

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 358
5605508

BETWEEN BRIAN SHELLEY
Applicant

AND WAITAKERE UNITED
INCORPORATED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 5 July 2016

Submissions received: 26 July 2016

Determination: 27 October 2016

DETERMINATION OF THE AUTHORITY

- A. Brian Shelley was unjustifiably dismissed by Waitakere United Incorporated.**

- B. Mr Shelley is awarded \$10,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000. Waitakere United Inc is to pay this by five monthly instalments of \$2000.00 each, the first to start within 28 days of the date of this determination.**

- C. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] Brian Shelley (Mr Shelley) claims that he was unjustifiably dismissed by his former employer football club Waitakere United Incorporated (Waitakere United or the Club).

[2] Waitakere United are a large football franchise with eight stakeholder clubs operating in West Auckland. The Club has a premier team playing in New Zealand Football's ASB National League, which plays in the summer season from October to March.

[3] Mr Shelley played football internationally and coached in Australia. Mr Shelley initially moved to New Zealand after being approached to play for Waitakere United's national league team (the team or the premier team).

[4] The premier team had a strong history in the ASB Premiership, having won either the league or championship stages on a number of occasions in recent years.

[5] The Club offered Mr Shelley an employed role as joint head coach, with the premier team as his focus. He continued to play for the team, as well as coach it.

[6] From January 2014 Mr Shelley was employed by Waitakere United as the Director of Football. The full time role had various responsibilities, including overseeing all football activity within the Club and being Head Coach for the Waitakere ASB and O League Squads.

[7] The Waitakere United premier team finished in in the top four teams in both the 2013 and 2104 seasons and qualified for the play offs, although some saw this as a decline from previous achievements. Mr Shelley was the joint coach for first year and a sole coach for the second year.

[8] The Club later appointed Paul Smalley as Technical Director of Football, sometimes referred to as Director of Football. Mr Smalley and Mr Shelley had been at a Melbourne football club together previously.

[9] In April 2015 Mr Shelley and Mr Smalley sought a meeting with the Club's chairman Steve Williamson about the possibility of Mr Shelley's position becoming

part time and only involving the head coach role, so that he could pursue a business opportunity to provide extra security for his family.

[10] The Club and Mr Shelley entered into an employment agreement solely for the head coach role, which was for one year from 6 April 2015.

[11] The 2015 season commenced with the Waitakere United premier team losing against the Auckland City club, who had just finished third in the club world cup championships. The Waitakere United team then won their second game against a team that was historically generally lowly ranked. The Waitakere United team then lost their third game to WaiBop United, a usually much lower ranked team.

[12] The Club's CEO Bill MacGowan phoned Mr Shelley on 22 November 2015. Mr Shelley saw this as a general catch up, but accepted that Mr MacGowan had questioned Mr Shelley's decision to allow the team's players to have the weekend without a training session, as a break. As a result a voluntary training was arranged that weekend, but Mr Shelley did not attend.

[13] On 24 November the Club's Board met and there was concern about the team's season so far. Mr Shelley was not involved in the meeting, but Mr Smalley was invited to attend some of it. There was discussion with him about the team's players, personnel and results to date.

[14] After Mr Smalley left, the Board agreed that Mr MacGowan would talk to Mr Smalley and Mr Shelley the following day, and be authorised to accept their resignations with remuneration continuing until the end of December. The Board minutes do not refer to what I will describe as any fall back position, in the event that one or both resignations were not received.

[15] The minutes also show that Mr MacGowan was authorised to engage another named person as replacement coach with responsibility for all subsequent matches.

[16] On Thursday 26 November Mr MacGowan texted Mr Shelley asking him to attend a meeting on Friday 27 November at 10 am at the Heritage Hotel. No other details were provided.

[17] Mr Shelley considered the fact of the meeting as well as the venue unusual and so called Mr MacGowan to ask for the agenda. Mr MacGowan's reply was that they would be discussing football matters. Mr Shelley discovered from Mr Smalley that he had also texted to attend the same meeting.

