Determination Number: AA 423/05
File Number: AEA 640/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Lance Muir (Applicant)
AND	Savour & Devour Limited (Respondent)
REPRESENTATIVES	Kylie Dunn, Counsel for Applicant Maria Dew, Counsel for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	13 September 2005
SUBMISSIONS RECEIVED	20 September 2005 (Applicant); 28 September 2005 (Respondent); 30 September 2005 (Applicant in reply)
DATE OF DETERMINATION	21 October 2005

DETERMINATION OF THE AUTHORITY

[1] The respondent dismissed the applicant from his position of duty manager on 10 May 2005. The dismissal followed an extended interview of the applicant by the respondent's representatives, including a private investigator, on 9 May 2005.

[2] The applicant claims his dismissal was unjustified. The respondent replies that it conducted a fair investigation of concerns regarding the applicant and was entitled to dismiss him following admissions on two matters volunteered by the applicant in the 9 May meeting.

[3] The Authority must determine whether the actions of the respondent in dismissing the applicant were what a fair and reasonable employer would have done in the circumstances at the time of the dismissal. Particular issues include:

- the scope of the 9 May meeting and the basis on which the applicant participated in it;
- the import of admissions on certain matters made by the applicant; and
- what occurred at the 10 May meeting where the applicant was dismissed.

The employer's investigation

[4] The respondent company is owned by Geoff and Tara Brogan ("the employers") who have operated a café/restaurant business in Grey Lynn since November 2003.

[5] Mr Muir was employed in November 2003 and soon became duty manager of the day shift. His employment agreement required him to comply with company policies, procedures and all reasonable directions. It also provided for termination without notice for serious misconduct and breach of his employment agreement. His job description included the duty of "cash up and managing the on-site money as required to the highest professional standard possible".

[6] From January 2005 the employers began investigating discrepancies in the café takings which occurred on the day, night and weekend shifts but were highest on the day shift. They were concerned that the daily takings often did not balance with the total on their till transaction records. In March and April the actual cash takings were $770 and $801 respectively below the amounts recorded on the till records.

[7] They also consulted a private investigator, Peter O'Shea of Auckland Investigations Limited. On his advice they installed an additional security camera, disguised as a smoke alarm, above the till. The cafe already had two other cameras. Images from the cameras were recorded on a hard drive for around 10 days and could be saved to a disc for viewing on a computer screen.

[8] Mr and Mrs Brogan spent some time reviewing sections of daily images from these cameras and became concerned about how the applicant operated the till. In his role as duty manager they had also spoken to him about their concern regarding a high level of till discrepancies. They regarded his responses to those discussions as being casual or disinterested.

[9] The employers and Mr O'Shea reviewed sections of camera images. Mr O'Shea's evidence was that one section of images showed the applicant carefully counting out money from till and another section showed the applicant taking notes out without counting them. His advice to the employers was that a difference of this sort in cash handling methods could be an indicator of theft.

[10] Mr O'Shea then conducted what he described as covert surveillance. This involved visiting the café himself on one occasion, and watching staff activity over three days from a van parked outside and fitted with a hidden camera. The café front wall is largely glass.

[11] Mr O'Shea and the employers became interested in how the applicant did the "change run" with the dairy next door. The dairy kept a lot of change and the café staff developed a practice of swapping notes from its till for coins from the dairy when the café's till and safe were low on change.

[12] Mr Muir did a "change run" to the dairy at least two or three times a week. The employers had identified on their camera images at least two occasions in April where Mr Muir took notes from the till without counting them out. This was described in evidence as taking out "a wad" or "a bunch" of notes from the till, putting the notes in his pocket and going to the dairy next door. In the dairy he would talk with one of the owners about how much change he could get, take out the required number of notes to pay for it and return to the café with bags of coins in his hands and any remaining notes in his pocket. The suspicion of the employers was that Mr Muir was taking more notes than he needed to on the change run so he could keep some of the notes in his pocket rather than returning all of them with the coins to the till.

[13] In early May Mr O'Shea advised the employers there was no conclusive evidence of theft by the applicant or any other employee. He recommended recording serial numbers of bank notes in the till so this could be used to check any notes found on staff. This system was not yet in place by 9 May.

