follows:

For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the reimposition of the employment relationship to be achieved successfully [...].

In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[107] Practicability means more than simply being possible, regardless of consequences. It involves a wide range of considerations, including matters which may not have been reasons for the dismissal.

[108] Reasonableness considers the effects of an order. The Authority must inquire broadly into the equities of the parties' cases when considering the prospect of reinstatement and balance the interests of the parties and the justice of their respective cases.⁶ This balancing exercise, weighing the evidence on a case-by-case basis, concerns not only the past but more particularly the future. An employer opposing reinstatement will need to substantiate their opposition by evidence.⁷

[109] Ms Moataa sought reinstatement as her primary remedy for unjustified dismissal. Several placemakers gave evidence in support of Ms Moataa's reinstatement, including that she was a well-respected supervisor.⁸ The evidence from Ms Moataa about practicability and reasonableness was minimal, which is understandable given the amount of time she has been out of ISS employment. The union urges me to reinstate Ms Moataa to her position as the only remedy that can fully

⁴ *Hong v Auckland Transport* [2019] NZEmpC 54 at [65] and [66].

⁵ [2021] NZEmpC 142 at [39].

⁶ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160 at [65].

⁷ Above n6 at [66].

⁸ For example, Ms Thompson, Ms Tuala, Ms Wereta.

undo the harm, including reputational harm, that has occurred. The union also points to the evidence ISS witnesses have filed opposing reinstatement as being unreliable.

[110] Submissions for Ms Moataa on the issue of reinstatement relied heavily on opposing ISS's resistance to reinstatement by reference to principles – an approach the Employment Court has previously found has “some merit”.⁹

[111] The Court also stated:¹⁰

Where, as here, an employer opposes reinstatement because of a loss of trust and confidence in the former employee in as a result of the circumstances of dismissal, but a review of those circumstances discloses that, reasonably and objectively, the employer did not have grounds or at least such sound grounds to lose trust and confidence, the employer cannot continue to oppose reinstatement for those reasons.

[112] ISS says reinstatement is impracticable and unreasonable in the circumstances and would not be appropriate because of the serious issue of trust and confidence. Mr Auld's evidence to the Authority was that supervisors have to make decisions sometimes in the absence of managers and ISS's “24-7” operation is built totally on trust. Some managerial staff and supervisory staff for ISS said Ms Moataa's actions demonstrate she cannot be trusted to do the supervisor's job, and undermine the purpose of the role.¹¹ It submits the lack of trust and confidence Ms Moataa's managers and colleagues have referred to in their evidence is “well-founded” and Ms Moataa's accounts and evidence are not reliable when viewed objectively. Ms Moataa acknowledged what she had done was wrong. Apologising and saying she did not mean to, does not mean a blind eye should be turned to her actions. ISS says the lack of trust and confidence it has in Ms Moataa has been compounded by repeated breaches of trust and demonstrable dishonesty about matters since her dismissal.

[113] One of the most compelling statements on reinstatement came from Ms Moataa's fellow supervisor Mr Nalder. In his written statement, Mr Nalder said he cannot see how Ms Moataa could be trusted to come back to work, but he resiled from this statement at the investigation meeting. He said he felt sad and sorry for Ms Moataa. He felt the company should have been more clear about messaging and whether logging others in and out was “against the law” and what the consequences were of doing so.

⁹ *Harris v Warehouse Limited* [2014] NZEmpC 188 at [162].

¹⁰ Above n 9.

¹¹ For example, Mr Petersen, Ms Visan.

He said Ms Moataa was doing it [logging in to Kronos] to make sure placemakers were paid.

[114] The evidence before the Authority consists of witnesses opinions rather than facts. Their opinions as to the practicability and reasonableness of reinstating Ms Moataa must be assessed in light of my finding that ISS's process was fundamentally flawed and a reasonable employer could not, in all the circumstances, have reasonably concluded Ms Moataa had knowingly deceived and broken the trust of her employer.

[115] Applying the principles applicable to a consideration of reinstatement, the following factors favour ordering Ms Moataa's reinstatement:

- (a) The findings made in this determination show ISS had not fairly and reasonably established grounds for its declared loss of trust and confidence in Ms Moataa.
- (b) Ms Moataa had an exemplary disciplinary record, and ISS took no measures to address her belief she had discretion to log placemakers in and out of Kronos. Ms Moataa was also allowed to continue working in the supervisor's role for several months while the investigation was ongoing until her dismissal.
- (c) Direct evidence available from people Ms Moataa had worked with, or could work with on reinstatement, support the view that productive employment relationships with co-workers could be restored and continued. In saying this, I take into account that of the two supervisory staff who initially said they could not trust Ms Moataa if she returned to work, Ms Agafili did not work directly with Ms Moataa at Kenepuru / Porirua, and Mr Nalder resiled from his statement that Ms Moataa could not be trusted to come back to work.
- (d) There was no evidence to suggest Ms Moataa's position was not available for reinstatement. In any case, that would not be a barrier to a reinstatement order because ISS has been on notice since April 2023 when Ms Moataa lodged her Statement of Problem, that reinstatement was sought, so Ms Moataa should not be disadvantaged by how ISS has

chosen to fill or cover the position. It could be possible to reinstate Ms Moataa elsewhere within ISS.