[18] The two men met with Mr MacGowan and Mr Williamson (the Club's representatives). Mr MacGowan asked for an account of the season to date and who was responsible for what, which Mr Shelley provided.

[19] The Club's representatives asked the other two men to leave for 10 minutes, so they could have a discussion. Mr Smalley offered his resignation which was accepted.

[20] After an adjournment, Mr McGowan advised Mr Shelley that the Club was terminating his employment with immediate effect.

[21] Mr Shelley claims that his dismissal was substantively and procedurally unfair. The Club says that it was a justified dismissal, and that Mr Shelley should have been aware of what was coming.

[22] The investigation meeting was held on 5 July 2016. Mr Shelley, Mr Smalley, Mr MacGowan and Mr Williamson gave evidence. Mr Smalley's evidence was heard by internet video link.

[23] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[24] The issues for investigation and determination are:

- (i) Was Mr Shelley unjustifiably dismissed by Waitakere United?
- (ii) If so, what remedies (if any) should he received?
- (iii) Should either party be required to contribute to the other's costs for this proceeding?

Change of hours

[25] An issue arose at the investigation meeting regarding Mr Shelley's reduction in hours of work in April 2015. He had been working full time but asked to reduce to part time to take up a business/employment opportunity outside the Club.

[26] Mr Smalley says that he had a number of discussions with Mr Williamson on the issue, before the meeting occurred between the two men and Mr Shelley. Mr Smalley said that Mr Williamson did not express any concern or dissatisfaction regarding Mr Shelley's proposed reduction in hours.

[27] Mr Williamson's perception was that the reduction in hours was forced upon the Club as a fait accompli by Mr Shelley, in conjunction with Mr Smalley. Mr Shelley did not agree but accepted that he had had discussions with the other potential employer before speaking to Mr Williamson.

[28] Mr Williamson says that he understood that Mr Shelley's reduction in hours was for a limited period of six months, and that Mr Shelley would then increase his hours when the ASB season started later in the year.

[29] This was not reflected in the employment agreement, which is for one year, with provision for hours to vary as required, but no specific indication of an increase in six months.

[30] The Club representatives considered that Mr Shelley did not significantly increase his hours in September/October 2015 when the summer season started. Mr Williamson says that he discussed his concerns about that with Mr Smalley rather than directly with Mr Shelley. Mr Shelley says that he was not aware that the Club had any concerns about his hours.

[31] Regardless of who has the more accurate recollection about the events regarding the change to hours, it was apparent that Mr Williamson's sense of Mr Shelley's commitment to the organisation and faith in him, was affected by those events, but that this was not passed on to Mr Shelley.

[32] This forms a background to the dismissal, although there was no evidence that the hours issue was discussed at the dismissal meeting.

Employment agreements

[33] The employment agreements did incorporate some performance requirements for Mr Shelley. The 2014 agreement had a two year term which specified:

...the Board reserves the right to remove the responsibility of ASB/O League Head Coach if in the view of the Board the performance of these squads do not meet the standard expected by WU.

[34] The 2015 agreement did not have same removal provision, however, Schedule 1 stated that:

The objective of the ASB squad this year is to win the ASB Premiership and qualify for the Oceania Championship tournament in the 2016/2017 season.

[35] Mr Shelley was to report to Mr MacGowan as general manager and Mr Smalley as director of football.

Events leading up to the dismissal meeting

[36] After the loss to WaiBOP Mr MacGowan phoned Mr Shelley on 22 November 2015. This was Mr Shelley's first contact with Club senior representatives since the ASB season started, other than with Mr Smalley. Mr Shelley says that Mr MacGowan generally seemed in quite good spirits, and there was no negativity from him towards Mr Shelley on the phone.

[37] Mr Shelley accepts that Mr MacGowan was concerned that was no training planned by Mr Shelley in the weekend.