9 May 2005

[14] On Monday 9 May Mr Brogan went to a bank, at Mr Muir's request, to get change for the café. The previous day was a busy one for the café and the till was low on change. Mr Brogan was away more than two hours and found on his return that, in his absence, Mr Muir had done a "change run" to the dairy.

[15] Mr Brogan decided to review the morning's camera images. He copied this to a computer disc and took it to the Brogans house in a neighbouring street a few minutes walk from the café.

[16] The camera images showed Mr Muir removing some notes from the till and later returning to place coins and notes in the till.

[17] Mr Brogan rang Mr O'Shea and arranged for him and a colleague, Mark Reitz, to visit the café and interview Mr Muir.

[18] Mr Brogan introduced Mr Muir to the private investigators and the four men stepped out into the carpark at the rear of the café. I accept Mr Brogan's evidence that Mr O'Shea asked Mr Muir "*if he was aware cash ups were regularly out*" and Mr Muir replied: "*Yes, I know*". Mr O'Shea said they wanted to ask him questions regarding this. Mr Muir asked if other staff were going to be interviewed and was told yes by Mr O'Shea. He agreed to come to the Brogans house to be interviewed. The café does not have an office or any space for a private meeting.

[19] At Mr O'Shea's request, Mr Muir showed what was in his pockets and went back into the café where he showed the contents of his wallet, which included a $10 note.

[20] The parties' evidence differs on whether Mr Muir was advised he could have a support person or representative accompany him to the meeting. The employers say Mr O'Shea said this in the carpark but Mr Muir said: "*No, what would I need that for?*". Mr Muir says while walking to the Brogans house he was asked if he would "*like to bring someone*", which he took to mean another café employee and replied "*no*".

The 9 May interview

[21] Mr Muir had visited his employers' house before. It was used as the venue for recent training in till use.

[22] At the start of the interview Mr Muir signed a statement handwritten by Mr O'Shea into his notebook saying he knew "*that this interview concerns missing cash from my employers business premises*". It states he was happy to be interviewed with his employers present and for the interview to be recorded.

[23] Mr Muir disputes that a line reading "*I do not need a support person*" was in the statement when he signed it as being "true and accurate". I saw Mr O'Shea's notebook at the investigation meeting and could not tell whether the line had been written at the time or not.

[24] The interview began at 2.45pm and concluded at 5.15 pm. There is a 71-page transcript. The parties agree there were sections of the interview where the tape was switched off but disagree about what was said in those times. There are around 73 minutes of recorded interview over a two-and-a-half hour span.

[25] Much of the recorded interview involves repeated attempts by Mr O'Shea to get Mr Muir to admit that the $10 in his wallet came from the "change run" to the dairy that morning.

[26] The employers had established that Mr Muir changed $60 of notes at the dairy that morning for $50 of coins and a $10 note. On reviewing camera images after the interview they realised that this $10 note was not the one Mr Muir had in his wallet.

[27] Mr Muir says he was asked more than 20 times during the interview if he had stolen money from his employer. My review of the transcript of the recorded portions of the interview identified 15 such occasions.

[28] In reply to questions from me Mr O'Shea described a number of the allegations that he put to Mr Muir during the interview as "bluff" or accepted they were made without foundation. These included claims that:

- he had spoken to one of the dairy owners that day about Mr Muir getting change. He had not.
- he had been watching Mr Muir during the change run to the dairy that day. He had not.
- he had seen Mr Muir walking out of the dairy with notes in his hand. He had not.
- he could show Mr Muir camera images of two or three occasions on which he had put notes in his pocket during a change run. Mr O'Shea told me this was a "slight exaggeration" as he had seen one occasion.
- Mr Muir's "no sales" entries on the till were "considerably higher than anyone else who works there". Mr O'Shea told me this was "bluff". He had no data to support that assertion when it was put to Mr Muir. In fact the only information put to Mr Muir was by Mrs Brogan who referred to an incident in March where she saw him made two 'no sales' while she had coffee with a friend at the café and she queried him about at the time.
- Mr Muir should have counted out notes so they could be seen on a camera above the till. However staff had not been told about the installation of that camera. Mr Brogan confirmed there was no policy requiring staff to count cash "for the camera".
- private investigators, described as "our guys", had sat in the café and watched Mr Muir operate the till. They had not. Mr O'Shea himself had visited once.
- private investigators had followed Mr Muir into the dairy and watched how he handled the cash during change runs. Mr O'Shea told me this was bluff.
- the dairy owners were co-operating in an exercise with the employers to record the serial numbers of notes used in the change run. This was not so.