[116] This determination has not made findings in relation to whether Ms Moataa's conduct reached the threshold of serious misconduct, but rather that the process undertaken to ascertain the facts and ISS's conclusion that those facts warranted dismissal, did not reach the standard of what a fair and reasonable employer could have done in the circumstances.

[117] The Authority's conclusions means Mr Auld's assessment of loss of trust and confidence in Ms Moataa by ISS cannot stand as robustly as ISS considered. I accept Mr Auld genuinely believed at the time of dismissing Ms Moataa, and when he gave evidence before the Authority, that his loss of trust and confidence in her was such that reinstatement would be neither reasonable nor practicable. However, I conclude on an objective assessment of the evidence that even if it could be said to have been warranted, such loss of trust and confidence is not irremediable.

[118] I am satisfied it is both practicable and reasonable to reinstate Ms Moataa to a position with ISS which is no less advantageous than the supervisor position she left in February 2023. Ms Moataa has had a long career in the cleaning industry and an unblemished work history throughout her employment with ISS. I am satisfied the employment relationship can be successfully re-established and it would be reasonable to do so given the finding of unjustified dismissal.

[119] I order that ISS must reinstate Ms Moataa on 30 August 2024 into her former position or a position no less advantageous to that she held at the date of her dismissal. ISS may choose not to require Ms Moataa to report for work until as late as 20 September 2024 to allow it to carry out any necessary organisation to make a position available for Ms Moataa, provide any retraining required to meet changed working conditions, and to take any steps necessary to ensure Ms Moataa's smooth transition back to the workplace. However, Ms Moataa must be restored to the payroll from 30 August 2024.

[120] The parties are reminded the Ministry of Business, Innovation and Employment's Mediation Service is available to assist them if there are difficulties with the implementation of a reinstatement order.

Compensation

[121] Ms Moataa seeks an award of compensation for her unjustifiable dismissal claim under section 123(1)(c)(i) of the Act.

[122] The Authority heard evidence about how Ms Moataa was dismissed. The union told Ms Moataa she had been dismissed on 31 January 2023, but ISS was still willing to consider a further submission. Ms Moataa had to contact Mr Stone on 1 February 2023 to find out whether she had been dismissed, and after leaving work, Mr Auld confirmed her dismissal that afternoon. Ms Moataa did not receive the final decision letter confirming the reasons for her dismissal until six days after she had been dismissed. While I acknowledge there was an intervening weekend and public holiday, I do not accept there was any reason why a senior manager at ISS could not have met with Ms Moataa on her last day of work, or why a letter could not have been delivered to Ms Moataa at her home. I find the way in which Ms Moataa, as a senior and well-respected employee, was treated on her last day of work was humiliating and hurtful.

[123] Ms Moataa gave evidence about the impact of her dismissal. She told the Authority the situation really hurts her because she loves her job and she loved working in the area with the hospital and the patients. She suffered financial strain, stress and mental exhaustion. There has been an impact on her physical health. Ms Moataa's family have had to take on her responsibilities and she feels sad and hopeless. She has been unable to financially support her family or visit family in Samoa or to contribute to her wider church community. Ms Moataa said she feels like a burden.

[124] After she lost her job, Ms Moataa looked for anything to do with cleaning and went through a jobseeker program, but was unsuccessful because she was waiting for a role closer to home.

[125] I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$20,000.00.

Lost remuneration

[126] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost

remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies reimbursement will normally be limited to “the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration”. However, s 128(3) allows that the Authority “in its discretion” may award a greater sum where appropriate. There is no automatic entitlement to full loss.¹² Whether I award more than three months’ ordinary time remuneration, and if so how much more (bearing in mind actual loss merely represents the upper award) this should be assessed based on the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee’s employment such that they would not have earned the total amount of the claimed loss.¹³ I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis). Ms Moataa has the onus of showing she has lost income as a result of the personal grievance, which is subject to a duty to mitigate her loss.

[127] Ms Moataa says in the period of 6 February 2023 until 28 August 2023 she lost \$41,483.36 in income. For the period 29 August 2023 to 15 May 2024 when there was a pay increase this amount was \$57,346.56. She received the job seeker benefit from 6 June 2023 to October 2023 at a weekly amount of \$417.02, and as at the time of the Authority’s investigation meeting, this had decreased to \$351.92 per week because a winter energy payment was not included.