[38] Mr Shelley says that he had no sense from the phone call that his position was under threat. Mr MacGowan did not suggest otherwise.

[39] On 24 November the Club's Board met and decided that Mr MacGowan was authorised to accept Mr Smalley and Mr Shelley's resignations. Mr Williamson says that there was no discussion at the Board meeting about what would happen if the resignations were not received. There was some historical basis for the Board to expect that Mr Smalley in particular might offer his resignation, but none for Mr Shelley. Mr Williamson says that he regarded them as a team and expected that they would both resign.

[40] Mr MacGowan texted Mr Shelley to call a meeting, with Mr Shelley on enquiry being told that it was about football matters.

[41] Mr Williamson says that he expected that Mr Smalley would fill Mr Shelley in on what had happened at the part of the Board meeting which he attended. However, nothing was done to ensure that happened. Mr Williamson says that he never communicated anything with Mr Smalley regarding Mr Shelley's termination of employment.

[42] Mr Shelley accepted that Mr Smalley mentioned lots of negative comments being made at the Board meeting, but that this was not unusual for Board meetings which Mr Shelley had previously attended. Mr Smalley told Mr Shelley that there were people who suggested that the coach should be changed but that Mr Smalley had tried to deal with that issue.

The dismissal meeting on 27 November

[43] No notes of the meeting were provided to the Authority. Mr MacGowan thought that he may have made some but that they were no longer in existence. There are some disagreements between witnesses as to what occurred, although these are largely not significant to my findings.

[44] The four men met at the hotel in the morning. The Club accepted that the venue for the meeting was not ideal. The hotel had a connection with the Club, and meeting or conference rooms had been used there before. However, none were available that day. The group was directed to the top floor dining room, but that was being set up for lunch. They then proceeded to look for another space.

[45] When Mr Shelley was walking towards the meeting area, Mr Smalley told him that he thought that they were going to be sacked, as he had heard rumours that the Board had already approached another coach to be a replacement. Mr Shelley says that he was very shocked as he was expecting a general catch-up.

[46] The meeting proceeded in a lobby area. This was not the hotel's main lobby, but was accessible to the public. There were people in sight from time to time.

[47] Mr Williamson says that there was general agreement between the four that the site was okay. Mr Shelley says that he was concerned that if someone had walked

past they could have heard the discussion. Mr Shelley did not know if anyone had actually heard anything.

[48] During the meeting Mr Shelley was asked to give an account of the season's three games so far. The Club representatives wanted to know who was responsible for various things such as picking the team, substitutions and the team talk. Mr Shelley said that he was responsible. Mr MacGowan says that they were trying to understand clearly the responsibilities between Mr Shelley and Mr Smalley; where the buck stopped regarding the premier team.

[49] Mr Shelley says there was also heated discussion during the meeting between the other participants regarding sponsorship and money issues. He says that he was out of his depth on these matters and was not involved. The Club representatives agreed that there was some discussion of these matters, which Mr Smalley raised.

[50] The issue of whether other people had been approached to take up the coaching role was discussed. There was disagreement between witnesses regarding whether the Club's denial related to specific named people or the broader issue of whether anyone had been approached.

[51] Mr Williamson says that he had no preconceived idea about terminating employment prior to the meeting. He did expect that both Mr Shelley and Mr Smalley would resign.

[52] An adjournment was called. Mr Williamson and Mr MacGowan discussed the responses of the other two men. They then met with Mr Smalley separately, and he offered his resignation which was accepted.

[53] Both Mr Williamson and Mr MacGowan say that they were surprised when Mr Shelley had not resigned too. They called him back to meet with them.

[54] Mr Shelley says that as soon as he got back in the room Mr MacGowan said that he was terminating his employment with immediate effect. Mr Shelley says that he could not believe what was happening; he said that he wanted to get legal advice.

[55] Mr Williamson believed that there had been some more discussion once Mr Shelley got back in the room before the dismissal was announced. However, Mr

MacGowan's recall, which I prefer, was that as soon as Mr Shelley got back in the room he was informed that they had accepted Mr Smalley's resignation and were dismissing Mr Shelley on one month's notice.

[56] Mr MacGowan did not consider that they had given a specific reason for dismissal other than that team performance was not up to standard.

Media coverage

[57] Mr Shelley says that at the meeting he expressed his concern about how the dismissal would get into the public domain and about his reputation staying intact. He did not consider that there was anything agreed about the announcement of the decision. Mr Shelley says that he thought they would talk more about it later. He says that he did not want to rush into it as he wanted a chance for the news to sink in.

[58] The Club says that they reached an agreement with Mr Shelley that the Club's media person would release a statement to the press, including protecting Mr Shelley's reputation. I accept that Mr Shelley's recall may not be clear after receiving the unexpected dismissal advice. Mr MacGowan accepted that Mr Shelley seemed to be in shock at the dismissal, but did not accept that Mr Shelley could have misunderstood what the Club directed in terms of announcements.

[59] It was understandable that Mr Shelley would want some time to digest what had happened. He had not been advised that this was a disciplinary process nor that dismissal was a possible outcome of the meeting and says that he did not anticipate it.

[60] However, in the modern world of fast communication, and when there was another game a day or two days later, this approach was unlikely to be practicable if an official announcement was to get out before word got out in other ways.

[61] Mr MacGowan says that by the time he reached his next destination after the meeting, about an hour's drive away, the news that Mr Shelley had been "sacked" was on the NZ Herald website.

[62] Mr Shelley says that he was concerned about the team, and his priority was the players. He phoned the team captain and told him that his contract was terminated. He then texted the players saying the same thing, he says so they were aware not to expect him (in the weekend) for the game.

[63] It was probably naïve of Mr Shelley not to expect that the news would get out as a result of his contacts.

[64] The item on appeared on the NZ Herald website at 2.42pm that afternoon. It appears that Mr Shelley's decision to text players, whilst perhaps understandable, resulted in a media story that he was "sacked", before the Club issued its statement that Mr Shelley had stepped down. There is a reference in the item to the text to players saying that the Club had terminated his agreement.

[65] The Club media manager appears to have issued a statement by email at 3.42pm which refers to Mr Shelley "stepping down" from his position. There was some uncertainty from Club representatives as to whether this was in fact issued in light of the earlier NZ Herald item coming out earlier. However; material from the Club's statement, including a quote from Mr MacGowan, is included in a Stuff website item at 4.51pm, strongly suggests that it was released.

Unjustified dismissal claim

[66] Mr Shelley challenges both the substantive and procedural aspects of his dismissal.

[67] I heard much evidence from all witnesses regarding the team's performance both at the start of the 2015 summer season, and before and after that. This included strongly held beliefs about the reasons behind various wins and losses. There was clear passion regarding the game and the team's prospects.

[68] Mr Shelley questioned whether the team's performance had improved after he left and considered that the replacement coach had effectively been cut more slack than he was.

[69] The Club stressed the need for urgent action at the time that Mr Shelley was dismissed, as they were about a quarter of the way into the season. For the Club it was argued that there is a tradition of football coaches falling on their swords and offering their resignations when their team performs badly. This might even be after just one disastrous result. In some cases coaches were dismissed.

[70] Various news items and internet pages were provided of such resignations, mutual agreements to depart and dismissals. Many of those examples were from English teams. Mr Shelley accepted that in certain situations when a team was underperforming the coach/manager goes.

[71] Mr Shelley however, was employed in New Zealand, and the parties' employment relationship was governed by the Employment Relations Act, as well as by the employment agreement between them.

[72] It is not for me to substitute my views on the team or Mr Shelley's performance for the Club's views as the employer. There would no doubt be a multitude of views amongst the footballing public about what was not working for the team and whether there were prospects of improvement into the season.

[73] What I must do under s 103A of the Act is determine whether on an objective basis, the employer's actions, and how the employer acted, were what a reasonable employer could have done in all the circumstances.