[29] At the investigation meeting I saw selected clips of around three minutes of video camera images provided in evidence by the employers. These showed Mr Muir working at the till and on at least two occasions taking bank notes for a "change run" from the till without counting them out or showing them to another staff member. I also saw some still images taken from Mr O'Shea's van camera of Mr Muir on the footpath outside the café walking into the next door café. The employers' evidence was that they relied on these images to support their decision later that night to dismiss Mr Muir for "irregularities in cash handling". At the 9 May interview Mr Muir was not shown these images or given any opportunity to comment on their content. Mr Brogan and Mr O'Shea confirmed to me that the video clips and photos were available at the house at the time of the interview.

[30] At no stage was Mr Muir given specific dates or times of other allegations regarding his cash handling, except for the incident that day. Rather, Mr O'Shea merely told him: "*I'm expecting you to give explanations for stuff that you've been doing in the last couple of weeks*".

[31] Mrs Brogan also told me that she left the interview to speak with one of the dairy owners. She asked questions about how much cash Mr Muir bought with him during change runs to the dairy and what he did with the notes, confirming that he put them in his pocket as he left to return to the café. At the investigation meeting I saw handwritten notes that Mrs Brogan said she made on 18 May of her questions and the dairy owner's answers on 9 May. Counsel for the applicant objected to the admission of those notes. In written submissions given after the meeting, the respondent opted not to "pursue" admission of those notes. Accordingly I take no account of those notes. I do take account, however, of Mrs Brogan's evidence that she returned, after speaking to the dairy owner, to

the interview with Mr Muir but told him nothing of that conversation and did not put any of its contents to him for comment. However, I find, that she and Mr Brogan did take what they considered as confirmation by the dairy owners of their suspicions of Mr Muir into consideration in making their decision to dismiss him.

[32] Part way through the meeting Mr O'Shea asked whether he and his colleague Mark Reitz could search Mr Muir's car parked opposite the café. Mr Muir signed a note confirming his consent. The car was searched by the two investigators in Mr Muir's presence.

[33] While attempting to refute the employers' allegation of theft, Mr Muir volunteered some information or admissions about other aspects of his work ("the admissions"). These were that:

- he had recently made a personal eftpos transaction on the café till for $200, although he knew the company policy no longer allowed staff to make such transactions;
- his cash handling procedure for change runs looked suspicious; and
- that morning a customer pointed out that a $20 note had fallen out of his pocket which he realised must have been from the change run and he had put it back in the till.

[34] During one break in the interview Mr Muir went outside to have a cigarette and telephoned his girlfriend on his cellphone. I accept his evidence that Mr O'Shea's colleague Mark Reitz intervened and told Mr Muir to end the phone call, asked who he was talking to and told him not to telephone anyone else as this would "make things worse".

[35] The interview ended with Mr Muir being told he was suspended while the employers thought overnight about what he had said. A meeting was set for 3pm the next day and Mr Muir was told he had the right to bring a representative.

[36] Mr and Mrs Brogan and Mr O'Shea then spent some hours reviewing the camera footage. In the course of that review, according to their evidence, Mr and Mrs Brogan came to the view that Mr Muir had not taken the $10 note that was the subject of accusations put to him that day but that both his cash handling for change runs to the dairy and his use of the café's eftpos facility were serious misconduct warranting dismissal.

The 10 May dismissal

[37] Before the scheduled meeting with Mr Muir on 10 May, the Brogans had their solicitor prepare a letter of dismissal. It advised his employment was terminated immediately. It stated:

> *Our clients have considered the reasons you gave yesterday for your behaviour when asked to explain irregularities in cash-handling at Savour & Devour and the breach of company policy in accessing Eftpos funds for personal use via the till and other concerns discussed with you yesterday.*

[38] Mr Muir attended the meeting with his legal representative. Mr Brogan says he opened the meeting "as I intended to with my decision". He handed Mr Muir the letter of dismissal. No tentative conclusions regarding the employers' investigation were put to Mr Muir for comment. When Mr Muir's legal representative objected to the process, the employers' restated the reasons for the dismissal given in their lawyer's letter and, I accept, said the dismissal was not for theft.

