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Pool v San Remo Pasta Limited (Auckland) [2017] NZERA 283; [2017] NZERA Auckland 283 (15 September 2017)

Last Updated: 22 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 283
3003271

BETWEEN JANET POOL Applicant

AND SAN REMO PASTA LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Jonathan Kay, Counsel for the Applicant

Michael Quigg, Counsel for the Respondent Investigation Meeting: 15 and 16 June 2017 in Whakatane Determination: 15 September 2017

DETERMINATION OF THE AUTHORITY

- A. **San Remo Pasta Limited unjustifiably dismissed Janet Pool.**
- B. **In settlement of her personal grievance for unjustified dismissal San Remo must pay Ms Pool the following sums within 28 days of the date of this determination:**
 - (i) \$2,158 in reimbursement of lost wages; and
 - (ii) \$12,000 as compensation under s 123(1)(c)(i) of the

[Employment Relations Act 2000.](#)

Employment Relationship Problem

[1] San Remo Pasta Limited (San Remo) dismissed Janet Pool on 14 April 2016. She had worked as a merchandiser for San Remo since July 2014. Her role involved travelling between supermarkets in the Eastern Bay of Plenty checking San Remo products were stocked and correctly displayed in each store. At the time she also worked as a merchandiser for two other companies in some of those supermarkets.

[2] San Remo's human resources manager Duanne Banham told Ms Pool of her dismissal by letter. His letter said she was summarily dismissed for "serious and

wilful breach" of her obligations as an employee. It said an investigation had proven allegations she incorrectly recorded hours worked at stores, falsely claimed pay for those hours, and did not give honest answers during the company's investigation.

[3] San Remo's New Zealand sales manager Kerry Wharerau began that investigation on 24 March 2017. He did so after getting an email early that morning from San Remo's central North Island territory manager Steve Millstead.

[4] Mr Millstead was Ms Pool's direct manager. His email described the hours Ms Pool was employed on each day of the week to work for San Remo at various supermarkets. He then identified five dates on which he said Ms Pool had claimed pay for more

hours than she worked. He also referred to some problems in work arrangements between Ms Pool and another merchandiser. That merchandiser is referred to as Ms FUV in this determination.

[5] Mr Millsteed also reported he had learned Ms Pool had been involved in a previous instance of what he called “time theft and claiming hours she did not work”. He wrote that this had occurred three years earlier when Ms Pool worked as a merchandiser for two other companies. He said a representative of one of those companies told him Ms Pool resigned before she was dismissed for dishonesty. Mr Millsteed’s email ended with the following sentence: “We are dealing with a dishonest person”.

[6] Later that morning Mr Wharerau telephoned Ms Pool. He asked her to explain the hours she had worked on five dates. Those dates were 7 March 2016 and four days in 2015 – 31 August, 5 November, 9 November and 19 November.

[7] The following week Mr Banham wrote to Ms Pool advising her San Remo was conducting an investigation about “numerous discrepancies” in the wages she claimed. She was called to a meeting that was described as her opportunity to “respond in full” to those discrepancies.

[8] Ms Pool went to that meeting, held on 12 April, with a legal representative and Laura Drury, her flatmate at the time. Mr Wharerau had Mr Millsteed and one other company representative with him. He asked Ms Pool more questions about her hours of work and what she had entered on timesheets she had sent in each week. Ms Pool had brought along clock-in slips she had kept from one of the supermarkets she visited. Those slips included four from days that Mr Wharerau had asked about.

[9] After the meeting Mr Wharerau checked some of the information Ms Pool provided about dates she attended various supermarkets. He also asked Mr Millsteed about some of Ms Pool’s responses.

[10] He then discussed the matter with Mr Banham and recommended dismissing Ms Pool. Mr Banham adopted his recommendation and wrote the 14 April letter advising Ms Pool she was dismissed for serious misconduct.

The issues

[11] Ms Pool claimed she was unjustifiably dismissed. To resolve her claim the

Authority had to determine the following issues:

(i) did San Remo sufficiently investigate its allegations before dismissing Ms Pool (including advising her of all its concerns, giving her a reasonable opportunity to respond, and genuinely considering her responses)?

(ii) Were concerns over Ms Pool’s interactions with another merchandiser, Ms FUV, a factor in the dismissal and, if so, did Ms Pool have a reasonable opportunity to address those concerns?

(iii) If Ms Pool’s dismissal was found to be unjustified, was she entitled to awards of lost wages and compensation for distress caused by her dismissal?

(iv) Should any remedies awarded be reduced because Ms Pool’s conduct

contributed to the situation that gave rise to her grievance?

(v) Should either party contribute to the costs of representation of the other party?

The Authority’s investigation

[12] The following people gave sworn or affirmed evidence at the Authority’s investigation meeting: Mr Wharerau, Mr Millsteed, Ms Pool, Ms Drury, Ms Pool’s mother Megan Pool, and Andrew Soutar.

[13] Mr Soutar is the owner and operator of Pak N Save Whakatane. He attended under witness summons. His evidence was relevant to concerns about Ms Pool’s interactions with Ms FUV. Her name has been anonymised, using randomly chosen initials, because she did not attend the investigation meeting and had no opportunity to respond to comments made about her in the evidence given there.

[14] As permitted by 174E of the [Employment Relations Act 2000](#) (the Act) this determination has stated findings of fact and law, has expressed conclusions on issues necessary to dispose of the matter and has specified orders made. It has not recorded all evidence and submissions received.

A sufficient investigation?

[15] San Remo said its representative, Mr Wharerau, acted fairly in investigating concerns about the hours Ms Pool recorded and the wages she claimed for those hours. It said she was provided with all necessary information and an opportunity to respond to those concerns. While the phone call made to her on 24 March was accepted to be “not ideal circumstances in which to give a response”, she had a further opportunity to provide an explanation at the 12 April meeting. The meeting occurred on notice, after she had a chance to take legal advice, and she attended it with both a lawyer and a support person. Mr Wharerau was said to

have simply focussed on what he called the “pure facts” of what hours Ms Pool had worked and what wages she had claimed for the five days in question. San Remo submitted his conclusions were not “contaminated” by other events or concerns involving her.

[16] The Authority’s role is not to decide whether Ms Pool accurately recorded her hours and correctly claimed wages for those hours. Rather, under the statutory test of justification, the Authority must consider whether San Remo’s inquiries and decisions were what a fair and reasonable employer could have done in all the circumstances at

the time.¹

[17] In assessing whether San Remo met that standard, the Authority could consider the nature and quality of its evidence of having done so and whether San Remo had a sufficient and reliable evidential base for its conclusions. San Remo was

entitled to prefer one conflicting version of events over another, but had to do so on a basis that was reasonable in all the circumstances at the time.²

[18] For the reasons explained in this determination what San Remo did, and how it did it, failed to meet that objective standard. In summary the shortcomings in San Remo’s actions included:

- (i) relying on answers Ms Pool made in a surprise phone call; and
- (ii) failing to provide all information necessary for Ms Pool to have a fair opportunity to explain the hours and wages she claimed; and
- (iii) failing to provide an opportunity to comment on further information gathered; and
- (iv) failing to disclose, and to give Ms Pool the opportunity to comment on, a further allegation prejudicial to an assessment of her reliability and honesty; and
- (v) failing to give Ms Pool the opportunity to be heard about the prospect of dismissal before Mr Banham sent his letter imposing that consequence.

The surprise phone call on 24 March

[19] Mr Wharerau acted promptly when he got Mr Millstead’s email on 24 March. Within two hours he phoned Ms Pool from Auckland. He was San Remo’s most senior manager in New Zealand. He had never met or talked to her before his call to her that day.

[20] He asked Ms Pool to explain where she was, what she did and what she claimed as pay for each of the five dates he asked about.

[21] One of those days Mr Wharerau asked about was three weeks’ before his call. The other four days were in the previous year, between four and six months earlier.

[22] She was asked to recall for him, on a moments’ notice, which supermarkets she was at and for how long on each of those dates. At the time Ms Pool’s job involved travelling between four or five supermarkets on different days of the week to carry out various tasks for San Remo. The time allocated for those tasks at each supermarket ranged between 30 minutes and two hours. At some of those

supermarkets she also did work for the other companies who employed her to do their merchandising work.

[23] Unknown to Mr Wharerau Ms Pool was also unwell at the time he telephoned her. She had been vomiting earlier that morning and had stopped work for the day. She had sent Mr Millstead a text about an hour earlier advising she was ill and was being ‘sent home’ by her mother. Her mother also worked as a merchandiser and was at the same supermarket in Whakatane that day. Ms Pool was sitting with her mother in the supermarket’s café when Mr Wharerau’s call reached her mobile phone.

