This determination includes an order prohibiting publication of some names

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2013] NZERA Auckland 570
5419501

	BETWEEN	KARYN TAIAPA Applicant
	AND	AOTEA FINANCE LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Shelley Kopu, Counsel for the Applicant Sylvia Wood, Advocate for the Respondent
Investigation Meeting:	17 and 18 October 2013
Determination:	12 December 2013

DETERMINATION OF THE AUTHORITY

A. Aotea Finance Limited (AFL) did not act as a fair and reasonable employer could have done in all the circumstances at the time of its disciplinary investigation and dismissal of Karyn Taiapa because it:

(i) did not give Mrs Taiapa an opportunity to comment on whether she should be suspended from her duties while AFL investigated allegations she had breached company policies; and

(ii) did not conduct a full and fair investigation of those allegations; and

(iii) dismissed her for reasons not fully put to her and without sufficient evidence to properly substantiate the allegations actually made.

B. In settlement of Mrs Taiapa's personal grievance for her unjustified dismissal, AFL must pay her:

(i) a sum equal to what Mrs Taiapa would have earned for 24 weeks in her employment with AFL, in reimbursement of lost wages under s123(1)(b) and s128(3) of the Employment Relations Act 2000; and

(ii) compensation of $8000 under s123(1)(c)(i) of the Act.

C. Costs are reserved.

Employment relationship problem

[1] Aotea Finance Limited (AFL), a South Auckland-based loans business, dismissed Karyn Taiapa from her role as a lending officer on 10 April 2013.

[2] AFL managing director Terry Cooke made that decision following an investigation he first notified Mrs Taiapa of on 6 March. He met with her that day to give her a letter setting out allegations (that she had breached a number of AFL policies) and to suspend her from work.

[3] The allegations were about four matters: firstly, brokerage fees charged to customers who had said in written complaints that no broker was involved in their loan application; secondly, brokerage fees charged to customers at a level higher than set in a memo that Mr Cooke said he had issued to Mrs Taiapa and other employees in January 2010; thirdly, approval of a loan for an amount said to be above Mrs Taiapa's delegated lending authority; and, fourthly, whether she followed correct procedure for having a loan document signed by one customer.

[4] The allegations about brokers' fees related to fees paid to Karaka Street Limited, a business operated by Mark Francis who was at the time registered as a financial service provider for broking services. Where a customer applied for a loan through a broker AFL included the broker's fee among its other charges to the customer for setting up any loan made and then paid the fee to the relevant broker on a monthly basis.

[5] AFL's investigation of its allegations about Mrs Taiapa was largely conducted through correspondence between her solicitor and AFL's advocate. It included arrangements for some AFL client files to be delivered to the solicitor's office and for Mrs Taiapa to view those files there. After receiving Mrs Taiapa's written response to the allegations on 28 March, AFL's advocate replied with a letter setting out Mr Cooke's preliminary view that Mrs Taiapa had breached a number of her obligations and proposing to dismiss her. Mrs Taiapa's solicitor made further written submissions about the proposal and the information on which Mr Cooke had reached his conclusions. AFL responded with a decision to dismiss Mrs Taiapa on seven grounds, questioned the "*veracity*" of her response, and said Mr Cooke:

> *"[did] not accept, as no reasonable employer should have to, that an employee can rewrite policy, ignore the delegated lending authority level, breach broker charge policies and charge brokerage fees to two customers where there is no evidence a broker was involved supported by complaints from the customers stating they did not go through a broker … and allow loan documents to be taken from the office without an Officer of the Company present to witness the signature of a loan applicant, as required under the Credit Contracts and Consumer Finance Act."*

[6] Mrs Taiapa raised a personal grievance over her dismissal on 24 April and lodged her application to the Authority on 15 May.

The investigation

[7] For the Authority's investigation of Mrs Taiapa's claim written witness statements were lodged by her, AFL lending officer Ericka Rere, Mr Francis, Mr Cooke, AFL Papatoetoe branch manager Rita Tai, and Tony Barrow, a private investigator engaged by AFL after Mrs Taiapa's dismissal. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their written statements and answered questions from the Authority member and the parties' representatives.

[8] Mr Barrow's evidence was about a review AFL engaged him to conduct in early May after Mrs Taiapa's dismissal. He said he was asked to review information on payment of broker fees and loan applications and to advise whether there were matters that "*could involve criminality*". He interviewed some customers by

telephone, met with some other brokers operating in the market at the time and endeavoured, without success, to arrange interviews with Mrs Taiapa and Mr Francis. Mr Barrow said he finished his inquiries in July and lodged "*a complaint file*" with the Police. In timetable directions for the Authority investigation AFL was given an opportunity to lodge a copy of Mr Barrow's report and any supporting documents. Because Mr Barrow's review and report was carried out after Mrs Taiapa's dismissal, information from it was not relevant to the justifiability of AFL's decisions made at the time of her dismissal, but could have affected remedies awarded to Mrs Taiapa if it verified significant unsatisfactory conduct by her that was only discovered after her dismissal.[1] However AFL did not lodge a copy of that material and Mr Barrow's written and oral evidence to the Authority, I found, did not confirm any wrong-doing by Mrs Taiapa or add information relevant to the justification for AFL's decisions about ending her employment or whether remedies should be awarded to her.

[9] There was a heavy innuendo in Mr Cooke's written and oral evidence to that Authority that AFL's engagement of Mr Barrow, his inquiries and the complaint file lodged with the Police disclosed or confirmed some wrongdoing by Mrs Taiapa. However that innuendo was not substantiated by the other evidence AFL had provided the Authority and consequently I took no account of it.

[10] In preparing this determination I considered the written and oral evidence of the witnesses, relevant documents provided by the parties and their representatives' closing submissions. As permitted by s174 of the Employment Relations Act 2000 (the Act) I have not set out all the evidence received or submissions made but have stated findings of fact and law, expressed conclusions on the issues for determination and specified orders made.

Order prohibiting publication of certain names

[11] Written and oral evidence given in the Authority's investigation, and some relevant background documents lodged by both parties, included the names of various customers of AFL. Publication of the names of those customers in relation to this matter and this determination is prohibited under clause 10 of Schedule 2 of the Act. Where necessary to refer to those customers directly in this determination I have used

[1] *Salt v Fell* [2008] ERNZ 155 at [83] and [104] (CA).

the initial from their surname only, sufficient to identify them to the parties but not to publicly disclose the fact of their financial relationship with AFL.

The issues

[12] The issues for investigation and determination by the Authority were:

(i) whether the way in which AFL went about suspending Mrs Taiapa from her duties on 6 March 2013 was what a fair and reasonable employer would have done; and

(ii) whether AFL carried out a full and fair investigation of its allegations about Mrs Taiapa's conduct in carrying out her duties; and

(iii) whether, in light of that investigation, AFL's decision to dismiss Mrs Taiapa was what a fair and reasonable employer could have done in all the circumstances at the time; and

(iv) if AFL's actions were unjustified, what remedies should be awarded to Mrs Taiapa, considering her claims for lost wages and compensation for hurt and humiliation; and

(v) whether any remedies awarded to Mrs Taiapa should be reduced due to blameworthy conduct by her that gave rise to her personal grievance; and

(vi) whether either party should contribute to the costs of representation of the other party.

Suspension

[13] On 6 March Mrs Taiapa was called to a meeting with Mr Cooke and AFL's employment advocate, Sylvia Woods. Mr Cooke's evidence confirmed that Ms Woods gave Mrs Taiapa the letter setting out the allegations, along with some background documents (including copies of written complaints from six customers), and told Mrs Taiapa that Mr Cooke had decided to suspend her for the period of the investigation. When Mrs Taiapa attempted to speak about the allegations Ms Wood stopped her, called the meeting to a close and told Mrs Taiapa to leave the premises (which she did some 20 minutes later).

[14] Mrs Taiapa's employment agreement included a term allowing AFL to suspend her on pay while investigating an allegation of misconduct or serious misconduct. However there was no dispute in the evidence that Mrs Taiapa was not

given the opportunity to comment on the prospect of suspension before Mr Cooke made that decision so AFL had not met its statutory obligation to give her a reasonable opportunity to respond to its reasons for suggesting she should be suspended from work before taking that action against her.[2] While there may be some circumstances where such an opportunity is not required, I was not persuaded the omission was justified on the basis of the evidence about the particular circumstances of AFL and Mrs Taiapa on that day.[3] Ms Wood may properly have stopped Mrs Taiapa talking about the *content* of the allegations but she should have allowed her to first get some advice (if Mrs Taiapa wanted to do so) and then to discuss whether it was practical and fair to stay at work during the investigation. AFL's concern about its perceived risk of further unsatisfactory transactions may ultimately have outweighed Mrs Taiapa's interests (which included not attracting the stigma and speculation often associated with suspension). However it may also have been the case that what became an extended wrangle over the availability of, and access to, AFL records of customer transactions would have been avoided if Mrs Taiapa were not suspended. AFL could have considered minimising any perceived risk of Mrs Taiapa interfering with files or other records by having her perform other duties during the investigation or by making sensible arrangements to monitor her access to such material. AFL's failure to have that discussion resulted in Mrs Taiapa being treated unfairly and was more than a minor default in the process AFL followed. There were subsequently acrimonious exchanges between the parties about what documents were on customers' files and what was in AFL's electronic file notes on dealings with customers. That acrimony could have been avoided if more thought and discussion had occurred before Mrs Taiapa's suspension. It included Mr Cooke alleging Mrs Taiapa had deleted an electronic file in the 20 minutes between being suspended and leaving AFL's premises and that she took certain documents with her (both allegations disputed and unproven).

The test of justification

[15] Section 103A of the Act obliged AFL to make decisions about Mrs Taiapa's employment that were what a fair and reasonable employer could have decided in all the circumstances at the time of its investigation and its decision to dismiss her. That

[2] Section 103A(3)(c) of the Act.
[3] *Graham v Airways Corporation of New Zealand Limited* [2005] ERNZ 587 at [104] (CA).

obligation is based on long-standing principles described by the Court of Appeal in this way:[4]

> *We agree with the Court that "*the real test is whether the employer has shown that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision*". As we have already said, the decision must be looked at from two points of view, that is, fairness to the employer and fairness to the employee. From the employer's point of view, he must show that he had reasonable grounds to believe and did honestly believe there had been misconduct by the employee of sufficient gravity to warrant dismissal. …*
>
> *The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee. Good working relations depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable. Similarly, if an employer destroys that relationship by dismissing the employee without reasonable grounds for believing there has been misconduct by the employee, then the employee's dismissal is not justifiable and the employee has a remedy in the personal grievance provisions of the Act.*
>
> *What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.*

[16] In Mrs Taiapa's case the evidence of Mr Cooke and others raised significant doubt about whether Mr Cooke could in fact have had reasonable grounds to believe she had committed misconduct of sufficient gravity to warrant dismissal. In part this was because he had not made reasonable enquiries – that was, in terms of the present statutory formulation, insufficient investigation[5] – and in part because he drew conclusions on the basis of those enquires that an employer acting fairly and reasonably could not have reached. Instead Mr Cooke's conclusions and decisions were really based on a belief about Mrs Taiapa's conduct that his own oral evidence confirmed he was not able to prove. The allegations related to how she did her work but did not fully and openly address what Mr Cooke believed was happening – he thought that Mrs Taiapa and Mr Francis were co-operating in a scheme to charge

---

[4] *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* (1990) ERNZ Sel Cas 985, 992-3 (CA).
[5] Section 103A(3)(a) of the Act.

extra brokerage fees to customers and that Mr Francis was then providing a cut or kickback from those fees to Mrs Taiapa.

[17] While Mr Cooke denied the real reason for his dismissal of Mrs Taiapa was that he believed she was giving customer information to Mr Francis and getting money in return, he admitted that "*in essence*" that was what he believed had happened. And I have accepted Ms Rere's evidence that Mr Cooke told her in May that was the reason Mrs Taiapa had been under investigation. In answer to a question from AFL's own advocate during the Authority investigation Mr Cooke said:

> *" ... [T]here was a much bigger underlying problem than what we were acting on. I was unable to prove that at that stage. We established enough areas of concern to us to dismiss Karyn".*

[18] If squarely put to Mrs Taiapa, that would have been a most serious accusation of fraud. If established to the balance of probabilities, such actions by her would be serious misconduct and grounds for summary dismissal from her employment, and, if established beyond reasonable doubt, could result in criminal conviction. In the employment context such an accusation required evidence in support of it that was as convincing in its nature as the charge was grave.[6] Framing or describing her offences not as fraud but as various other acts of misconduct that were said to breach company policies did not lessen the gravity of the allegations and the requirement for AFL to have convincing evidence in support of them.[7]

Flaws in AFL's investigation

[19] Mrs Taiapa claimed AFL unfairly disadvantaged her by not providing some relevant information, considering information she did not have the opportunity to respond to, soliciting complaints from customers in return for a refund of fees, and by not interviewing Mr Francis.

[20] The most significant of those alleged failings was Mr Cooke's decision not to talk to Mr Francis or seek information and documents from him that may have helped

---

[6] *NZ Shipwrights Union v Honda NZ Ltd* [1989] 3 NZILR 82 at 85 (LC) upheld in *Honda NZ Limited v NZ Shipwrights Union* [1990] 3 NZILR 23 at 26 (CA).
[7] *NZ Shipwrights Union* above at 85 and *Honda NZ Limited* above at 26.

resolve points in issues with Mrs Taiapa about the dealings with some of the customers who – at AFL's request – had provided written complaints.

[21] Mr Francis offered to talk with Mr Cooke after Mrs Taiapa told him she was under investigation. Mr Cooke declined that offer.

[22] Mr Cooke's rationale for his approach was plainly inadequate. He said his concerns about Mrs Taiapa were dealt with as an internal matter and it would not have been appropriate to approach Mr Francis as an external party with whom AFL had a commercial relationship. However Mr Cooke had no such similar difficulty arranging for Ms Tai and two other staff members to conduct telephone interviews with a number of customers about their dealings with Mrs Taiapa – and specifically if they had applied through a broker or directly to Mrs Taiapa at AFL. Those customers were 'external' parties with whom AFL had a commercial relationship, albeit one where they were paying fees and interest to AFL rather than, as Mr Francis was, have fees collected from those customers and passed on to him in a monthly cheque from AFL.

[23] More importantly, Mr Francis could have been asked to provide specific information about the loan applications that were under scrutiny and how those applications were made. There were two particular categories of information AFL could have legitimately asked him for, and without necessarily raising any suspicion that the inquiry was anything more than routine - firstly, if he had information about two customers for whom AFL said broker instruction sheets could not be found on their files, and, secondly, text messages he had sent to or received from customers about loans. The latter would have specifically assisted on the issue of whether particular clients had sent a text to Mr Francis asking him to broker a loan for them or, as some alleged in their written complaints, only been in contact with Mrs Taiapa at AFL. His evidence was that, if asked in March 2013, he would have had a number of those relevant text messages on his phone but, by the time of the Authority investigation, did not.

[24] It was not sufficient excuse, as proffered by Mr Cooke in the latter stages of his oral evidence to the Authority, that Mr Francis was known to be a poor keeper of records. Mr Francis' evidence to the Authority was that he disposed of sheets for customers who were unsuccessful in their applications but deliberately kept sheets of

those who were successful so that he could send them a follow-up text in subsequent months asking if they wanted to apply for a top-up loan. Such top-up loans, and whether broker fees were properly applied to them, were the very subject of AFL's inquiry. By asking Mr Francis for the sheets and texts at the time, AFL could have gained documentary or electronic proof about who those customers had dealt with or, if Mr Francis was unable to provide information requested, have been on stronger grounds for its concerns.

[25] If AFL had spoken to Mr Francis about these issues, it may also have gained insight into why customers made applications for a 'top up' loan through him (and incurred a broker's fee for doing so) rather than applying directly to AFL (and not incurring the broker's fee). The evidence of Mr Francis was that he routinely sent text inquiries to customers about top up loans and that it was not in his interest – of generating fees for himself – to tell customers that they could go directly to AFL. Instead repeated applications made through him were regarded as suspicious by Mr Cooke and that suspicion fell on Mrs Taiapa because she was the person who processed the applications received from Mr Francis.

[26] Mr Cooke may also have gained some insight into why Mr Francis' dealings with AFL dropped significantly after Mrs Taiapa was suspended. Mr Cooke regarded that as further cause for suspicion of her. However Mr Francis had a rational explanation that referred to a change by AFL in the extent and kind of supporting documents it required him to have potential customers supply. AFL was previously content with the customer's name, contact details and, if renting, a copy of their tenancy agreement (which could be faxed directly from Housing New Zealand). However the type of customers he dealt with had more difficulty providing the employment and bank documents AFL now required and in getting access to facilities to fax such material to him or AFL directly.

[27] Mrs Taiapa's allegation that the written complaints AFL relied on were solicited from customers in return for the promise of money was not capable of determination on the available evidence. Mr Cooke was adamant in his oral evidence that no promise of a refund of fees was made during the initial questioning of customers but he did not conduct the telephone interviews that resulted in those customers providing written complaints. It was clear that they were told at some point

during those conversations that a refund of fees was possible if they provided a written complaint. And it was also clear from the documents available to AFL that most of those customers who said they had not sought top-up loans through Mr Francis' broking business were incorrect.

Flaws in the grounds for dismissal

[28] On the totality of the evidence available to the Authority investigation I was not satisfied that a fair and reasonable employer could have considered there was clear evidence to support the grounds for dismissal of Mrs Taiapa given by AFL or could have reasonably believed those grounds were more likely than not to be true on the basis of the enquiries AFL had carried out.

[29] I have considered the information available to Mr Cooke under the following headings for each of the grounds ultimately given for AFL's decision to dismiss Mrs Taiapa.

(i) breached policy by charging fees to Mr I and Ms H

[30] AFL's 6 March letter to Mrs Taiapa said she appeared to have breached company policy by charging brokerage fees to six customers when no broker was involved in their loan application.

[31] As part of the outcome of its investigation AFL decided to take no action in relation to four of those customers' written complaints because their files contained broker sheets sent by Mr Francis and confirming the applications were made through him and not directly to AFL.

[32] However Mr Cooke persisted with the allegation in relation to two clients – Ms H and Mr I – because, according to his evidence, he and Ms Tai had checked those clients' files but found no broker sheets and no reference on AFL's electronic log notes to a broker sheet being received in either case.

[33] Yet when Mrs Taiapa checked those files during supervised access to them provided in her solicitor's office, she found Mr I's file contained a copy of a broker

sheet dated 17 September which coincided with the date shown in the client log notes for a loan being made to Mr I. And while Ms H's file did not include a broker's sheet, the AFL log notes for Ms H's account included an entry for 24 May 2012 including the words: "*Loan req rec via broker*" (which I have interpreted as saying 'Loan request received via broker).

[34] Despite this information AFL's dismissal decision included findings that there were no broker sheets for Mr I and Ms H and no reference to broker sheets for those customers in its log notes. It also decided that those customers had given honest accounts and were "*credible*". It was a conclusion that was inconsistent with the information available to Mr Cooke.

(ii) failed to follow the January 2010 memorandum directions on brokers' fees

[35] AFL's 6 March letter to Mrs Taiapa said broker fees she charged to some customers were higher than the limits stated by Mr Cooke in a memorandum dated 29 January 2010. In deciding to dismiss her Mr Cooke rejected her explanation that she had not received the memorandum and he did so because he said he had personally delivered it to her desk.

[36] Mr Cooke could not establish that Mrs Taiapa ever saw that memo prior to AFL's disciplinary investigation. His best evidence was that he had left it on her desk. However he accepted during questioning that he had not handed it to her or ever discussed its contents or the application of it with her in the following three years. He said two other lending officers had copies of the memo that they said they had received at the time but there was no direct evidence from those two staff members about that.

[37] The direct evidence from other AFL staff that was available to the Authority – that of Ms Rere and Ms Tai – did not support Mr Cooke's conclusions as reasonably drawn. Ms Rere said she had never seen the memo. Ms Tai said she had seen the memo but accepted in answer to a question during the Authority investigation that her understanding up to March 2013 about the appropriate level of broker fees to charge was the same as that of Mrs Taiapa. That common understanding explained why Ms Tai approved monthly fee schedules prepared by Mrs Taiapa that clearly showed fees

greater than those stated in Mr Cooke's memo (with one example being a $100 fee for a 'top up' loan arranged through a broker, rather than a $75 fee). However there was at least one example after Mrs Taiapa's suspension (and which Ms Tai knew was for, among other things, not applying the broker fees set in the memo) where Ms Tai had approved a $100 fee rather than the $75 stated in Mr Cooke's memo. Ms Tai's explanation for that was that she must have made a mistake.

[38] The evidence overall did not support Mr Cooke's conclusion and decision that there was a policy that Mrs Taiapa knew or should have known through the 2010 memo and that it was known and applied by other staff, including her manager Ms Tai.

(iii) Brought AFL into dispute by her dealings with Mr I and Ms H

[39] AFL's dismissal decision said the brokers fees Mrs Taiapa had charged Mr I and Ms H brought the company into disrepute. Its closing submissions said Mr Cooke "*was sure this action would have been conveyed to others within [AFL's] customer base*" and Mr Cooke had alerted the Financial Markets Authority about a possible dispute about fees charged.

[40] There were no subsequent issues with the FMA as Mr Cooke said the official he spoke with was satisfied with measures AFL had put in place to deal with the issue.

[41] And Mr Cooke had no evidence (either at the time of Mrs Taiapa's dismissal or at the time of the Authority investigation) of any actual or known effect on AFL's reputation from Mr I or Ms H speaking to anyone else about their complaints about brokers fees charged to them.

(iv) Breached her delegated lending authority

[42] AFL said Mrs Taiapa breached her lending authority by approving a loan for a couple, Ms C and Mr T, who were previous customers of AFL and borrowed $4000 for purchase of a car. Mr Cooke said he or Ms Tai should have been shown the application before Mrs Taiapa approved the loan as they were both available at different times that day to do so. He was shown the application later in the day and

thought Ms C and Mr T should get approval for only $3000 based on their previous transaction history with AFL. He denied Mrs Taiapa's evidence that he had previously authorised her approving loans of up to $5000.

[43] His conclusion that Mrs Taiapa had breached her delegated lending authority was not what a fair and reasonable employer could have found because:

(i) there were no clearly established and documented lending authorities for staff (which is highly unusual for a financial services business) and Ms Rere's evidence confirmed that she too shared Mrs Taiapa's understanding about their delegated level of authority.

(ii) The evidence of Mr Cooke, Ms Tai and Mrs Taiapa did not confirm that he and Ms Tai were in fact available in the AFL office to be consulted about the loan to Ms C and Mr T at the time that Mr Cooke alleged he and Ms Tai were present on the relevant day.

(iii) Mrs Taiapa's actions suggested she genuinely believed she was acting as authorised because she had taken the file for Ms C and Mr T to show Mr Cooke before the money was released to the couple and that was how he became aware of the transaction.

(iv) Mr Cooke's own evidence was that he had said he wanted to see applications for $5000 or more before they were approved and the loan Mrs Taiapa approved for Ms C and Mr T was below that level.

(v) breached company policy regarding execution of a loan document

[44] Mr I's written complaint included a statement suggesting that he was allowed to take home a loan agreement that his wife also needed to sign. AFL's 6 March letter to Mrs Taiapa said that instance was "*a breach of company policy and a breach of the Credit Contracts Act*".

[45] Mrs Taiapa responded during AFL's investigation that there was no written policy but she would usually have both clients come to the office or have a field agent got to the customer's home to get loan agreements signed. She said this was not followed in the case of Mr I's wife because of a particular difficulty in her availability due to shift work.

[46] Mr Cooke asserted that staff including Mrs Taiapa were "*schooled on a one-on-one basis*" about the necessary procedure for signing loan documents. He said they were expected to know that taking away a document for signature was unsatisfactory, particularly because there could then be some doubt about the authenticity of a signature and that might later cause difficulties if it were necessary to enforce security for a loan.

[47] While there were sound reasons for not having documents taken away from AFL offices by customers for signing elsewhere, the evidence of Mr Cooke and Ms Tai did not establish that Mrs Taiapa was trained as suggested. Neither was there evidence of a company procedure that was as clear and consistently applied as they said. Mr Cooke accepted that there were circumstances where he would have exercised a discretion around the signing of documents as Mrs Taiapa had done and approved a loan to a couple with only one signature.

(vi) breached the Credit Contracts and Consumer Finance Act by failing to ensure witnessing of a loan contract

[48] Throughout its investigation AFL insisted there was a provision in the Credit Contracts Act that required an officer of the company to witness signatures to a loan agreement. Mr Cooke wrote that it was "*simply ridiculous*" to deny knowledge of such requirements. However there was, as he accepted during the Authority investigation, no such provision in that legislation. He was wrong to have said otherwise and was wrong to have asserted it as a valid reason for dismissal.

(vii) exposed AFL to legal risk by her actions

[49] AFL's allegation that Mrs Taiapa exposed the company to legal risk was based on its assertions that she had acted wrongly in the various instances alleged. In light of the conclusions made in this determination, this reason given for her dismissal was a 'make weight' added to others that were not reasonably or fairly reached.

Remedies

Lost wages

[50] Mrs Taiapa sought lost wages from the date of her dismissal to the date of the issue of this determination. She provided sufficient evidence of her endeavours to find a new job, largely in the lending sector where she has worked over the last 15 years (including the last four with AFL). She had applied for 11 jobs and had five interviews without success. She believed her chances of getting a new job were affected by rumours in the relatively small lending sector about why her employment at AFL came to an end. However she accepted there was insufficient evidence to confirm her suspicions, based on second or third hand accounts, that Mr Cooke and Ms Tai were the source of those rumours.

[51] The period from the date of Mrs Taiapa's dismissal to the date of the Authority investigation was 27 weeks. I did not have evidence to take account of beyond the date of the investigation meeting. Taking wages lost during that period to be her actual loss to that date,[8] there was no evidence of any particular contingences (such as ill-health or likely termination of her employment for other reasons such as resignation or redundancy) that would require substantial reduction in the amount to be awarded in reimbursement of lost wages when exercising the discretion given to the Authority under s123(1)(b) and s128(3) of the Act.

[52] Accordingly I have set 24 weeks as the period on which to calculate the lost wages and which AFL must pay to Mrs Taiapa by way of compensation for remuneration lost as a result of its unjustified dismissal of her.

Compensation for hurt and humiliation

[53] Mrs Taiapa gave evidence of feeling humiliated by her dismissal over what were really allegations of fraudulent activity and the distressing effect on her, including being upset by the effect on her children and her husband from the resulting financial pressures on their family. She was shocked by AFL's accusations and her

[8] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [81] (CA).

confidence was undermined by her dismissal, which had a negative effect on her family life and her performance in job interviews.

[54] Taking into account the particular circumstances and the general range of awards in cases of this type, the appropriate award of compensation under s123(1)(c)(i) of the Act for the humiliation and distress caused by AFL's unjustified dismissal of Mrs Taiapa was $8000.

No reduction for contributory conduct

[55] As required under s124 of the Act I considered whether any reduction of remedies was appropriate in this case however the evidence did not establish blameworthy conduct by Mrs Taiapa sufficient for that step to be taken.

[56] Considering the seven specific grounds given for her dismissal there was, at worst, one broker instruction sheet missing from a file (but a file note suggested one was received), one occasion she approved a loan of $4000 which Mr Cooke thought should have been approved at only $3000 (but was within the $5000 discretion she reasonably believed she was entitled to exercise), and she once allowed a customer to take away a loan document to get signed by his wife (which was not good practice but Mr Cooke himself sometimes allowed a loan to a couple to be made on the basis of only one signature).

[57] An employer acting fairly and reasonably might have taken some corrective action on such matters but here AFL unjustifiably used them as reasons for a dismissal that was really motivated by allegations of fraud that were not sufficiently investigated and not substantiated by the available evidence.

Costs

[58] Costs are reserved. The parties are encouraged to resolve any costs issues between themselves. If they are not able to do so, Mrs Taiapa may lodge and serve a memorandum on costs within 28 days of the date of this determination and AFL would then have 14 days from the date of service to lodge a reply memorandum. No application or reply on costs will be considered outside this timetable without prior leave being sought.

[59] If the Authority were required to determine costs, and subject to the application of the general principles on costs and what the parties might say in any memoranda lodged,[9] the likely award would be at the usual one day rate of $3500.

Robin Arthur
Member of the Employment Relations Authority

[9] *PBO Limited v Da Cruz* [2005] 1 ERNZ 808.