Determination

[39] I find that Mr Muir was unjustifiably dismissed. He has a personal grievance. He is entitled to remedies.

[40] The Authority's investigation of the respondent's decision to dismiss Mr Muir must consider whether, firstly, conduct was disclosed capable of being regarded as serious misconduct and, secondly, whether the respondent came to its decision to dismiss by carrying out a full and fair investigation: *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457; [2001] 3 NZLR 29, 37 (CA).

[41] The respondent argues that it was entitled to rely on the admissions volunteered by Mr Muir to justify the decision to dismiss. It relies on the Employment Court's decision in *Murphy and Routhan (t/a Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (Goddard CJ). The relevant proposition is found in this extract (at 620-621):

> *The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair inquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy. Nor does it matter that there are differences in detail between the admission and the complaint if the differences bear only on the extent or frequency of the apparent wrongdoing but do not contradict the basic premise that it had taken place.* (my emphasis)

[42] I do not accept that decision can be relied on in this matter to 'cloak' the respondent's decision with legitimacy for these reasons:

- Both Mr Muir and the pizza worker were accused of theft in their respective employers' inquiries. The pizza worker admitted theft of another kind. Mr Muir denied theft but volunteered instances of other misconduct. His admissions were not for "the very activity" which was the subject of the employer's inquiry, that is "*missing cash*". Neither was the difference between the subject of the employer's inquiry and Mr Muir's admissions one of detail, extent or frequency. Rather, it was a difference of substance. He admitted to not properly following cash-handling procedures and breaching the eftpos policy, not taking money or property. Mr Muir made admissions intended to show he was being honest in his replies, not to 'own up' to dishonesty. The distinction is clear by referring back to the facts in *Enzo's Pizza* – there, the worker denied taking money but admitted taking the employer's property (in that case, pizzas).

- The Court accepted in *Enzo's Pizza* that an employer can properly inquire into any question arising about the discharge of an employee's duties, particularly for an employee in a position of trust handling money. It accepted (at 618) that such an inquiry "may drift imperceptibly into a disciplinary inquiry and "will almost certainly do so if the employee responds by blurting out a confession of wrongdoing". However, the Chief Judge carefully does not suggest that *any* confession of *any* wrongdoing would then legitimise summary dismissal. The qualification of the Court's proposition was this:

  > *In such event, if the confession is one of serious misconduct warranting summary dismissal, then the employee may not be entitled to complain if a summary dismissal follows.* (p618)

[43] I accept that Mr Muir's admissions were an attempt to demonstrate to his employers that he was being candid and frank in his replies. They were made in the scope of a meeting he was told was about cash going "*missing*" and whether he was stealing it, not his performance. He was not on notice that admissions about breaches of other policies might result in his dismissal. Mr O"Shea told me that at no stage in the interview did he suggest to Mr Muir that he could lose his job but assumed from the nature of the interview that he would be aware of its "*severity*".

[44] Mr Muir's admitted breaches were clearly misconduct. Mr Muir was, no doubt, careless in the way he carried out the change runs, particularly in not counting out notes. His use of the eftpos facility on the occasion he admitted to – after a clear directive not to use it – was deliberate. But, I find, the evidence does not support the view that either breach was of a dishonest nature capable of being regarded as serious misconduct.

[45] However, even if those admitted breaches were capable of being regarded as serious misconduct, it is at the next step that the respondent's actions are clearly not justifiable. The standard of disclosure required of an employer is this:

> "*In general, a full and fair investigation of an employee's conduct will include a candid disclosure to the employee of the information which the employer regards as significant and a real opportunity for the employee to respond before the employer draws any conclusions*": *Singh v Sherildee Holdings Limited* (unreported, EC Auckland, AC53/05 22 September 2005, Couch J) at 83

[46] The respondent's agent, Mr O'Shea, conducting the interview in the presence of Mr Brogan (and for most of the time, Mrs Brogan), did not candidly disclose information to Mr Muir. This was despite the camera images and photos on which the employers relied being available in the same room. Rather, a series of spurious allegations were put to Mr Muir in the hope of shaking him into a confession of a theft that the employers later realised he had not committed. Consequently Mr Muir was denied a real opportunity to reply before the respondent drew its conclusions. On May 10 the respondent failed to rectify this situation in its conduct of the disciplinary meeting at which it dismissed Mr Muir. A fair and reasonable employer would have outlined its conclusions from its investigations on the previous day and considered any comments or responses from the employee rather than handing over a prepared letter of dismissal.