[24] During their discussion Ms Pool told Mr Wharerau that Mr Millstead had authorised her to claim ten hours each week. Mr Wharerau rejected that explanation as “highly unlikely”. She also referred to bullying claims made about her but Mr Wharerau said he only needed to talk to her about allegations regarding her timesheets.

[25] Ms Pool was treated unfairly by Mr Wharerau’s surprise call. Her inability to respond with the expected level of detail, on the spot, created a negative impression that tainted Mr Wharerau’s view of her. This was clear from the letter Mr Banham sent her on 30 March. It said she had been “unable to offer any reasonable explanation” in what it called an “initial discussion” with Mr Wharerau on 24 March.

Failure to provide necessary information

[26] During that 24 March phone call Ms Pool wrote the five dates Mr Wharerau mentioned on a café napkin. The letters Mr Banham later wrote to her about San Remo’s investigation did not list those dates. Prior to the 12 April meeting she was not given copies of her timesheets and the supermarket records that San Remo considered showed inconsistencies in the hours she claimed

to have worked on those five dates.

[27] Mr Wharerau believed Ms Pool already had access to her timesheets because she had submitted them by email each week. He thought she could find that information by looking at her 'sent' emails. However he did not check she did have access to that information at the time of his investigation.

[28] Ms Pool's employment agreement required her to accurately record her hours of attendance but not to keep those records once submitted. At the Authority investigation meeting she said she had emailed those timesheets from a computer at her grandmother's house. She filled in those sheets using a note she kept of her hours in a notepad function on her mobile phone. After entering the hours on her timesheet she deleted those notes in order to write in the next week's hours. She also kept the clock-in visitor labels from her visits to the Whakatane Pak N Save. She took those labels with her to the 12 April meeting with Mr Wharerau.

[29] Part of Ms Pool's explanation for whether her hours were accurately recorded was that, for some days, she had combined some time spent at different supermarkets on different days into a single figure. Assessing that explanation required cross checking of the timesheets and store sign-in sheets or login records for supermarkets she visited on more than just the five dates Mr Wharerau had asked about. That full range of documents was not available at the 12 April meeting. In at least one instance the store no longer kept those records by the time that meeting was held so could not be checked.

[30] Mr Wharerau said copies of timesheets were available for Ms Pool and her representative at the 12 April meeting but they had not asked for them. Ms Pool denied that was so. She said she did ask for that information to be sent to her and expected a further opportunity to provide explanations.

[31] On this disputed point, the onus fell on San Remo to establish it had acted reasonably by providing that information for Ms Pool. Mr Wharerau's evidence did not compellingly demonstrate San Remo had done so.

Failure to provide opportunity for comment on further information

[32] Following the 12 April meeting Mr Wharerau conducted some further inquiries. Two points arose from his endeavours that were relevant to conclusions he drew but he did not give Ms Pool an opportunity to comment on those points.

[33] Firstly, he asked Mr Millsted for his response to Ms Pool's suggestion that Mr Millsted had told her to round up her hours to ten a week. Mr Millsted denied doing so.

[34] Ms Pool had given that explanation to Mr Wharerau during the 24 March telephone call. Mr Wharerau did not ask her about it during the 12 April meeting. Mr Millsted was at that meeting. If Mr Wharerau had asked for Mr Millsted's response there, Ms Pool could have then provided any further comment or information she might have had about whatever Mr Millsted said.

[35] While Mr Wharerau could legitimately have accepted Mr Millsted's denial of Ms Pool's assertion, he had to do so on a reasonable basis. There was no evidence he had ever turned his mind to the prospect that Mr Millsted might have made such an arrangement with Ms Pool but did not want to disclose doing so to his senior managers.

[36] In any event Mr Millsted's denial was a new piece of information in Mr Wharerau's investigation. He should have given Ms Pool an opportunity to comment on it. Mr Millsted also gave Mr Wharerau a copy of an email sent to Ms Pool on 29

June 2015 that Mr Millsted said supported his description of the arrangements for her hours. Ms Pool should have been given the opportunity to comment about that email and whether what it said was different from arrangements Mr Millsted made with her in November 2015. She was off work in September and October 2015 recovering from knee surgery and changes were made to her hours and supermarket runs when she returned to work in November.

[37] Secondly, Mr Wharerau reviewed the login records from some supermarkets. Comparing that information with the responses Ms Pool gave about the five dates in question, he concluded she had deliberately recorded inaccurate information. This formed the basis of a further allegation made in the 14 April dismissal letter – that she did not give honest answers during his investigation. She was not given an opportunity to respond to that new allegation before the decision to dismiss her was made.