[128] ISS submits there has been an abject failure by Ms Moataa to mitigate her loss in the intervening 18 months since she was dismissed. There is no evidence she has sought or applied for any jobs, and to the contrary it appears she waited for a job to be found for her. ISS says the contended financial distress of Ms Moataa’s family members is not relevant to an assessment of reimbursement for lost wages.

[129] Mitigation of loss in the context of awarding the remedy of reimbursement is about mitigating loss of income as a result of the personal grievance. If the employee has not acted reasonably to mitigate the extent of their loss, they have not lost remuneration as a result of the grievance, and this will be a relevant factor for the Authority to consider when exercising its discretion to reimburse the employee for their actual loss.

¹² *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315.

¹³ *Sam’s Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

[130] The case of *Maddigan v Director-General of Conservation*¹⁴ bears some similarities to Ms Moataa's case, where the Court found:

More generally, there is a need to be realistic about the extent to which employees such as Mr Maddigan would be able to commit to a prospective new employer while, at the same time, seriously progressing a claim for reinstatement. Mr Maddigan had been summarily dismissed after a 20-year career with the defendant, in circumstances he struggled to understand and following a process which was flawed. He was negatively impacted by the dismissal and it would have taken him time to find his feet. I conclude that while it is true that Mr Maddigan was inactive on the job-seeking front in the period following his dismissal, this was reasonable in the particular circumstances.

[131] Based on the evidence before the Authority, I find Ms Moataa lost remuneration as a result of the personal grievance. It was reasonable in the circumstances for Ms Moataa to be inactive on the job-seeking front given her significant tenure working in the cleaning department at Keneperu Hospital.

[132] However, even allowing for the challenges to her confidence, Ms Moataa could reasonably have done more to seek alternative work and income throughout the 18 months referred to. I accept ISS's submission about the absence of any evidence Ms Moataa sought alternative employment. Stepping back to look at the matter objectively, I see no reason to depart from the default position of ordering three months' ordinary time remuneration. The job seeker benefit did not commence until June 2023, and therefore it does not impact the appropriate amount to order for lost remuneration during the three month period following Ms Moataa's dismissal. The amount of lost remuneration was \$1,430.49 per week,¹⁵ or a total of \$17,165.53 (gross). That is an appropriate amount, and I order that to be paid.

Contribution

[133] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Ms Moataa may have acted in a way that contributed to the situation that gave rise to her grievance.¹⁶

¹⁴ [2019] NZEmpC 190 at [66].

¹⁵ Lost remuneration between 6 February 2023 to 28 August 2023 (29 weeks) was \$41,483.36 total.

¹⁶ Employment Relations Act 2000, s 124.

[134] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:¹⁷

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee’s actions “require” a reduction in the remedies that would otherwise have been awarded.

[135] The Court also stated:¹⁸

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[136] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[137] Ms Moataa says she has not contributed to her personal grievance.

[138] ISS submits Ms Moataa’s contribution to the situation is “overwhelming” and any award of compensation or lost wages to Ms Moataa should be reduced.

[139] I have found ISS did not sufficiently investigate the alleged misconduct, raise its concerns with Ms Moataa, or genuinely consider her explanations. Ms Moataa has consistently denied wrongdoing. Based on the evidence before the Authority, I do not ascribe any responsibility to Ms Moataa for the personal grievance, and I do not find any evidence of contribution such that any appropriate remedies are required to be reduced.

Orders

[140] Ms Moataa’s claim that her dismissal was unjustified has been successful and remedies are appropriate.

[141] I order ISS Facility Services Limited to:

- (a) Reinstate Ms Moataa to her position as a Supervisor, or a position no less advantageous to her on 30 August 2024, pursuant to sections 123(1)(a) and 126 of the Act.

¹⁷ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

¹⁸ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

- (b) Pay Ms Moataa compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$20,000.00 within 28 days of the date of this determination.
- (c) Pay Ms Moataa her actual lost wages for a period of three months following her dismissal under s123(1)(b) of the Act in the amount of \$17,165.53 (gross) within 28 days of the date of this determination.

[142] The reinstatement order is effective from Friday 30 August 2024 for Ms Moataa to be restored to the payroll. Allowing time for ISS to make arrangements for Ms Moataa's return, ISS may choose not to require Ms Moataa to report for work until as late as 20 September 2024. Leave is granted for the parties to return to the Authority if there are difficulties with the implementation of the order for reinstatement.

[143] A permanent non-publication order is made over the "Contract for Provision of Services" at the front of the Supervisors' Guidebook under clause 10 (1) of Schedule 2 of the Act.

Costs

[144] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[145] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Moataa may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum ISS will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[146] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁹

Natasha Szeto
Member of the Employment Relations Authority

¹⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1