[47] The respondent's actions in its conduct of the interview of Mr Muir also breached its statutory obligations of good faith. An employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of a worker's employment must provide that worker with access to information about the decision and an opportunity to comment on the information to their employer before the decision is made (see Employment Relations Act 2000 s4(1A)(b)-(c)). The wording of these statutory provisions do not limit their requirements to redundancy or restructuring – it applies equally to the situation of an employer considering 'adversely affecting' a worker's employment by deciding to dismiss that worker.

[48] Rather than conduct the 9 May interview in good faith, I find that Mr O'Shea deliberately misled Mr Muir regarding the specific information or evidence that the employers had to support the allegations being made (see para [28] above).

[49] Mr O'Shea told me he regularly conducts employee investigations and meetings as part of his private investigation business. Both he and the employers accepted that he acted as the company's representative in the interview. Mr O'Shea told me he understood the minimum procedural requirements for investigating employee conduct. Mr Brogan's evidence was he had previously been a manager in another business with hiring and firing responsibility for 60 staff and was aware of the requirements of properly inquiring into employee conduct. Either the self-confidence of both men exceeded their actual knowledge or they should have known better than to act as they did.

[50] I do not accept the respondent's submission that it did not authorise and should not be liable for what it accepts were "a number of misrepresentations" put to Mr Muir by Mr O'Shea. Mr Brogan was present throughout and Mrs Brogan attended most of the 9 May interview. They did not intervene to correct any of Mr O'Shea's misrepresentations made on their behalf. Rather I find

that they expressly adopted the acts of Mr O'Shea by taking the benefit of them. That 'benefit' was in the form of Mr Muir's admissions, the information on which they made their decision to dismiss. That information was not disclosed by any other aspect of their inquiry.

Contribution

[51] In deciding the nature and extent of remedies the Authority must consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance, and if those actions so require, reduce remedies that would otherwise be awarded accordingly.

[52] Even where an employer has not conducted a full and fair inquiry, matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be considered actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. Blameworthy conduct by the applicant is not ignored merely because the the employer became aware of it through a process that was not 'sound'. Rather the Authority is directed to consider contribution in a way that will do justice to the overall situation proved in its investigation of the grievance: *Ark Aviation Ltd v Newton* [2001] 1 ERNZ 133, paras 41-42 (CA).

[53] I consider the admitted conduct of Mr Muir – albeit on matters outside the scope of the 9 May interview – attracts some element of blameworthiness. The employers had given him clear written instructions on 31 January and 7 February that "*the new company policy is that there will be no more cash out on eftpos for staff*". His use of the eftpos facility and, to a lesser degree, his casual approach to cash-handling during 'change runs' were both courses of conduct which were "faulty when set against the employee's duties to his or her employer and the instincts of self-preservation that the employee should have at his command": *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31, 53 (EC, Goddard CJ). Accordingly I consider the applicant's remedies should be reduced by one-fifth.

Remedies: reinstatement

[54] The primary remedy is reinstatement which Mr Muir seeks.

[55] However I accept the evidence of Mr and Mrs Brogan that reinstating the applicant would not be practicable in the particular circumstances of their relatively small workplace and the level of trust required in the position of duty manager. Mr Muir's contributory conduct is taken into account and also weighs against granting this remedy. Accordingly I decline the application for reinstatement.

Remedies: lost wages

[56] I do not accept the respondent's submission that the applicant's claim for lost wages should be declined or reduced because he told prospective future employers that he had been dismissed by the respondent after being accused of "theft". Consequently he took longer to find a new job than he otherwise might. I consider he was entitled to take that view given the wording of his letter of dismissal referring to "other concerns discussed … yesterday" and the main thrust of the interview was regarding allegations of theft.

[57] Mr Brogan says that he told the applicant that he was not being dismissed for theft but that is not credible in light of the respondent's submission that till discrepancies reduced in the months after Mr Muir's dismissal. The innuendo is clear – the Brogans believe that Mr Muir was taking the money. Having listened to their evidence I have no doubt that is their true view. However that is not the concern of the Authority – it investigates the quality of the employer's inquiry not the

veracity of the allegations. Further Mr Muir had a difficult line to walk seeking a new job – better to be 'up front' with potential employers about why he lost his previous job rather than face suspicion and scrutiny if they heard about the theft allegations later.

[58] Mr Muir seeks lost wages for the nine weeks between his dismissal and when he was able to get a new job. He also seeks the difference between his wages while employed by the respondent and his wages in his current job, another café, from 11 July 2005 to the date of this determination, a further 15 weeks. I consider this remedy is warranted but, on the second 'shortfall' element, only for 12 weeks.

[59] Under section 123(1)(b) and s128(2) and (3) the applicant is awarded:

- a sum equivalent to nine weeks of his ordinary weekly wage with the respondents; and
- a further sum equivalent to the difference in hourly rates in his present job ($15) and his former job with the respondents ($18.50) for a further period of 12 weeks. Allowing for a 45 hour week in each job this amounts to a further $1890 ($3.50 x 45 x 12).

[60] From the total of these two awarded amounts must be deducted firstly, $500 earned by the applicant in casual work between 11 May and 11 July, and secondly, a 20 per cent reduction for contribution. The remaining sum is, of course, subject to income tax.

Remedies: compensation

[61] Mr Muir seeks "a substantial award" of compensation for hurt and humiliation.

[62] The evidence on this claim was limited. Mr Muir's witness statement says he was "*disappointed*" by his treatment by the Brogans. In the investigation meeting Mr Muir told me that Mr O'Shea's repeated and unfounded allegations left him "*questioning my own actions and my own sanity*". The repeated questions left him "*exhausted*".

[63] The respondent's submissions concede that Mr Muir's own evidence referred to feeling "*badgered and humiliated*" by Mr O'Shea. However it rightly points out there was no corroborative evidence of distress. There was no evidence of needing to visit a health professional for the effects of any distress resulting from his dismissal or any evidence of friends or family as to whether he suffered any ill effects.

[64] Mr Muir appears to have been relatively stoic in his response to the circumstances of the 9 May interview. He says he stayed "*calm and co-operated as best I could*". He also presented as a resilient individual.

[65] I have also borne in mind that this remedy is to compensate the employee for hurt and distress, not to punish the employer for its conduct.

[66] However being dismissed in an unfair manner is traumatic and an employee should be fully compensated for that trauma: *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 (CA) per Thomas J. An award set too low can have the effect of increasing the hurt and humiliation suffered by a party: *Ballylaw Holdings Ltd v Henderson* [2003] 1 ERNZ 313, 332 (EC, Goddard CJ). Awards for non-economic loss, allowing for matters of impression and discretion, are made within recognised parameters: *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at para [85] (CA, William Young J) and *NCR (NZ) Corporation Limited v Blowes* (unreported, CA, CA 186/04, 23 September 2005).

[67] Mr Muir is entitled to moderate compensation for the distress arising from the manner of 9

May interview and his subsequent dismissal. This included the indignity of having his car searched outside the café where staff and customers could see, although there was no evidence that he had suffered distress from any comment or queries that may have caused.

[68] I consider the appropriate level of compensation under s123(1)(c)(i) in this matter is $6500. This is reduced by the amount set for contribution under s124 to $5200 without further deduction.

Penalty: breach of good faith

[69] The respondent's actions, through Mr O'Shea's approach to the 9 May interview and the Brogans' apparent complicity, may have warranted a penalty for breach of good faith under s4A(b)(iii) of the Act. Its conduct was not simply inept, it was deliberate and breached its duty of good faith. However no penalty was sought by the applicant. As there was no consideration of that possibility at the investigation meeting or opportunity for submissions on it, I have not considered that point further.

Summary of orders

[70] The respondent is ordered to pay to the applicant, after allowing for deduction of the amount of $500 earnings made in migration and the reduction of remedies under s124, the following:

- a sum equivalent to nine weeks' wages;
- a further sum equivalent to the difference in hourly rates in his present and previous job for a period of 12 weeks; and
- compensation for hurt and distress of $5200.

Costs

[71] The issue of costs is reserved. The parties are invited to resolve this issue themselves. If they are unable to do so, the parties may apply for a costs determination.

Robin Arthur
Member of Employment Relations Authority