Failure to disclose a further prejudicial allegation

[38] Mr Wharerau had not given Ms Pool a copy of Mr Millsted's [24](#) March email that contained the allegations about her hours. That email sparked Mr Wharerau's inquiry. It contained relevant information. He should have let her see it and comment

on its contents. If he had done so, Ms Pool would have learned of Mr Millsted's highly prejudicial further allegation that she left a previous merchandising job after she was accused of claiming for hours she did not work.

[39] Mr Wharerau said he took no account of that allegation in Mr Millsted's email. He said he "probably" read it but it was not part of his thinking when he spoke to Ms Pool later that same morning. Instead he said he only considered the facts regarding her hours worked for San Remo.

[40] While that was possible, this further allegation was about a scenario apparently quite like the one under investigation. Based on it, Mr Millsted had made an unequivocal statement that Ms Pool was not honest. As a matter of likelihood, an employer would

consider information about a previous similar instance (if confirmed as correct) was relevant to the probability an employee could have acted in the same way again.

[41] San Remo's obligation to establish it acted reasonably had to be assessed on an objective standard. It was not sufficient to rely on Mr Wharerau's inherently subjective assertion that he had simply taken no account of such a prejudicial allegation. A fair and reasonable employer could not, in those circumstances, have failed to disclose such a serious allegation to Ms Pool so she got an opportunity to provide any information that might refute it. Mr Millsteed had identified, by name, two representatives of other companies as the source of his allegation. Mr Wharerau could have checked its authenticity with them directly.

[42] In the Authority investigation meeting Ms Pool denied there was any truth to the allegation. She said left her merchandising role with those two companies after suffering a mental health breakdown in late February 2013. In his email Mr Millsteed had written that Ms Pool had been "banned" from working in one supermarket as a result of what he called time theft. That part of his allegation was inconsistent with the fact that Ms Pool, after her health recovered, did again work in that supermarket as a merchandiser, including for San Remo.

Failure to provide opportunity to be heard by the decision-maker

[43] An employer considering whether to end a worker's employment must give her or him any relevant information about that prospect and the opportunity to comment on that information before the decision is made.³

[44] On 13 April Mr Wharerau rang Mr Banham at San Remo's head offices in South Australia to report on his investigation of Ms Pool. In their discussion they agreed Ms Pool had wilfully breached her obligation to accurately record her hours of work. According to his witness statement Mr Wharerau then recommended summary termination of her employment. He said Mr Banham endorsed the recommendation.

[45] Ms Pool was not advised of the finding of serious misconduct or given an opportunity to be heard by the decision-makers about what disciplinary consequence might be imposed on her as a result of their finding. She had attended the 12 April meeting knowing dismissal might be a prospect but no findings of serious misconduct had yet been made. She was not asked there, or subsequently, about anything she might want the decision-maker to consider before imposing a sanction.

[46] On Mr Wharerau's evidence it was Mr Banham who made the decision to dismiss Ms Pool. Mr Banham had not met her or heard from her during any part of the investigation, and particularly not on the prospect of dismissal as a result. This breached a longstanding and fundamental principle of natural justice in case law as well as the statutory good faith obligations.⁴ Ms Pool may have had something to say about her health or other personal circumstances that a fair and reasonable employer could have taken into account before deciding an appropriate disciplinary outcome. She was treated unfairly by not being given that opportunity.

[47] It was possible, contrary to his evidence, that Mr Wharerau was really the decision-maker. If so, Mr Banham had merely agreed with and carried out Mr Wharerau's decision that dismissal was the appropriate outcome. However, if that

were so, Mr Wharerau still had to meet those obligations to act fairly before making

³ [Employment Relations Act 2000, s 4\(1A\)\(c\)](#).

⁴ *Irvine Freightlines Limited v Cross* [1993] 1 ERNZ 424 at 442 and *Quinn v BNZ* [1991] 1 ERNZ

1060 at 1070.

that final decision. As well as giving Ms Pool the opportunity to comment on his conclusions about serious misconduct, he had not heard from her about any personal or other factors that she might ask be taken into account before a decision was made. This was particularly important given Mr Wharerau was not Ms Pool's direct manager and had no contact with her until the 24 March phone call and the 12 April meeting. He had no detailed knowledge of factors, such as her service and personal circumstances, that a decision-maker might consider taking into account. A further meeting, or at least an opportunity to comment, was needed.

Were concerns about Ms Pool's interaction with another merchandiser relevant?

[48] The statutory test of justification requires the Authority to consider how the employer acted in "all the circumstances at the time the dismissal or action occurred".

[49] Mr Wharerau insisted he took no account of any other concerns about Ms Pool in reaching his conclusions about her conduct. Ms Pool considered that conflict between her and Ms FUV played a part in what happened and how it happened.

[50] This conflict was particularly relevant to how Mr Millsteed came to send his 24 March email to Mr Wharerau raising concerns about Ms Pool. His email began by setting out an instance of that conflict between Ms FUV and Ms Pool. It had occurred against a background in which Ms Pool considered she had been pushed out of working in one of the Whakatane supermarkets and replaced by Ms FUV.

[51] During September and October 2015 Ms Pool was off work for around eight weeks while she recovered from knee surgery. Over that time Ms FUV was employed to fill in for her at two supermarkets in Whakatane. On her return to work in November

2015 Ms Pool was asked to cover for another merchandiser at a store in Te Puke, on what she understood was a temporary basis. As a result Ms Pool did not immediately return to working her previous hours for San Remo at the Whakatane Pak N Save store. She did however continue to work there for another company, Watties. Those arrangements meant her work required more travel out of Whakatane than previously.

[52] In early March 2016 Mr Millsteed suggested Ms Pool keep doing the Te Puke hours so Ms FUV could keep the hours at the Whakatane Pak N Save. Around this time Ms FUV planned some annual leave and asked Ms Pool to cover those hours while she was away. Ms FUV understood Ms Pool had agreed to do so but Ms Pool said she had not confirmed that arrangement. Ms Pool did not cover all those hours. As a result the San Remo shelves at the supermarket were not properly maintained during Ms FUV's leave.

[53] Ms FUV was not happy about what happened and Ms Pool was not happy that she was then blamed for the shelves being emptied. Soon after Ms FUV's return from leave Ms Pool complained to Mr Millsteed about overhearing Ms FUV and a supermarket manager criticising her for what had happened. Mr Millsteed raised Ms Pool's complaint with Ms FUV who denied she had criticised Ms Pool. Soon after Ms FUV gave Mr Millsteed written notice of resignation from her role as relief merchandiser for San Remo at the Pak N Save Whakatane. She wrote that she did not want to be part of "nasty gossip and bullying antics" by Ms Pool.

[54] Also around this time some staff members at the Whakatane Pak N Save had complained to a Watties manager about how Ms Pool spoke to them in carrying out her role as a merchandiser for that company's products.

[55] Ms FUV had also told the supermarket operator Mr Soutar about her view that she was being bullied by Ms Pool and intended to resign. He encouraged her to tell Mr Millsteed. On 23 March Mr Millsteed advised Mr Soutar he had received a complaint from Ms FUV about bullying behaviour by Ms Pool. Mr Millsteed told Mr Soutar San Remo would investigate her complaint. Mr Soutar emailed that information about Ms Pool to the Watties representative. In a later email to that representative Mr Soutar wrote that he did not want "a person like this" working in his store.

[56] Mr Millsteed's [s 24](#) March email, that started Mr Wharerau's investigation into Ms Pool's timesheets, was sent the day after he advised Mr Soutar that San Remo would investigate Ms FUV's bullying complaint.

[57] San Remo's submissions on this point suggested any link between Ms FUV's complaint and the investigation of Ms Pool's timesheets amounted to little more than a conspiracy theory, not supported by any reliable evidence. It suggested Mr Wharerau's evidence showed he was solely focussed on the timesheets. He had insisted he was not distracted or influenced by any other allegations about Ms Pool's conduct or character.

[58] However, even accepting that latter submission, Mr Millsteed was affected by those surrounding circumstances. And the conclusions Mr Wharerau reached had relied on what Mr Millsteed said, particularly in rejecting Ms Pool's explanation that Mr Millsteed authorised her 'rounding up' hours.

[59] In those circumstances a fair and reasonable employer could not have ignored the prospect that Mr Millsteed's input might be unfairly influenced by other matters. Mr Millsteed's evidence established his working relationship with Ms Pool had deteriorated by mid-March 2016. His discussions with her about the changes to her working arrangements and returning to her previous hours at the Whakatane Pak N Save had become fractious. He described himself as feeling threatened because she said she would complain to San Remo's head office or get her lawyer involved.

[60] Ms Pool asked Mr Wharerau to consider that context from the outset of his phone call on 24 March. She referred to her dispute with Mr Millsteed about her working arrangements and Ms FUV's bullying complaint. However Mr Wharerau simply declined to consider those points or make any further inquiries about them or consider their possible relevance. Even if those points, ultimately, would have made no difference to the conclusions he reached about the timesheets, they were part of the circumstances that he should have fairly examined before discounting.

An unjustified dismissal

[61] The nature of the defects in San Remo's inquiry made its decision to dismiss Ms Pool unjustified. And the evidence did not support a conclusion that San Remo could justifiably have made the same decision if its inquiry had been carried out free of those defects. Such a conclusion would have required further information from the timesheets and store records that were not available or analysed. It would also have required a more rigorous assessment, not made at the time, about the prospect that some agreement or misunderstanding occurred between Ms Pool and Mr Millsteed about what hours she could claim. More was also required to establish that a fair and reasonable employer could have concluded Ms Pool acted deliberately or wilfully in what she did. It also required some allowance for the prospect that the opportunity for further input from Ms Pool, before the dismissal decision was made, may have influenced the outcome.

[62] Accordingly San Remo's actions and decisions did not meet the statutory test of justification. Ms Pool had established her personal grievance for unjustified dismissal. An assessment of remedies for that grievance was required.

Remedies

Lost wages

[63] Ms Pool sought an award of lost wages from the date of her dismissal to the date she lodged her application in the Authority in February 2017.

[64] Her evidence did not support an award for a period that long. She provided evidence of seeking jobs between May and September 2016. In October 2016 she had begun a stay in a private retreat to address her health issues. From that information five months was the maximum period for which a loss of wages arising from her unjustified dismissal could be assessed. However, even during those five months, her job search, and her ability to have taken another job, was limited by her health issues. Those issues resulted in two hospital admissions. There was also some doubt she would have remained in San Remo's employment until September if she had not been dismissed. Mr Wharerau said that, during their 24 March phone conversation, Ms Pool told him she had "already told Steve Millsteed to stick his job up his arse". Ms Pool could not recall saying so to Mr Wharerau but accepted she could have done.

[65] Against that background, and allowance for the contingencies of life, there were no grounds to order San Remo to pay Ms Pool more than three months' ordinary time as compensation for remuneration lost as a result of her grievance.⁵ Ms Pool's lost wages for those three months totalled \$2158. This sum, awarded under s

123(1)(b) of the Act, was calculated on her hourly pay rate of \$16.60 for ten hours a week, annualised and divided on a monthly basis.

Compensation for humiliation, loss of dignity, and injury to feelings of the employee

[66] Ms Pool sought an award of \$30,000 compensation for the distress caused by her dismissal.

[67] Evidence from her, her mother Megan Pool and Ms Drury established Ms Pool was greatly upset by the accusations made about her conduct and how San Remo carried out its investigation. She was tearful and embarrassed.

[68] She suggested that her hospital admissions in June and October 2016 were due to the stress she suffered as a result of her unjustified dismissal. However medical notes lodged as part of the evidence for the Authority investigation revealed other sources of stress and effects on Ms Pool's health. The difficulties she experienced during that part of the year could not all, confidently, be said to result from San Remo's actions in dismissing her.

[69] Broadly assessed, \$12,000 was an appropriate level of compensation for the effects that could be attributed to her unjustified dismissal.⁶

Any reduction for culpable contributory conduct?

[70] Under s 124 of the Act the Authority must consider whether Ms Pool's

conduct contributed to the situation that gave rise to her grievance. If she was at fault or to blame for some of what happened, a reduction of remedies may be required.

⁵ [Employment Relations Act 2000, s 123\(1\)\(b\)](#) and [s 128](#).

⁶ [Section 123\(1\)\(c\)\(i\)](#).

[71] In light of the conclusions made in this determination about inadequacies in San Remo's investigation, fault or blame on Ms Pool's part could not be clearly established. In those circumstances no reduction of remedies could be made.

Costs

[72] Costs are reserved. Ms Pool received a legal aid grant to bring her application to the Authority. If an Authority determination of costs is required, Ms Pool, as the successful party, should lodge and serve a memorandum on costs within 14 days of the date of this determination. San Remo would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[73] Typically costs would be determined on the Authority's usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Robin Arthur

Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106]-[108].