[74] In doing so I must consider under s 103A(3) whether the employer :

- (a) Having regard to the resources available, sufficiently investigated the allegations against the employee before dismissing;
- (b) Raised the concerns with the employee before dismissing;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns; and
- (d) Genuinely considered the employee's explanation (if any).

Substantive justification for the dismissal

[75] Mr Shelley says that he was effectively given no verbal or written reason for his dismissal. At the dismissal meeting Mr Shelley was told that team performance was not up to standard. There was no letter of dismissal.

[76] Through his representative, Mr Shelley asked for a statement of the reasons for his dismissal. Unfortunately this arrived when Mr Williamson was away overseas, and the letter was sent also relatively shortly before Christmas. A detailed response was received some weeks later from the Club's counsel stating that Mr Shelley was dismissed for his poor performance as head coach.

[77] I accept that the Club was very concerned with how the premier team were performing at the start of the 2015 season. The win, draw or lose nature of football games does bring a team's performance into sharp relief. However, equally there is more to a team's performance than just the coach.

[78] The Club's position was it expected Mr Shelley to resign, because of the football tradition and because they saw him and Mr Smalley as a team who came and should go together. However, the resignation which the Club expected did not come.

[79] I note that there was nothing in Mr Shelley's employment agreement to indicate any sort of tie between his continued employment and Mr Smalley remaining with the Club. The 2014 agreement had a provision allowing the Club to remove the responsibilities as ASB/O League coach in the event of performance not meeting the standard, but the 2015 agreement did not.

[80] It became apparent that Mr Williamson and Mr MacGowan had concerns about the team's preparation in the lead up to the season and Mr Shelley's decision to allow the players not to train the weekend after the WaiBOP defeat. Mr Shelley raised issues about the lack of availability of training grounds used previously, but the Club representatives considered that that was an issue which Mr Shelley, and Mr Smalley, should have solved.

[81] When asked what was different about the start of this season, compared to the previous two seasons when the team had come fourth in the league, Mr MacGowan says that the whole environment was not the same; there was not the same negativity coming back from the captain or the players. There was no evidence that this issue of team morale was put to Mr Shelley or canvassed with him.

[82] The Club argued that the circumstances which I must take into account under s 103A of the Act, include the nature of the role and the industry, in this case high performance sport.

[83] However, the Club had previously chosen to retain Mr Shelley despite results in the previous two seasons which had not been as successful as some that the Club had had in previous years.

[84] The Club had specified in Mr Shelley's employment agreement that the objective of the ASB squad was to win the ASB Premiership and qualify for the Oceania Championship tournament. However, the Club decided to take its first and only disciplinary action against Mr Shelley after three games.

[85] Ultimately I see this as a performance issue. If the Club was not satisfied with Mr Shelley's performance then they had the opportunity to take steps to deal with those issues, as other employers do. I do not accept that the Club was entitled to effectively dismiss without going through any type of warning or performance management or improvement process. There may well have been room to tailor that plan to deal with the situation of this employment being in high performance sports.

[86] The complete absence of any issue being raised with Mr Shelley prior to 27 November regarding his performance, have lead him to question the real reason behind his dismissal. He speculates that it may have been an issue regarding him agreeing with Mr Smalley on a significant issue, or as a cost cutting exercise. Although I find no basis for the dismissal being for an ulterior motive, Mr Shelley's concerns are perhaps understandable given the speed of the decision and absence of a clear statement of the reason at or around the time of his dismissal.

Procedural Unfairness

[87] Aside from the issue of whether Mr Shelley's dismissal was substantively justified in these circumstances, there are also significant issues regarding the procedure used in his dismissal.

[88] Mr Shelley did not get advice that the meeting was going to be about him and his employment. Instead he was advised, very broadly, that it was about "football matters". This was not sufficient for him to know that the focus would be on his own performance.

[89] Mr Shelley received no advice about what the outcomes of the meeting could be, or that is employment was in jeopardy.

[90] Whilst it might well have been reasonable for him to expect that serious discussion about the team's performance would be involved, I do not accept that this was sufficient warning to him that his job was in jeopardy.

[91] Mr Shelley acknowledged that the Club was concerned about the results. However, I accept his evidence that he did not have a sense that his job was on the line. Mr MacGowan's impression was also that when Mr Shelley was told he was dismissed that he was not expecting that.

[92] I do not consider that Mr Smalley telling Mr Shelley that some people at the Board meeting had called for the coach to be changed and that he had tried to deal with that, was sufficient to give Mr Shelley warning that dismissal was a possibility at the meeting of 27 November.

[93] The mention by Mr Smalley as they were going into the meeting that they could lose their jobs, is likewise not sufficient notice, coming not from those calling the meeting, and occurring only minutes before the discussion started.

[94] The part of the meeting before Mr Shelley was advised that he was dismissed also included Mr Smalley, effectively as a co-employee whose job was also on the line. Discussion at the meeting included issues which Mr Smalley had but which Mr Shelley had little knowledge of or involvement in. These aspects also detract from Mr Shelley having been given a fair opportunity to discuss his own situation.

[95] Mr Shelley was not sufficiently informed by the Club about the concerns it had, and the information and views it was relying on. Mr MacGowan's evidence was that he had spoken to the team captain on several occasions about aspects of the team's training, performance and morale. The Club representatives regarded the morale issue as important, but this information was not passed on to Mr Shelley and thus he was not given an opportunity to comment on it.

[96] Likewise the Club representatives considered that Mr Smalley had expressed concerns about Mr Shelley at the Board meeting, although this was denied by Mr Smalley. Mr Shelley was not informed of this, although the Club's representatives appeared to find it significant.

[97] Mr Shelley had the opportunity to speak at the meeting. I accept that some of the matters discussed at the meeting were matters which would have been covered if this had been set up more formally as a disciplinary meeting. However, this was

tempered by Mr Shelley's lack of knowledge on the information the Club were considering and the fact that action against him was on the cards.

[98] There was no advice from the Club about Mr Shelley being entitled to bring a support person or representative to the meeting.

[99] Mr Shelley says that his dismissal was pre-determined, as the alternative coach was already appointed. The Club admitted that discussion had already taken place after the Board meeting with a possible substitute, although they say that no agreement had been reached as it depended on what happened with Mr Shelley. The offer to the replacement was only made in the late afternoon of 27 November. There was no evidence that an appointment had been made at the time that Mr Shelley was dismissed.

[100] Given the prospect that both the Director of Football and the Head Coach might resign, I do not find it unreasonable for Waitakere United to have approached another coach about possible availability. There were no other obvious internal replacements and games were occurring frequently.

[101] Under s 103A(5) I must not determine a dismissal to be unjustifiable solely because of defects in the process followed which were minor and did not result in the employee being treated unfairly. However in this case there are a number of significant procedural defects which I do not consider to be minor. I am also not satisfied that Mr Shelley can be said not to have been treated unfairly as a result.

[102] In conclusion I find that there was procedural unfairness and that the Club did not act as a fair and reasonable employer could have in all the circumstances.

Remedies

[103] Mr Shelley withdrew his claim for lost wages at the case management conference held prior to the investigation meeting. His only remaining claim for a remedy is under s123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.

[104] The Club argues that any award should be reduced due to contribution and that I should take into account subsequently discovered misconduct. Also, it sought to have any money awarded against it payable to Mr Shelley by instalments.

Subsequently discovered conduct

[105] Before considering Mr Shelley's claim, I deal with the Club's reliance on two subsequently discovered matters in order to reduce any compensation which might be awarded.

[106] In *Salt v Fell, Governor for Pitcairn, Ducie and Oeno Islands*¹ The Court of Appeal held that subsequently discovered information or misconduct cannot be taken into account under s 124 (contribution) but can and should be taken into account when determining wage reimbursement and humiliation compensation under s 123.

[107] The first issue raised by the Club concerns failure to check on some players' immigration status. There was a dispute between the parties as to who was responsible for that. Mr Shelley thought that club administrators were, whereas the Club representatives thought that Mr Shelley was.

[108] Although Mr Shelley's employment agreement listed his key responsibilities as including recruitment and negotiation with playing staff, there was no explicit reference to immigration issues.

[109] The second issue relied on by the Club concerns a player who Mr Shelley had appointed, who they said was substantially inferior to what was expected at that level. Mr Shelley says that Mr Smalley was primarily responsible for that signing, although accepted that he (Mr Shelley) had agreed with it. He denies that the player was as inferior as the Club suggests.

[110] I am not satisfied that the Club has established either of these matters as proven misconduct by Mr Shelley. They appear to be at most performance issues.

Compensation for humiliation, loss of dignity and injury to feelings

[111] Mr Shelley has given much unchallenged evidence regarding his significant degree of suffering as a result of his dismissal and the manner in which it was carried

¹ [2008] NZCA 128

out. He was devastated and hurt to be treated as he was. He says that even more than six months later at the time of the investigation meeting, he was still not fully recovered from it. He became depressed and disillusioned with the game that he has played all his life. He has completely lost his confidence as a coach and has not been able to put himself back in the coaching environment.

[112] Mr Shelley had many sleepless nights trying to process what has happened and the reason for his dismissal.

[113] A written statement was received from Mr Shelley's wife, without objection. This referred to him becoming insular and withdrawn, refusing to have any involvement with football and becoming distant and detached from his family.

[114] Mr MacGowan accepted in evidence that Mr Shelley did seem to be pretty much in shock by the news that he was dismissed and did not think that Mr Shelley expected that outcome.

[115] It is clear that football had been a substantial part of Mr Shelley's world and that understandably he felt unable to be involved in it for some months after his dismissal.

[116] Mr Shelley also relied on two aspects of the Club's behaviour after his dismissal as aggravating his humiliation and loss of dignity. The first concerned his player transfer to another club. The second was the discussion with third parties.

[117] Mr Shelley considers that this case was at the higher end of the scale with an award of \$15,000 warranted. This is on the basis of what he describes as the punishing of him after the dismissal, regarding the post dismissal media issue and the delay in transfer and comments to the new club.

[118] As stated above, it seems likely that it was Mr Shelley's actions after the dismissal that resulted in the news story about him being sacked. I therefore do not increase the compensation award on the basis of the NZ Herald news story about Mr Shelley being "sacked".

[119] Some months after his dismissal he wanted to transfer as a player, to another club. This necessitated a transfer application being made, which had to be signed off by Waitakere United. Mr Shelley says that this process took considerably longer than it should have.

[120] The Club says that there were issues with whether Mr Shelley had returned his kit (a standard transfer question) and clarifying whether he still had some furniture which had been supplied by the Club on his arrival in New Zealand.

[121] The Club said that once the issue was raised with the national body it only took a week and a half to resolve. However, there was email evidence that the Club told the national body that they had they were in an employment dispute with Mr Shelley and they felt that they were within their rights to decline the transfer for that reason. This possible basis of justification for the Club's actions regarding transfer was not pursued by the Club at the investigation meeting.

[122] In addition, an email query was sent from the new club regarding the decision to decline to approve the transfer of Mr Shelley and another player, attempting to clarify gear issues which could have led to the decline. Mr MacGowan responded by email to the new club, suggesting that they needed to have a conversation with Mr Shelley regarding his "current relationship" with Waitakere United.

[123] Given that Mr Shelley was no longer an employee, I take this to be a suggestion that the new club talked to Mr Shelley about the fact that he was taking a personal grievance claim against Waitakere United. Mr MacGowan accepted that he had discussions with Mr Shelley's new club that there were issues which needed to be clarified.

[124] The Club argued that its actions regarding the transfer and Mr Shelley's new club were in relation to Mr Shelley as a player and not an employee and thus should not be considered by me. However, it is clear from the various emails that the Club were taking Mr Shelley's employment case into account when making decisions regarding him as a player, and thus they connected the two.

[125] In addition, actions taken against a former employee which relate to another aspect of their life, can be taken into account in determining compensation for

distress. For example, in *Strachan v Moodie (aka "Miss Alice") t/a Moodie & Co*² the Employment Court considered an employer's actions in relation to an employee's attempts to adopt a child in relation to compensation. The reference to that case is not to suggest that I consider this case to involve a similar level of desire to harm the former employee.

[126] Mr Shelley's wife referred to the shock to her husband of the delays in the transfer after he had spent a long time motivating himself to get back into the industry.

[127] Submissions on behalf of the Club suggested that in the event that the grievance was established and compensation awarded, that there was no reason to depart from the average level of award which was described as \$5,000, with a reduction for contributory conduct.

[128] I take into consideration the Employment Court's comments in *Hall v Dionex Pty Ltd*³ of the danger of using consistency to keep awards at an artificially low level. In any event I would regard an average level of award as now somewhat higher than \$5,000.

[129] In conclusion, I accept that Mr Shelley has suffered substantially as a result of his dismissal. The speed and lack of process were a significant factor in this. The transfer issue has added to his distress. I award Mr Shelley \$10,000 as compensation under s 123(1)(c)(i) of the Act.

Contribution

[130] I am required under s 124 of the Act to consider the extent to which the actions of Mr Shelley have contributed to the situation that gave rise to the personal grievance. If the actions of Mr Shelley are to be taken into account they must be both causative of the outcome and blameworthy⁴.

[131] Waitakere United argued that Mr Shelley's contribution in the sense of not ensuring that the team played better was substantial and that remedies should be reduced by 75 %.

² [2012] NZ EmpC 95

³ [2015] NZEmpC 29 at [88]

⁴ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178]

[132] Mr Shelley opposed any contribution on the basis that he was denied the chance to work on issues or explain his position. He also noted that if there were so many concerns regarding the previous season why the Club allowed him to have a new contract when he wanted to switch to a part time role in April 2015.

[133] Mr Shelley considered that if there were concerns then the Club could have not agreed to the change, or could have let him know the concerns later so that he could address it.

[134] I found it somewhat problematic to decide whether Mr Shelley's behaviour was both causative and blameworthy of the decision to dismiss. The decision was based on the team's performance and an acceptance of Mr Shelley's advice that he was responsible for various aspects of the team's management. And yet it seems that well coached teams sometimes lose and poorly coached teams sometimes win. There appear to be a complex range of factors in the success and failure of teams.

[135] I accept that Mr Shelley's efforts and performance are an important factor in the team's results. However, I do not see his conduct as so blameworthy as to require a reduction of the compensation. Although there was concern about the team's results over three games, the Club's evidence did not establish that Mr Shelley had significant performance inadequacies due to any blameworthy conduct of his. The Club did not properly address its performance concerns as a fair and reasonable employer could have done.

[136] I find that no reduction of the compensation under s 123 (1)(c)(i) is required under s 124 of the Act.

Instalments

[137] Under s 123(2) of the Act when making an order under subsection s 123(1)(b) or (c), the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[138] Waitakere United is a football club which relies heavily on grants made to it, particularly to pay wages and salaries. Although no documentation regarding the Club's current financial position were received, I accept that it is a relatively small employer, reliant on a lot of volunteer time in order to operate.

[139] Mr Shelley says that he is open to payment in instalments if that was considered fair and reasonable.

[140] I therefore order that the Club pays Mr Shelley the compensation under s 123(1)(c)(i) of the Act in five monthly instalments of \$2000 each, the first to start within 28 days of the date of this determination.

Costs

[141] The parties are invited to resolve the matter. If they are unable to do so Mr Shelley shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Waitakere United shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority