IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE

[2025] NZERA 85
3303560

	BETWEEN	LATHAM RYDER Applicant
	AND	LONGCHILL LIMITED Respondent
Member of Authority:	Shane Kinley	
Representatives:	Darren Mitchell, advocate for the applicant Chris Quirk, for the Respondent	
Investigation Meeting:	18 November 2024 in Palmerston North	
Submissions:	At the investigation meeting	
Determination:	17 February 2025	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Latham Ryder was employed by LongChill Limited (LCL) for a number of years as a truck driver, until he was summarily dismissed on 3 December 2023 for theft from a customer of LCL. Mr Ryder claims his dismissal was substantively and procedurally unjustified.

[2] LCL says its decision to dismiss Mr Ryder was justified.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by Mr Ryder and for LCL by Chris Quirk, LCL's Operations Manager. Mr Ryder and Mr Quirk answered questions, under affirmation, from me and from the representatives.

[4] At the conclusion of the investigation meeting Mr Ryder's advocate provided written submissions and both representatives provided oral submissions. I briefly adjourned the investigation meeting before proceeding to give an oral indication of preliminary findings under ss 174(b) and 174B of the Employment Relations Act 2000 (the Act), which are recorded in this written determination under s 174B(2) of the Act at paragraphs [32] and [62] below.

[5] 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 orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

(a) Was Mr Ryder unjustifiably dismissed by LCL?

(b) If LCL's actions were not justified (in respect of dismissal) what remedies should be awarded, considering:

  (i) compensation under s 123(1)(c)(i) of the Act; and

  (ii) lost wages under ss 123(1)(b) and 128 of the Act?

(c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievance?

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

Was Mr Ryder unjustifiably dismissed by LCL?

Test of justification

[7] In assessing Mr Ryder's claim he was unjustifiably dismissed I must apply the test of justification under s 103A of the Act, being whether LCL's actions, and how LCL acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[8] In reaching my conclusions about Mr Ryder's claim, s 103A(3) requires that I consider:

a. having regard to the resources available to it, did LCL sufficiently investigate before taking action;

b. did LCL raise concerns that it had with Mr Ryder before taking action;

c. did Mr Ryder have a reasonable opportunity to respond; and
d. did LCL genuinely consider Mr Ryders's explanation or comments.

[9] I may also take into account any other factors I think are appropriate (s 103A(4)). I must not determine an action to be unjustifiable where there were defects in LCL's process that were minor and did not result in Mr Ryder being treated unfairly (s 103A(5)).

[10] A fair and reasonable employer is expected to comply with its statutory obligations which include good faith obligations and particularly the requirement for both parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.[1] When an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees, the employer is required to provide the affected employees with access to relevant information and an opportunity to comment on the information before the decision is made.[2] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action because "a fair and reasonable employer will comply with the law".[3]

Event on 14 November 2023

[11] At approximately 1.50am on Tuesday 14 November 2023 Mr Ryder entered the site of one of LCL's clients, Goodman Fielder, and took at least one loaf of bread. Video (CCTV) footage was provided of the area where the bread was taken from and also a loading bay where Mr Ryder entered Goodman Fielder's site.

[12] Mr Ryder's witness statement said:

> I did go onto the Goodman Fielder site on 14 November 2023 and took some bread. I took this from an overs bin that had stock that was not going to a shop for sale. This stock would usually be used for pig food. This was something other staff did at the site, and I thought this was okay to do.

[13] In response to questions from me at the investigation meeting Mr Ryder said his reason for taking the bread was because he was hungry on his day off, so he went and got bread like he had many times before. He also said the rules were pretty lax and loose

[1] Section 4(1A)(b) of the Act.
[2] Section 4(1A)(c) of the Act.
[3] *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ at [65].

and he didn't think there was any real issue, so long as bread wasn't taken from picked orders and what was taken was not excessive.

[14] Mr Ryder confirmed he had viewed the video of him taking the bread but denied having seen a Goodman Fielder sign prior to it being provided by LCL as part of its statement in reply. The Goodman Fielder sign reads:

> STAFF BREAD
> Golden Rules
> Anything in the rack has been approved by the team leader & is fair game.
> You are only to take two units home & only on the days that you have worked.

[15] The Goodman Fielder sign included the capitalisation and underlining above, with the first two lines in colour and substantially larger than the last two lines. The words "two units" were in red text as well as underlined.

LCL's investigation process and decision to dismiss Mr Ryder

[16] At the Authority's investigation meeting on 18 November 2024 LCL provided a letter from Goodman Fielder dated 26 November 2023 which permanently banned Mr Ryder from its site "due to untrustworthy and dishonest behaviour including trespassing and theft". This appears to be the notification which Mr Quirk said he had received on 26 November 2023.

[17] At the Authority's investigation meeting Mr Quirk described a meeting he had attended with Mr Ryder's uncle, the sole Director and a shareholder of LCL, who had been "summonsed" by Goodman Fielder to discuss "concerns over activity where [Mr Ryder] visited the site and took bread". Mr Quirk said the video footage was viewed at this meeting and confirmed Goodman Fielder's complaint, which had "humiliated" Mr Ryder's uncle. As a consequence, Mr Quirk commenced a disciplinary process with Mr Ryder, having discussed this approach with Mr Ryder's uncle. My Ryder's uncle did not attend the Authority's investigation meeting or provide evidence.

[18] The documentary evidence about the disciplinary process was not contested and involved letters from Mr Quirk to Mr Ryder as follows:

a. Letter dated 27 November 2023 raising allegation of theft from Goodman Fielder site, advising this may amount to serious misconduct, which may lead to dismissal. An invitation was made to a disciplinary meeting on 1 December 2023, where Mr Ryder would be able to respond and give his views in relation to the allegation. Mr Quirk said he

delivered the letter to Mr Ryder's letterbox and claimed Mr Ryder's sister saw him deliver the letter;

b. Letter dated 1 December 2023 advising as Mr Ryder had not attended the scheduled investigation meeting that day and had not contacted Mr Quirk, that if he did not engage by 3 December 2023 LCL would take this as an acknowledgment of theft and serious misconduct, and would move to "instant dismissal". This letter referred to Mr Quirk having reviewed the CCTV footage provided by Goodman Fielder. Mr Quirk said he again delivered this letter to Mr Ryder's letterbox; and

c. Letter dated 3 December 2023 advised LCL was terminating Mr Ryder's employment with "immediate effect" following a "gross misconduct" investigation … specifically because of the theft" incident at Goodman Fielders on 14 November 2023. Mr Quirk said this letter was delivered on 4 December 2023.

[19] This process was interspersed with text messages on 1 December 2023 and what appears to be 4 December 2023, where reference is made to Mr Ryder needing to respond by 12.30pm if he wished to discuss the matter, although not all of the text message providing this extended time to respond has been provided.

[20] Mr Ryder's former representative had contacted Mr Quirk at 11.56am on 4 December 2023 and a file note from the representative of this conversation was provided. Mr Quirk said the file note was "out of context" as it did not include his full comments, although he did not dispute the content of the file note otherwise. The file note concluded by recording Mr Quirk saying there would be a termination letter in Mr Ryder's letterbox that afternoon.

Submissions of the parties

[21] Mr Ryder said his dismissal was procedurally and substantively unfair for several reasons. LCL's process was said to be rushed, with attempts to have meetings on his rostered days off, with even the extended timeframe not allowing Mr Ryder to seek legal assistance. Mr Quirk was said to be biased against Mr Ryder and to have predetermined the outcome, with a strained relationship leading up to the dismissal and there being rumours earlier that Mr Ryder would be dismissed. The investigation process was said to be insufficient, with LCL simply relying on Goodman Fielder's

information and failing to advise Mr Ryder that Goodman Fielder had banned him from its site.

[22] LCL's substantive decision was said to not be that of a fair and reasonable employer in the circumstances, with allegations against Mr Ryder not made out. The rushed and flawed process was said to mean Mr Ryder's explanation was not able to be considered and alternatives to dismissal were not considered.

[23] LCL essentially said its decision was fair and reasonable, with Mr Ryder not engaging in the investigation or disciplinary process and even when an extension was granted to engage and Mr Ryder's former representative made contact, no further engagement or extension was requested. LCL said the CCTV footage provided by Goodman Fielder was clear with no argument being possible, and Goodman Fielder's sign was also clear that two loaves could be taken on working days only. As Mr Ryder was not working on 14 November 2023, he should not have been at the Goodman Fielder site and, simply put, he stole.

Analysis

[24] The importance of both substantive and procedural fairness has long been emphasised by the Courts, with the Employment Court recently stating in *E tū Inc v Singh* "It has long been recognised that good processes tend to support sound outcomes".[4]

[25] The Court of Appeal have also confirmed the significance of procedural justification, as distinct from substantive justification, in *Hardie v Round* (albeit in the context of dismissing an appeal from an Employment Court judgment) stating:[5]

> Gradually however it became clear that the gravamen of his concern is that, on the facts, Dr Round's conduct was so bad that Mr Hardie was entitled to pre-empt the usual processes attendant on a summary dismissal. In some sense that involves a proposition of law, but it is so hopelessly wrong that it does not need further discussion. The thrust of employment law in New Zealand, for many years, has been that appropriate processes have to be followed, otherwise there will routinely be inappropriate outcomes.

[26] In this matter LCL's main submission was that Mr Ryder's theft was obvious and his lack of engagement meant its decision to summarily dismiss him was justified,

[4] *E tū Inc v Singh* [2024] NZEmpC 84 at [46].
[5] *Hardie v Round* [2009] NZCA 421 at [22].

with his employment agreement clearly stating at cl 13.2 that summary dismissal was possible for serious misconduct situations including theft.

[27] The Court said in *Dumolo v Lakes District Health Board* that theft of low value items did not necessarily need to lead to dismissal and an employer should consider actions short of dismissal.[6] *Dumolo* was decided at the time when s 103A required consideration of "whether its actions and how it acted were what a fair and reasonable employer *would* have done in all of the circumstances at the time that the dismissal occurred" (emphasis in original).[7]

[28] In the context of the current test required under s 103A, I consider while potentially harsh, it was open to LCL to conclude the taking by Mr Ryder of low value items, being a small number of loaves of bread, could justify summary dismissal.

[29] I do not consider this matter crosses the threshold referred to by the Court in *New Zealand Post Primary Teachers Assoc v Board of Trustees of Kelston Boys' High School (No 1)*, where "a dismissal which is disproportionately and manifestly harsh in light of all of the circumstances of proven misconduct and other relevant criteria may be so unreasonable as to cause the dismissal to be found to have been unjustified".[8] In reaching this conclusion, I have considered the assertion on behalf of LCL that it was concerned about the implications of Mr Ryder's alleged theft for the contract it held with Goodman Fielder and the potential harm to LCL's commercial interests.

[30] I find LCL had substantive justification to invoke the serious misconduct provision in Mr Ryder's employment agreement and had reasonable grounds to conclude he had stolen bread from Goodman Fielder. The CCTV footage shows Mr Ryder having taken the bread from a stack of approximately fourteen bread racks which appear to be full, having first looked at a smaller stack of approximately three racks which were below a number of signs and may not have been full. I consider the CCTV footage is not consistent with Mr Ryder's evidence he took bread "from an overs bin that had stock that was not going to a shop for sale. This stock would usually be used for pig food".

---

[6] *Dumolo v Lakes District Health Board* [2014] NZEmpC 40 at [32] and [36].
[7] Ibid at [23].
[8] *New Zealand Post Primary Teachers Assoc v Board of Trustees of Kelston Boys' High School (No 1)* [1992] 2 ERNZ 793 at 827.

[31] This is not sufficient however to justify LCL's decision to dismiss Mr Ryder as it still needs to demonstrate it followed a fair process in doing so.

[32] I provided an oral indication of my preliminary findings at the investigation meeting that LCL's process had numerous procedural failings which may mean its decision to dismiss Mr Ryder, while substantively justified was procedurally flawed to such an extent LCL's decision was overall unjustified.

[33] Having reviewed the evidence in this matter I find LCL's process in dismissing Mr Ryder was not that of a fair and reasonable employer for the following reasons. First, LCL failed to advise Mr Ryder of the role his uncle had played in the decision-making process. Mr Quirk's said he discussed the theft allegation with Mr Ryder's uncle following a meeting at Goodman Fielder, which led to the initiation of the disciplinary process. This information was not disclosed until the Authority's investigation meeting when I consider Mr Ryder's uncle's role should have been disclosed at the time.

[34] Second, Mr Quirk also said at the Authority's investigation meeting that if Mr Ryder had engaged with the disciplinary process then he would have been told he needed to apologise to his uncle and there may then have been a possibility to preserve his employment and to request Goodman Fielder rescind its ban of Mr Ryder. While Mr Ryder is responsible for his lack of engagement, LCL should have been proactive in communicating these options to Mr Ryder. By failing to do so, LCL has undermined the disciplinary process and has not acted consistent with the duty of good faith in particular the requirement under s 4(1A)(b) of the Act to be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[35] The failure to communicate this to Mr Ryder also means I am not satisfied LCL genuinely considered alternatives to dismissal. The requirement to consider alternatives to dismissal has long been expected of an employer[9] and was recently reiterated by the Court in *E tū Inc v Singh*.[10] Caution is required in considering whether dismissal was an option open to the employer, with the Court saying in *Elisara v Allianz New Zealand*

[9] For example, in *Wellington Amalgamated Society of Shop Assistants and Related Trades IUOW v Wardell Bros & Co Ltd* [1977] ICJ 13 the Industrial Court considered whether a warning was all that was required.
[10] Above n1 at [93].

Ltd "I cannot say that the decision to summarily dismiss was outside the permissible range, although closer to the edges of what a fair and reasonable employer could have done in all of the circumstances".[11]

[36] Third, LCL failed during the disciplinary process to provide Mr Ryder the CCTV footage, to advise him Goodman Fielder had permanently banned him from its site and to provide him with a copy of the Goodman Fielder sign re staff bread. This information was pivotal to LCL's decision and by not providing it Mr Ryder was unable to respond fully to it.

[37] I consider LCL's failure to provide this information is inconsistent with the requirements of ss 103A(3)(b) and (c) to raise the concerns that it had with Mr Ryder before taking action and to provide Mr Ryder with a reasonable opportunity to respond. I also consider this failure is inconsistent with LCL's duty of good faith under s 4(1A)(c) of the Act when proposing to make a decision that would, or was likely to, have an adverse effect on the continuation of Mr Ryder's employment to provide him access to relevant information and an opportunity to comment on the information before the decision is made. A fair and reasonable employer will comply with the law including the duty of good faith.

[38] I consider the above procedural faults mean LCL's decision to summarily dismiss Mr Ryder, while substantively justified was procedurally flawed to such an extent LCL's decision was overall unjustified. I do not consider these defects in LCL's process were minor and consider they resulted in Mr Ryder being treated unfairly.

[39] Mr Ryder also claimed defects in the formal notification of the issues LCL was concerned about contributed to the overall unjustifiability of LCL's actions. I consider the core issue that LCL was concerned about was whether Mr Ryder had stolen from Goodman Fielder, which was clearly communicated to him in the initial letter inviting him to a disciplinary meeting dated 27 November 2023. While reference was then made to the availability of CCTV footage in the letter dated 1 December 2023, this was connected back to the allegation of theft. I am not satisfied this involves a separate procedural defect on the part of LCL.

[40] For completeness I find LCL's action in scheduling disciplinary meetings on Mr Ryder's rostered days off was not unreasonable. Mr Quirk said this was done to

[11] *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123 at [23].

avoid disciplinary meetings being on days when a driver was rostered to be driving a heavy vehicle, alluding to safety considerations. Mr Ryder could have requested the meeting be on a working day and he did not do so. In any event, I would have considered this to be a minor procedural defect which did not result in Mr Ryder being treated unfairly.

[41] I also find insufficient evidence was provided that Mr Quirk was biased against Mr Ryder and predetermined the outcome of the disciplinary process. While evidence was provided of a strained relationship between Mr Ryder and Mr Quirk, including other disciplinary matters having led to at least one warning, I am not convinced these led to Mr Ryder's dismissal. I accept Mr Quirk's evidence the dismissal was due to the specific allegation of theft rather than other earlier matters.

[42] Finally, Mr Ryder said he had heard rumours earlier in November 2023 that he would be dismissed by Mr Quirk and referred to a co-worker who he said had told him this. No corroborating evidence was provided of this allegation, and I do not consider the evidence provided supports LCL's decision being predetermined. While reference was made to Mr Quirk telling Mr Ryder's former representative that there would be a termination letter delivered later that day, I also do not consider this establishes predetermination. I accept Mr Quirk's evidence he did not finalise or communicate the decision to dismiss Mr Ryder until after the time for Mr Ryder to contact him had passed and the date on the dismissal letter reflected when the letter was drafted rather than when the final decision was made. I consider the evidence shows Mr Ryder had a chance to engage prior to the point of the decision being communicated and he did not do so, with his former representative not seeking any opportunity to make submissions on Mr Ryder's part.

Mr Ryder was unjustifiably dismissed

[43] For the reasons above, I find while LCL's decision to dismiss Mr Ryder was substantially justified, he was unjustifiably dismissed due to procedural failings by LCL which were not minor and resulted in Mr Ryder being treated unfairly.

What remedies should be awarded to Mr Ryder in relation to his unjustified dismissal?

[44] Having determined Mr Ryder was unjustifiably dismissed, I need to consider what remedies should follow. Mr Ryder sought three month's lost wages in the amount of $7,933.20 under ss 123(1)(b) and 128 of the Act, taking into account post-

employment benefit payments, and compensation of $25,000 for hurt and humiliation under s 123(1)(c)(i) of the Act.

[45] Mr Ryder said he hadn't really made efforts to get a new job as he was dealing with depression and had taken a hit to his confidence, and he took time out to look after his mental health. He accepted he was partially to blame for what happened but said he needed closure and to know what happened to him was a bit unfair and a bit unjustified. He also said losing his job in the way he did was humiliating and made him feel worthless.

[46] Mr Ryder said he had not contributed to LCL's significantly flawed disciplinary process, however, if I concluded he had, then only a modest reduction would be appropriate.

[47] Mr Quirk said LCL owner, Mr Ryder's uncle, was the one most humiliated by what had occurred.

[48] At the Authority's investigation meeting on 18 November 2024, I indicated I would review Mr Ryder's claim for lost wages to consider whether loss had occurred including whether Mr Ryder's actions in focussing on his mental health meant he was unable to work and to consider how to account for the benefit payments Mr Ryder received.

[49] Under ss 123(1)(b) and 128 of the Act I am required to consider Mr Ryder's actual loss resulting from his personal grievance.[12] Subsection 128(2) of the Act requires, where a grievance has been established, that I "order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration". I am also required to consider whether I should exercise my discretion to order a greater amount and whether the employee has contributed to the situation giving rise to his grievance.[13]

[50] In this case Mr Ryder has not obtained new employment and claimed for three months' lost wages. There is no evidence the casual connection between his grievance and his loss was broken due to his lack of efforts to obtain a new job and in any event

[12] See also *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at [81] and *Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136 at [51] and [52].
[13] Sections 128(3) and 124 of the Act.

arguably his circumstances have some similarity to those in *Maddigan v Director-General of Conservation*, where dismissal occurred in:[14]

> … circumstances [Mr Maddigan] 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 dismissal, this was reasonable in the particular circumstances.

[51] William Young J, in *Waitakere City Council v Ioane*, suggested that causation may require a reduced award of lost wages where a dismissal was unjustifiable solely on procedural grounds.[15] In this case, I am not satisfied a fair process would unquestionably have resulted in Mr Ryder's justifiable dismissal, given Mr Quirk's evidence dismissal could potentially have been avoided.[16] On balance, I consider dismissal was likely but not inevitable and applying William Young J's notion of "loss of chance"[17] I assess the likelihood of dismissal as equally likely to Mr Ryder's employment being able to be maintained.

[52] In these circumstances I consider an appropriate assessment of actual loss resulting from Mr Ryder's personal grievance to be one and a half months' remuneration, reflecting the three-month period claimed reduced by 50 per cent to account for the likelihood Mr Ryder's employment would not have been maintained. As actual loss is less than three months' ordinary time remuneration this is the amount to consider under s 128(2) of the Act. I was not asked to exercise my discretion under s 128(3) of the Act to award more than three months' lost wages and there was no evidence which would lead me to consider it would have been appropriate.

[53] Mr Ryder's evidence was he received benefit payments. The Court in *Judea Tavern Limited v Jesson* said that liability to pay wages or compensation for wages rests with the employer and other compensation in the nature of benefits, does not displace this liability, with "any question of reimbursement of such payments [falling] on the particular organisation and the individual concerned".[18] Consequently, the appropriate approach is to put any question of repayment of benefits to one side in terms of my assessment of an appropriate award under s 123(1)(b) and I decline to make any deduction from my calculation of lost remuneration for benefits in this case.

---

[14] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [66].
[15] *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 at [23] to [26].
[16] Ibid at [24].
[17] Ibid at [26].
[18] *Judea Tavern Limited v Jesson* [2017] NZEmpC 82 at [40].

[54] As I do not have sufficient evidence to calculate lost wages[19], I order LCL to calculate and pay to Mr Ryder one and a half months' lost wages under s 123(1)(b) of the Act, including any holiday pay and employer Kiwisaver contributions applicable. If the parties cannot agree on this amount, they may revert to the Authority for further orders.

[55] In relation to compensation under s 123(1)(c)(i) the Court of Appeal said in *Coutts Cars Ltd v Baguley*[20] I "should distinguish between hurt and humiliation from the manner in which the dismissal was handled and hurt and humiliation which likely would have been suffered in any event from loss of employment".

[56] I have considered the evidence of impact on Mr Ryder in relation to the effects of the procedural unfairness associated with his dismissal on him and consider these to be more moderate than he has claimed. I consider Mr Ryder conflated the impacts of the procedural unfairness involved in his dismissal, for which compensation is due, with his dissatisfaction at both being dismissed and with earlier issues with his employment at LCL, which are not relevant for an assessment of compensation.

[57] I fix the amount of compensation under s 123(1)(c)(i) which Mr Ryder is entitled to at $10,000 taking into account other comparable cases in the Authority and Court.

Should remedies be reduced under s 124 of the Act for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievance?

[58] I am also required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievance.

[59] The Court has recently succinctly summarised the key principles relating to contribution as follows:[21]

> the Court *must* consider whether there ought to be a reduction for employee contribution whenever it is satisfied that a personal grievance has been established. Two steps must be taken:
> - 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

[19] Given Mr Ryder's claim for lost wages at paragraph [44] took into account benefit payments, which I do not consider appropriate for reasons outlined at paragraph [53].
[20] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 at [52] and [53].
[21] *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [39] (citation omitted, in which the Court referred to *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 and *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [179]).

> - Second, an assessment of whether the employee's actions 'require' a reduction in the remedies that would otherwise have been awarded.

[60] The Court also stated:[22]

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

[61] The Court in *Xtreme Dining Ltd v Dewar* endorsed an approach where "a 25 per cent reduction is one of particular significance" and "a finding of contributory fault of 50 per cent is a significant one".[23]

[62] At the Authority's investigation meeting on 18 November 2024, I provided an oral indication of my preliminary findings, which was that if I confirmed my preliminary view that Mr Ryder's dismissal was unjustified on procedural grounds, then his contribution to the situation was likely to be significant.

[63] I have reviewed other cases where findings of significant contribution have been found, particularly those where there was a finding a dismissal was unjustified based on procedural failings, but the dismissal was substantively justified.

[64] In this case, I find Mr Ryder significantly contributed to the situation giving rise to his grievance due to his failure to engage with LCL's disciplinary process. Mr Ryder is not directly responsible for LCL's procedural failings however if he had engaged then he could have put to the test LCL's position, presented at the investigation meeting by Mr Quirk, that Mr Ryder needed to apologise to his uncle and there may then have been a possibility to preserve his employment and to request Goodman Fielder rescind its ban of Mr Ryder. Mr Ryder also would have been able to present his account of taking the bread, being that it was "from an overs bin that had stock that was not going to a shop for sale. This stock would usually be used for pig food. This was something other staff did at the site, and I thought this was okay to do".

[65] On balance I consider a reduction of 30 per cent is appropriate under s 124 of the Act to reflect this being a situation where Mr Ryder's contribution was significant, but not as great as in other cases where greater reductions have been ordered. A

---

[22] *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [41].
[23] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [217] to [222], with quoted text at [220] and [221], referring *Paykel Ltd v Morton* [1994] 1 ERNZ 875, *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 and *Telecom v Nutter* [2004] 1 ERNZ 315.

reduction of 30 per cent is consistent with other recent cases where a dismissal was found to be substantively justified but procedurally unjustified.[24]

Summary of outcome

[66] I have found:

a. LongChill Limited (LCL) had substantive justification to invoke the serious misconduct provision in Latham Ryder's employment agreement and had reasonable grounds to consider he had stolen bread from Goodman Fielder;

b. LCL's process in dismissing Mr Ryder was not that of a fair and reasonable employer due to LCL's failures to:

   (i) advise Mr Ryder of the role his uncle had played in the decision-making process;

   (ii) communicate fully with Mr Ryder during the disciplinary process and failure to genuinely consider alternatives to dismissal; and

   (iii) provide Mr Ryder with relevant information including the CCTV footage, advise that Goodman Fielder had permanently banned him from its site and a copy of the Goodman Fielder sign re staff bread LCL relied on;

c. LCL had communicated its core allegation of theft to Mr Ryder and reference to other concerns in letters for the disciplinary process does not amount to a separate procedural fault;

d. LCL's action in scheduling disciplinary meetings on Mr Ryder's rostered days off was not unreasonable;

e. Insufficient evidence was provided of Mr Quirk being biased against Mr Ryder and having predetermined the outcome of the disciplinary process;

f. In summary, while LCL's decision to dismiss Mr Ryder was substantially justified, he was unjustifiably dismissed due to procedural failings by LCL which were not minor and resulted in Mr Ryder being treated unfairly; and

---

[24] *Curnow v Advanced Security Group (Sth Is) Ltd* [2022] NZERA 359 at [98], *Huang v Optimal GPR & CCTV Drain Inspection Ltd* [2023] NZERA 265 at [171], *O'Neill v Prestige Building Removals Ltd* [2022] NZERA 495 at [96] and *Rutene v Ashburton Meat Processors Ltd* [2022] NZERA 599 at [111].

g. Mr Ryder significantly contributed to the situation giving rise to his grievance due to his failure to engage with LCL's disciplinary process.

Orders

[67] For the above reasons I order LongChill Limited to within 28 days of the date of this determination:

a. calculate and pay to Latham Ryder one and a half months' lost wages under ss 123(1)(b) and 128 of the Employment Relations Act 2000 (the Act), including any holiday pay and employer Kiwisaver contributions applicable; and
b. pay Mr Ryder $7,000 compensation under s 123(1)(c)(i) of the Act.

[68] The amount calculated under paragraph [67]a is to be reduced under s 124 of the Act by 30 per cent to reflect Mr Ryder's significant contribution to the situation giving rise to his grievance.

[69] If the parties cannot agree on the amount under paragraph [67]a above, they may revert to the Authority for further orders.

Costs

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

[71] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Ryder 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 LCL 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.

[72] 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.[25]

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

[73] As the investigation meeting for this matter took until approximately 1PM, my preliminary view is the notional daily rate for half of the first day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority