

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 217
3002517

BETWEEN JAMES WYNN-WILLIAMS
 Applicant

AND SYNLAIT MILK LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: Les Taylor QC and Johanna King, Counsel for the
 Applicant
 Scott Wilson and Shaesta Nand, Counsel for the
 Respondent

Investigation Meeting: 27 July 2017 at Christchurch

Submissions 27 July 2017 with further information received up to,
 and including, 13 September 2017

Determination: 14 December 2017

DETERMINATION OF THE AUTHORITY

- A. James Wynn-Williams was not unjustifiably dismissed by Synlait Milk Limited**
- B. Costs are reserved**

Employment relationship problem

[1] James Wynn-Williams was employed by Synlait Milk Limited as regional sales manager. Mr Wynn-Williams worked for Synlait under the terms of an individual employment agreement from 9 February 2015 until he was dismissed for serious misconduct on 16 December 2016.

[2] Mr Wynn-Williams was dismissed following an employment investigation which substantiated allegations relating to him causing the exportation of Synlait milk powder to Sudan, which was said to be contrary to an undertaking given by Synlait to its bankers, the ANZ.

[3] Mr Wynn-Williams said he was unjustifiably dismissed and also subject to disadvantage as a consequence of the employment investigation. He sought reimbursement and compensatory remedies and, initially, reinstatement from the Authority. Synlait denied all of Mr Wynn-Williams claims.

Issues

[4] The issues identified for investigation and determination are:

- (i) Was James Wynn-Williams' dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) If Synlait Milk Limited's (Synlait) actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (iii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[5] Prior to the investigation meeting, Mr Wynn-Williams withdrew his claim for reinstatement and the matter proceeded as a claim for reimbursement and compensatory remedies.

[6] During the investigation meeting, I heard evidence from Mr Wynn Williams and Synlait witnesses, strategy and business transformation manager (and decision-maker in Mr Wynn-Williams' dismissal) Chris France, former general counsel and company secretary, Quentin Lowcay, treasurer, Ronald Michel and financial controller, Casey Blatch.

[7] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received during the Authority's investigation 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.

Narrative

[8] Synlait is a large manufacturer and exporter of milk products. Its primary manufacturing operation and corporate headquarters are located at Dunsandel, which is about 40 kilometres south of Christchurch

[9] In December 2014, prior to the employment of Mr Wynn-Williams, Synlait provided an undertaking to its bankers, the ANZ that it would not engage in export dealings with certain countries including Sudan (also known as "North Sudan" or the "Republic of Sudan"). Seemingly the need for the undertaking related to the ANZ's banking licence in the United States, rather than any United Nations sanctions or other trade embargoes.

[10] When Mr Wynn-Williams commenced his employment with Synlait in February 2015, he said he was not provided with any information upon about the undertaking. Mr Wynn-Williams said Synlait had no written policies or procedures in respect of direct and indirect – via, for example, third parties "free on board" ("FOB": sold at the point of loading) – shipments to sanctioned countries.

[11] On 11 March 2016, Mr Wynn-Williams attended a sales team meeting to discuss the situation in Myanmar, a previously sanctioned country. During the meeting a discussion ensued about whether Sudan was a sanctioned country. Mr Wynn-Williams said he did not recall the discussion because at the time he was dealing with multi-nationals like Nestle, so specific country trading was not relevant to his job.

[12] After the meeting one of the attendees, customer services manager Sarah Colquhoun emailed Mr Michel asking about sanctioned countries. In response, Mr Michel forwarded an email prepared by an employee of the ANZ, which referred to the list of sanctioned countries as being a "reasonably fluid area at the moment after years of static restrictions". The email then identified six "no go areas", which were Iran, Sudan, Syria, Cuba, Crimea and North Korea. The email was sent to a number of Synlait employees including Mr Wynn-Williams.

[13] In or about June 2016, Mr Wynn-Williams was restructured into the new role of trader and distribution manager. In this role, he was responsible for interacting with third party traders, who on-sold Synlait products into various markets. However, during this period, Synlait was also looking to reduce its reliance on third parties and move towards direct exportation of milk product.

Export to Sudan

[14] Mr Wynn-Williams said the possibility of exporting milk product to Sudan arose in May 2016. He said he had been “introduced” to a third-party trader, Ausfine, by a colleague who was interested in selling product into various markets including Sudan. Ausfine came up with a proposal, which including exporting product to Sudan, and Mr Wynn-Williams forwarded it by email to his then manager. He said he received no reply. Mr Wynn-Williams said he then organised 400 metric tonnes of product to be sold to Ausfine on 6 July 2016. The purchase contract identified “FOB – PORT SUDAN” under the heading “Terms of Delivery”. The “Destination Port” on the form was identified as “Port Sudan”.

[15] Mr Wynn-Williams said the Ausfine contract initially came through with “TBC” identified as the destination but by 15 July 2016 the destination of Sudan was settled on. Mr Wynn-Williams stated this sort of process was not an unusual process when dealing with traders.

[16] Mr Wynn-Williams said Synlait uses a software product called “M3” which integrated its orders across one business platform. Mr Wynn-Williams said when he generated the supply relationship process for Ausfine in the M3 system, he knew the ultimate destination was Sudan so he entered Port Sudan as the destination. Evidently M3 allowed for the generation of the destinations of Sudan (and Port Sudan) but not, for example, Cuba which was also one of the “no go areas”. Synlait’s explanation for the pre-programming of the destinations was trading with Sudan was previously permissible, whereas trade with Cuba was not.

[17] Mr Wynn-Williams said having Sudan as a destination would have filtered through several reports once changed from “TBC”, because such changes were regularly emailed to the sales and logistics teams.

[18] On 11 July 2016, Mr Wynn-Williams sourced a “freight rate” from Synlait export manager, Julie Tweedie. By return email, Ms Tweedie quoted Mr Wynn-Williams the rate of \$US2908 for a forty-foot container to Port Sudan with a 36 day transit time. Mr Wynn-Williams said Ms Tweedie did not raise any issues with the transaction or the shipping arrangement.

[19] On 15 July 2016, Mr Wynn-Williams sold the product on behalf of Synlait to Ausfine. The terms of delivery for the contract were FOB via Lyttelton, meaning Ausfine owned the product upon its loading onto the ship of transit..

[20] Mr Wynn-Williams said in response to general discussion about his Ausfine deal, a colleague, he could not recall who, raised an issue with him about exporting product to Sudan. Mr Wynn-Williams sought clarification from Mr Lowcay and Mr Blanch. Mr Lowcay could not remember whether Sudan was on the ANZ sanction list or not. He also carried out a search of the Ministry of Foreign Affairs and Trade (MFAT) website looking for sanctioned countries. However, this did not result in any answers and Mr Lowcay directed Mr Wynn-Williams to Mr Blatch for further clarification.

[21] Mr Wynn-Williams said Mr Blatch told him the issue with shipping to Sudan related to rules set by ANZ and this meant Synlait could not *directly* export to there. In his evidence, Mr Blatch said his recollection of the discussion (and others of a similar nature), and his understanding of the position, was Synlait could not knowingly *directly* or *indirectly* export product to Sudan (and other sanctioned countries) Mr Blatch said Mr Wynn-Williams seemed frustrated with this answer and seemed to view the situation with the ANZ as negotiable.

[22] Mr Wynn-Williams said during these discussions neither Mr Lowcay nor Mr Blatch referred to, directed him to or provided him with a copy of the ANZ undertaking. Further, Mr Wynn-Williams claimed he came away from these discussions with a view *indirect* exporting to Sudan was permissible, provided a third-party such as Ausfine completed the export documentation.

[23] On 25 July 2016, Mr Wynn-Williams was copied into an email which contained the updated Overseas Market Access Requirement, a document prepared by the Ministry for Primary Industries. A review of the document discloses that export of “dairy products” to Sudan was permissible. Mr Wynn-Williams said this aligned with his conversations with Mr Lowcay and Mr Blatch.

[24] On 21 September 2016, Ms Colquhoun circulated a spreadsheet of data from the M3 system. The spreadsheet showed orders to Sudan. The spreadsheet also shows orders to Cuba, another sanction country. However, the evidence disclosed these orders were stopped by Synlait upon its disclosure to Mr France by one of Mr Wynn-Williams co-workers.

[25] At or about this time, Mr Wynn-Williams said he rejected a proposal from another trading company to directly sell to Sudan (and other destinations) based on his understanding about direct dealing with Sudan and because it would have meant Synlait was, in effect, competing against itself in some markets.

[26] In October 2016, Ausfine expressed an interest in further, larger, orders to Sudan. Mr Wynn-Williams said he discussed the opportunity with Mr Lowcay. He said Mr Lowcay again searched the MFAT website and they discussed how the only trade sanction in place at the time was for arms exports to South Sudan. Mr Lowcay stated in his evidence he may have said during this discussion if Synlait sold to a trader with genuinely no knowledge of where the product was going this, in his opinion, would be neither *direct* nor *indirect* trading with a sanction country.

[27] Mr Wynn-Williams also had a discussion with Mr Blatch who advised him Synlait could not trade with Sudan due to the arrangement with the ANZ. Mr Blatch told Mr Wynn-Williams he would enquire with the ANZ to see if there was a way Synlait could go ahead with the sale – such as through an aid programme or otherwise – but needed to know whether the exports were destined for Sudan or South Sudan.

[28] Mr Wynn-Williams subsequently emailed Mr Blatch about the proposed sale but it appears he did not reply. The proposed sale, while taking a slightly different format from previously, would result in a third party buying and then landing Synlait product in Sudan. Mr Wynn-Williams said because he did not hear back from Mr Blatch and because the sale proposed was indirect dealing with Sudan, he presumed there was no issue with it going ahead.

[29] Mr Blatch said he had a discussion with Mr France about the proposed sale, including that a waiver from the ANZ would be required for it to be undertaken. Mr France said he was not aware of the proposed sale and said he would talk to Mr Wynn-Williams about it. Mr Blatch said Mr France seemed concerned about the situation.

[30] Mr Blatch also had a conversation with a representative of the ANZ bank about the proposed sale, but because Mr Wynn-Williams did not get back to him, he did not pursue it further. Mr Blatch said he only became aware of Mr Wynn-Williams' email to him of 11 October 2016 as a consequence of these proceedings. In any event, Mr Blatch said it was "foolhardy" to presume from silence there was no issue with the proposed sale.

[31] Mr France said when he spoke to Mr Wynn-Williams about his conversation with Mr Blatch, they discussed the serious implications of direct and indirect trading with a sanction country. Mr France said at no time during that conversation did Mr Wynn-Williams advise him he had already entered into contracts where the destination was Sudan.

Preliminary investigation after concerns raised by ANZ

[32] On 22 November 2016, ANZ was sent an export document for one of the Sudan orders by Synlait's shipping agent. Evidently this was in error. ANZ raised the issue with Mr Michel. Mr Michel then raised the matter with the Synlait sales team via email. Mr Wynn-Williams advised Mr Michel the document related to an FOB sale to Ausfine. Mr Michel then communicated this to the bank.

[33] On 25 November 2016, Mr Blatch was contacted by ANZ raising concerns about trade with Sudan. He asked Mr France, who at that point managed the sales team, to obtain further details of the trade from Mr Wynn-Williams. Mr France phoned Mr Wynn-Williams and they spoke about Mr Michel's email and about Mr Wynn-Williams discussions with Mr Lowcay and Mr Blatch about indirect trade with Sudan. Mr France then relayed this in an email to Synlait chief financial officer, Mr Greenwood and Mr Blatch.

[34] Mr Wynn-Williams provided further information directly to Mr Blatch about the transaction in an email on 25 November 2016. He advised Mr Blatch that Synlait had sold product to Ausfine FOB Lyttelton and they were trading with Ausfine and not Sudan. Mr Wynn-Williams said the “red flag” was raised when the shipping agent accidentally sent an export document for the order to ANZ.

[35] Mr Wynn-Williams provided a further more detailed response to Mr Greenwood on 27 November 2016. In the email he made reference to a July 2016 request from Ausfine to sell product to Sudan and that at the “time the deal was done [he] was not aware of an issue dealing into the region”. He then acknowledged subsequent to the trade, someone suggested there might be an issue with such trading.

[36] On 30 November 2016, Mr France, Mr Lowcay, Mr Blatch, Mr Wynn-Williams and Synlait financial controller, Chris Horn met to discuss the matter further. Mr Blatch said there may have been an acknowledgment in that meeting there was no written policy in place dealing with sanctioned countries and existing controls could be supplemented by such a policy. Mr Wynn-Williams was more definitive in his evidence. He also said the key outcomes of the meeting were for Mr Horn to generate a one-page Synlait policy on the ANZ sanctioned countries and for him to update the finance team about the outstanding Ausfine shipments that were pending payment.

[37] Mr France then undertook enquires with relevant employees including Mr Blatch and Mr Lowcay. He said he became aware of several conversations between Mr Wynn-Williams and either or both Mr Blatch and Mr Lowcay about trading with Sudan. Mr France said he was provided with the email sent by Mr Michel to Ms Colquhoun on 11 March 2016 about sanctioned or “no go areas”. Mr France said he became aware two contracts had been entered into with Ausfine on 30 June 2016 and 15 July 2016 respectively where product was destined for Sudan.

[38] During these enquires, Mr France also uncovered an email exchange between Mr Wynn-Williams and representative from Ausfine on 16 August 2016. In the body of Mr Wynn-Williams’ email he stated in reference to supplying product to Sudan: “not to mention if I send any more product to Sudan I’ll end up double dead”. Mr Wynn-Williams said at the time of the email, he was aware direct trading with Sudan was impermissible but believe indirect trade was still acceptable.

[39] Mr France said he reflected on the information he had garnered and was concerned about the situation it disclosed. He said he believed there was a sufficient basis to warrant further investigation and the initiation of a disciplinary process against Mr Wynn-Williams.

[40] On or about 29 November 2016, Mr Wynn-Williams and Mr Michel had a disputed conversation about the matter. Mr Wynn-Williams said it occurred outside a meeting room whereas Mr Michel said Mr Wynn-Williams rang him and was trying to gauge how serious the situation was with ANZ. There was also a factual contest over what was said – however, both agreed that Mr Michel said words to the effect of Mr Greenwood had apologised to ANZ about the incident more times than he would have liked. Mr Wynn-Williams initiated a further conversation with Mr Michel, which Mr Wynn-Williams recorded without Mr Michel's knowledge. The conversation appeared to refer to discussions that were occurring behind closed doors between Synlait senior managers and about Mr Wynn-Williams' belief that variations on FOB sales were not *indirect* trading with Sudan. Mr Wynn-Williams said based on this second conversation with Mr Michel, "it was clear I was being lined up".

[41] On 2 December 2016, Mr France rang Mr Wynn-Williams and advised him he was being suspended on full pay pending an investigation. Mr France said he told Mr Wynn-Williams the investigation related to the serious issue of sale of product to Sudan. Mr France told Mr Wynn-Williams he was not to contact customers and was to keep the situation confidential. Mr Wynn-Williams said he believed Mr France did not advise him of the conduct he was being suspended for or give him an opportunity to comment on the proposed suspension. This was despite saying, on his evidence, at the time "all good". Mr France would say Mr Wynn-Williams actually said "no, that all sounds good".

[42] Later that day Mr France sent an email to the human resources department outlining the conversation he had with Mr Wynn-Williams and the initial steps he had taken in the disciplinary process.

[43] Following Mr Wynn-Williams suspension, calls were diverted from his phone. Unfortunately, this included private calls as the phone was being used at the time for both work and other purposes. Lack of access to the phone caused a series of personal difficulties for Mr Wynn-Williams post-suspension. Mr France said he was not aware of Mr Wynn-Williams' personal use of the phone at the time. However, Mr Wynn-Williams said he sought assurances from Mr France he would be able to retain access to his phone (evidently, he had brought the phone number with him to Synlait) during their conversation on 2 December 2016.

[44] On 5 December 2016, Mr France wrote to Mr Wynn-Williams identifying the allegations to be investigated, the potential outcome of the process including dismissal and inviting him to a disciplinary meeting for which he had a right of representation.

[45] The letter set out Synlait's concerns. In summary, these were:

- (i) Mr Wynn-Williams entered into two FOB Lyttelton contracts with Ausfine in circumstances where it was clear the ultimate destination was Sudan;
- (ii) In September 2016, in discussions with Mr Blatch Mr Wynn-Williams was advised that direct and indirect trade with Sudan was a breach of Synlait's undertaking to the ANZ;
- (iii) In discussion with Mr France, it was agreed they could not sell product to Sudan, directly or indirectly;
- (iv) At no point during these discussions did Mr Wynn-Williams advise Mr Blatch or Mr France he had already entered into contracts with a destination of Sudan;
- (v) There were five shipments in all to Sudan between 20 August 2016 and 21 November 2016;
- (vi) That on 25 November 2016 ANZ had advised Synlait it had become aware of trading with Sudan and Mr France had advised Mr Wynn-Williams of this the same day.

[46] The letter went on to state:

The Ausfine contracts put us in breach of our banking agreements with ANZ. We are currently addressing this with the Bank. The issue has been discussed with the Disclosures Committee of the Synlait Board, and may also have to be disclosed to the NZX.

[47] On 13 December 2016, Mr Wynn-Williams attended a disciplinary meeting at the offices of Synlait's solicitors. Also in attendance were Mr Wynn-Williams' solicitor, Mr France and Rachael Chapman from Synlait and the company's solicitor. Mr France provided a relatively full account of the meeting in his evidence. Mr France said Mr Wynn-Williams and his lawyer pointed to a lack of clear policy about trading with sanctioned countries, a lack of controls in place to prevent it and a lack of training. Mr France also said Mr Wynn-Williams stated he had made a "genuine mistake".

[48] In contrast, Mr Wynn-Williams said the "disciplinary meeting felt hopeless". He said that when he said Mr Lowcay and Mr Blatch had told him indirect trade with Sudan would be "ok", Mr France said "he already knew what [they] would say in reply". Mr Wynn-Williams also said "I got the strong impression there was nothing I could say that they would listen to".

[49] After the meeting, Mr France made further enquires of Mr Blatch, Mr Lowcay and Mr Michel about conversations they had with Mr Wynn-Williams. Mr France said Mr Blatch and Mr Lowcay were "adamant" they told Mr Wynn-Williams he could not sell to a customer if Synlait was aware the product was destined for Sudan (or any other sanctioned country).

[50] Synlait's solicitors provided written email statements from Mr Blatch, Mr Lowcay and Mr Michel to Mr Wynn-Williams and his solicitor for comment. Mr France said Mr Wynn-Williams' emailed response to these statements reiterated the points he and his solicitor made during the disciplinary meeting.

Preliminary decision to dismiss

[51] Mr France said over the course of a day he gave consideration to his investigation into Mr Wynn-Williams conduct and concluded:

- (i) Mr Wynn-Williams as a senior member of the sales team should have known Sudan was a sanctioned country when he sold the product to Ausfine;

- (ii) Mr Wynn-Williams was at the team meeting in March 2016 when sanctioned countries were discussed and he was subsequently copied into an email that contained the sanctioned countries list, which included Sudan;
- (iii) Mr Wynn-Williams acknowledged after entering into the first contract, but before entering into the second, he became aware there was an issue trading with Sudan.
- (iv) Mr Wynn-Williams failed to carry out appropriate due diligence before entering into the second contract.
- (v) the “water cooler” discussions, as Mr Wynn-Williams called them, with Mr Blatch and Mr Lowcay, was not an appropriate way to address the issue and, in any event, he was told by them, whose statements Mr France accepted, that indirect trade with Sudan was not permissible;
- (vi) there was serious concern Mr Wynn-Williams did not advise Mr Blatch or himself that he had already entered into two contracts with Ausfine with a final destination of Sudan despite having the opportunity to do so;
- (vii) if Mr Wynn-Williams had advised about these contracts earlier, some of the shipments scheduled for October and November 2016 could have been stopped; and
- (viii) the situation was potentially salvageable had Mr Wynn-Williams disclosed the existence of the contract but to not do so was to “mislead [Synlait] by omission”.

[52] Mr France said he considered all the matters raised by Mr Wynn-Williams and his solicitor during the investigation. Mr France said he did not believe even the existence of a written policy could explain Mr Wynn-Williams failure to carry out due diligence prior to entering into the contracts. Mr France said he did not regard that “Sudan” could be input in M3 was a significant factor because it was not “an exhaustive source of embedded rules”. Mr France said Mr Wynn-Williams actions and inactions seriously impacted the employment relationship to the point where he no longer had trust and confidence in him. However, before dismissing him, Mr France said he wished to give Mr Wynn-Williams an opportunity to make submissions in relation to dismissal and other matters he believed relevant.

[53] Mr France's preliminary decision was communicated to Mr Wynn-Williams' solicitors. In an email response, Mr Wynn-Williams' solicitors expressed their client's disappointment at the preliminary decision, re-iterated the position advanced at the disciplinary meeting in summary form and sought a sanction falling short of dismissal.

[54] At or about this time, Mr Wynn-Williams asserted Synlait had his mobile phone number transferred back into his own name by Vodafone. Synlait rejected this and said based on enquires, the phone number was transferred over on 19 December 2016.

Decision to dismiss

[55] Mr France said he considered Mr Wynn-Williams response. He said he would have considered an alternative outcome if he had received anything further. However, he did not. Mr France said he considered Mr Wynn-Williams' length of service and alternative sanctions short of dismissal including the imposition of a written warning as requested by his solicitor. However, as Mr Wynn-Williams was in a senior autonomous position, Synlait needed to be able to trust him and his judgment implicitly. Mr France said Mr Wynn-Williams placed the business in a very compromising position and took no steps to remedy the situation when he could and have should have done so. Mr France said Mr Wynn-Williams' "conduct irreparably damaged the relationship of trust and confidence and I did not believe that this could be restored given the serious nature of this conduct". Mr France confirmed his decision and this was communicated to Mr Wynn-Williams via his solicitors.

Dismissal

[56] Synlait dismissed Mr Wynn-Williams on 15 December 2016. He was paid four weeks' in lieu of notice in accordance with his employment agreement.

Other relevant matters

Other dealings with Sudan

[57] In response to investigation into Mr Wynn-Williams, it appears Synlait undertook some form of audit of its exporting. During this process evidence of “hot-loading” product to Sudan came to light. Hot loading in this context relates to the assumption of the risk (by Synlait) of loading (or loading and shipping) containers before all the pre-shipping procedures are met. It is undertaken by Synlait where there is an issue around credit/payment and where it waiting on quality sign-off from the laboratory.

[58] On 25 October 2016, a hot loading/hot shipping form was prepared for product orders under the Ausfine contract. The form states on its face that one of the destinations is Sudan. Mr France and Synlait chief financial officer, Mr Greenwood signed the form.

[59] On 8 November 2016, a further hot loading/hot shipping form was for prepared another product order. The form states on its face the destination is Sudan. Mr France and Synlait chief financial officer, Mr Greenwood signed the form.

[60] Mr France said the two instances related to Ausfine exceeding their credit limit. He said while he saw the forms, this was explained as the reason for the hot loading. Mr France said the other details were not discussed and he did not examine the forms in detail. He said this was an error on his part.

Synlait/ANZ

[61] Synlait obtained a waiver for breaching the undertaking from the ANZ after the bank, according to Mr Blatch, conducted “a thorough due diligence into the transaction and the controls [Synlait] had in place”. As part of its waiver negotiations with the ANZ, Synlait promulgated a written policy dealing with trading with sanctioned countries.

Evaluation

Procedure: suspension

[62] Mr Wynn-Williams also submitted there were defects associated with his suspension. He said Synlait did not observe a fair and due process. Mr Wynn-Williams said he was not advised of the specific conduct for which he was being suspended nor afforded an opportunity to seek legal advice. He said this breached cl 13.4 of his employment agreement, because Synlait could not reply on cl 13.5 which enabled expedition of suspension in certain circumstances. Mr Wynn-Williams said Synlait produced no evidence to satisfy those circumstances.

[63] Against this, Synlait submitted on the evidence available to it at the time of the suspension, even without the need for it to be tested, it had substantive grounds to suspend Mr Wynn-Williams. Synlait said Mr Wynn-Williams' employment agreement expressly provided for suspension and it was carried out in a procedurally fair manner. It said the decision to suspend Mr Wynn-Williams on full pay was one a fair and reasonable employer could have arrived at in all the circumstances at the time. I accept this submission.

[64] I find Mr Wynn-Williams was not disadvantaged in his employment through suspension. It is difficult to accept Mr Wynn-Williams was not aware of the specific reason he was being suspended. It clear from the evidence of Mr Wynn-Williams' own conduct in the lead up to his suspension, particularly his interactions with Mr Michel including surreptitiously recording one of their conversations, that he knew how serious the situation was and how seriously Synlait regarded it.

[65] Ideally Synlait could have held a meeting with Mr Wynn-Williams to discuss his proposed suspension but, in the circumstances, Mr Wynn-Williams had left work early on 2 December 2016 and seemingly Mr France had been looking for him in the workplace. It is important to note, however, that even if there were defects with Mr Wynn-Williams suspension, the Court has found that an employer can still justify a dismissal under s 103(A) of the Act in circumstances where an employee has been suspended in a procedurally defective manner.¹

¹ *Kereopa v Go Bus Transport Limited* [2009] NZEmpC 74 at [29]

Procedure: employment investigation

[66] Mr Wynn-Williams said the process adopted by Synlait was procedurally defective. He said Synlait closed its mind to options other than termination in order to satisfy the ANZ. Mr Wynn-Williams submitted the decision to terminate him was pre-determined and Synlait did not give genuine consideration to his responses. Mr Wynn-Williams said this was even in circumstances where Synlait acknowledged there was nothing deliberate in his conduct and he did not intend to breach the undertaking. He submitted at the time his employment terminated Synlait's banking facilities were no longer at risk and he was, effectively, "scapegoated". Mr Wynn-Williams alleged a disparity by Synlait between himself and Mr Greenwood and Mr France, who also engaged in trading with Sudan but did not face disciplinary action.

[67] Synlait said the decision to dismiss Mr Wynn-Williams was carried out in a procedurally fair manner. Specifically:

- (i) Synlait wrote to Mr Wynn-Williams, outlined the matters of concerns, advised him the matter was serious and could result in dismissal;
- (ii) Mr Wynn-Williams engaged solicitors, who sought to clarify several matters and obtain information, which was provided, and Synlait agreed to an adjournment of the proposed disciplinary meeting;
- (iii) Mr Wynn-Williams and his solicitor attended the disciplinary meeting on 14 December 2016 and responded at length and in detail to Synlait's concerns;
- (iv) Mr France investigated Mr Wynn-Williams' responses and provided further information to Mr Wynn-Williams and his solicitor for comment;
- (v) Mr Wynn-Williams provided feedback on the further information provided by Synlait on two occasions;
- (vi) Mr France provided Mr Wynn-Williams with his finding and his preliminary decision of dismissal for comment;
- (vii) Mr Wynn-Williams provided comment and proposed, through his solicitor, consideration of alternatives to dismissal;
- (viii) Mr France confirmed his decision to dismissed Mr Wynn-Williams after considering his feedback and the possible imposition of a final written warning; and

- (ix) While Mr France determined the conduct was sufficiently serious to justify summary dismissal, Synlait paid Mr Wynn-Williams four weeks' pay in lieu of notice.

[68] Synlait submitted Mr Wynn-Williams' dismissal was not predetermined. It said Mr Wynn-Williams argument of pre-determination/closed mind was hinged on two factors. First, Mr France saying he knew what Mr Blatch and Mr Lowcay would say in response to Mr Wynn-Williams explanation of his interactions with the pair. Second, Mr Wynn-Williams asserted Synlait had his mobile phone number transferred back into his own name by Vodafone at or about the time the preliminary decision to dismiss him was made by Mr France.

[69] In response to the first factor, Synlait said Mr France had spoken to both Mr Blatch and Mr Lowcay as part of his preliminary investigation and they had told him something different than that which Mr Wynn-Williams was saying. Synlait said there was nothing toward about this. In response to the second factor, Synlait's enquiries about the transfer of the phone produced written confirmation from Vodafone about when the phone number was transferred across and it relied on this.

[70] Synlait said there was no disparity of treatment between Mr Wynn-Williams and others who engaged in transacting with sanctioned countries including Mr France and Mr Greenwood and the other trader who was involved in the transaction with Cuba. Synlait said the fundamental difference between the situations was these other employees were open about their involvement and the transactions were able to be unwound or resulted from genuine mistakes. Synlait did not refer to any case law in support of this submission. However, the Court of Appeal considered the issue of disparity in *Chief Executive of Inland Revenue v Buchanan*.² In that case, the Court approved a three-stage test for assessing disparity of treatment in employment situations: first, was there disparity of treatment; second, if so, was there an explanation by the employer for the disparity and, third, if not, was the dismissal justified even though there was a disparity of treatment?

[71] I accept the submission of Synlait that the situations were different and there was no disparity of treatment. Having found as such, it is not necessary to consider the subsequent steps of the test.

² [2005] 1 ERNZ 767

[72] Objectively assessing the overall procedure undertaken by Synlait, I find it investigation into the allegations made against Mr Wynn-Williams was procedurally fair. The assertion of pre-determination is not made out. There is no evidence that “scapegoating” of Mr Wynn-Williams was the actuating motivation for his dismissal beyond supposition. I accept the evidence of Mr France that he had an open mind. In my assessment he carried out his investigation in a diligent and workperson-like manner. Perhaps, ideally, Synlait could have held one or two more meetings with Mr Wynn-Williams to discuss the further information which came to light as a result of further enquires and the preliminary decision to terminate his employment. However, the absence of such meetings, in the circumstances, did not result in Mr Wynn-Williams being treated unfairly because he was ably represented.

Substance

[73] Having found Synlait carried out a procedurally fair investigation into Mr Wynn-Williams conduct, was his dismissal substantively justifiable? Synlait said the finding of serious misconduct against Mr Wynn-Williams was open to it and he was not unjustifiably dismissed.

[74] Mr Wynn-Williams advanced four key arguments which went to the substance of his dismissal. First, he said he was not aware of the ANZ undertaking or provided with a copy of it when he commenced employment with Synlait. Second, having become aware of the undertaking after his first trade with Sudan in July 2016, Mr Wynn-Williams was informed or advised by Mr Lowcay and Mr Blatch *indirect* trade with Sudan was permissible. Third, Synlait did not have a policy, procedure or risk management tools in place in respect of trading with sanctioned countries. Fourth, his actions were the result of a genuine mistake.

[75] In response to the first argument, Synlait submitted Mr Wynn-Williams as a senior member of the sales team should have known Sudan was a sanctioned country and he was required to maintain up to date knowledge of trading conditions as part of his role. Synlait also said Mr Wynn-Williams was at the team meeting in March 2016 when sanctioned countries were discussed and he was subsequently copied into an email that contained the sanctioned countries list.

[76] Responding to Mr Wynn-Williams' second argument, Synlait rejected his view Mr Blatch and Mr Lowcay advised him indirect trading with Sudan was permissible. Synlait submitted Mr Wynn-Williams assertion the FOB Lyttelton did not constitute indirect trade with Sudan was "an artificial, highly technical and self-serving distinction" because FOB-type arrangements still resulted in Synlait products being landed in Sudan.

[77] Synlait said the existence of the two Ausfine contracts for product destined for Sudan only came to light through the error of a document being sent to the ANZ and the subsequent interest enquires made following this. Synlait said Mr Wynn-Williams had engaged in misleading behaviour by omission in not disclosing the existence of the contracts when asked to explain his activities in relation to trading with Sudan. Synlait said Mr Wynn-Williams never properly explained during the disciplinary investigation why he did not disclose the existence of the contracts despite numerous opportunities to do so including during discussions with Mr France and Mr Blatch about trading with sanctioned countries. Synlait asserted Mr Wynn-Williams kept the existence of contracts to himself in hope the shipments of product would be completed and their existence would not come to light.

[78] In response to Mr Wynn-Williams' third argument, Synlait said even the existence of a written policy for sanctioned countries would not explain Mr Wynn-Williams failure to carry out due diligence prior to entering into the contracts with Ausfine. Synlait said it regarded that fact "Sudan" could be input into its M3 system was not significant because the system was a non-exhaustive source of rules. Synlait also said it was not possible to codify all business rules.

[79] Synlait said it was entitled to demand a high level of trust and confidence in a senior employee. It submitted the higher level of employee, the greater the impact of any misconduct will be. Synlait said Mr Wynn-Williams was in a senior autonomous position and needed to be able to trust him and his judgment. It said Mr Wynn-Williams placed their business at risk and he took no steps to remedy the situation when he could and have should have done so. Synlait submitted it was entitled to conclude it had lost trust and confidence in Mr Wynn-Williams and his dismissal was open to it.³ Synlait submitted Mr France considered Mr Wynn-Williams length of

³ Relying on *Owers v BOC Gases New Zealand Ltd*, ERA Christchurch CA3/04, 19 January 2004 and *Carlton United Breweries v Bourke* [1994] 2 ERNZ 1

service and alternative sanctions such as the imposition of a written warning but ultimately decided that dismissal the appropriate sanction in the circumstances.

Conclusion about Mr Wynn-Williams dismissal

[80] The finding of serious misconduct against Mr Wynn-Williams by Synlait was available to it on the facts as established by a procedural fair investigation carried out in compliance with s103A of the Act. The subsequent disciplinary action taken against Mr Wynn-Williams, which saw him dismissed from his employment, was within the range of reasonable responses available to Synlait.

[81] Having found Mr Wynn-Williams was not unjustifiably dismissed by Synlait, it is not necessary to consider the issue of remedies.

Costs

[82] Costs reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.⁴

Andrew Dallas
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].