IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 319
5377408

	BETWEEN	ANDREW TALIVA'A BREWER Applicant
	AND	ALLIED INVESTMENTS LIMITED t/a ALLIED SECURITY Respondent

Member of Authority:	T G Tetitaha
Representatives:	Applicant in person Counsel for Respondent, Kate Hay
Investigation Meeting:	27 August 2012 at Hamilton
Submissions received:	27 & 28 August 2012 from Applicant 27 August 2012 oral submissions only from Respondent
Determination:	11 September 2012

DETERMINATION OF THE AUTHORITY

A. **Mr Brewer was dismissed unjustifiably;**

B. **AIL is ordered to pay Mr Brewer the sum of $8,530.20 pursuant to s.128(2) of the Act;**

C. **AIL is ordered to pay Mr Brewer $5,000 by way of compensation pursuant to s.123(1)(c)(i) of the Act.**

D. **AIL is ordered to pay $71.56 towards Mr Brewers costs.**

Employment relationship problem

[1] The applicant, Andrew Taliva'a Brewer ("Mr Brewer") seeks determination of a personal grievance pursuant to s.103(1)(a) Employment Relations Act 2000 ("the Act") alleging unjustified dismissal by the respondent, Allied Investments Limited t/a Allied Security ("AIL").

[2] The parties agreed Mr Brewer had been dismissed by AIL's letter dated 10 April 2012.

[3] AIL submits the dismissal was justified by reliance upon clause 28 (90 day trial period) in Mr Brewer's employment agreement with AIL dated 14 January 2012 ("the agreement"). In the alternative, AIL submits Mr Brewer's conduct leading up to the dismissal gave rise to frustration of contract pursuant to clause 17 of the agreement and/or amounted to contributory (mis)conduct pursuant to s124 of the Act reducing any remedies sought.

[4] Mr Brewer submits clause 28 in the agreement is unenforceable as he was not a new employee having been employed by AIL since 2009. He denies any contributory (mis)conduct.

[5] During the course of the investigation meeting Mr Brewer withdrew a matter pertaining to the definition of overtime in the agreement. No determination of the overtime matter is now sought.

Issues

[6] The issues arising from this matter are:

(a) Is the dismissal justifiable?

(b) Is clause 28 (90 day trial period) in the agreement a 'trial provision' as defined by s67A?

(c) Was Mr Brewer an 'employee' as defined by s67A when he signed the AIL employment agreement dated 14 January 2012?

(d) Was there conduct by Mr Brewer that enabled clause 17 (frustration of contract) to be invoked and/or reduce the remedies sought?

Facts

[1] Mr Brewer was employed by AIL as a security guard. His period of employment with AIL is a disputed fact.

[2] AIL is an incorporated company whose primary business is the supply of security services to traditional non-hospitality businesses. The sole director and shareholder is Mr Damian Black. AIL uses the trading name "Allied Security".

[3] On 3 October 2009 AIL and one of its employees, Mr Christopher McDowall, entered into a joint venture partnership known as Hospitality and Event Security ("HES").

[4] A document recording the creation of HES headed "Hospitality and Event Security Ltd Profit Share Agreement" was produced by Mr Black. Although the document referred to Hospitality and Event Security Limited as the joint venture partner with Mr McDowall, both Mr Black and Mr McDowall confirmed this entity was never incorporated and AIL became the joint venture partner using HES as a trading name only.

[5] Both Mr McDowall and Mr Black confirmed the purposes of HES were:

(a) To allow Mr McDowall to utilise his contacts to generate business in the hospitality and event security;

(b) To act as a vehicle for Mr McDowall to make more money; and

(c) To separate AIL's brand from hospitality and event security.

[6] In October 2009 Mr Brewer responded to an advertisement on the Trade Me website for a job as a casual security guard. There is a dispute whether the advertisement contained AIL's logo or not. A copy of the advertisement was not produced in evidence.

[7] Mr Brewer alleges he spoke to a person known as "Tane" whom he believed at the time was working for AIL. Mr Black disputed this and gave evidence Tane was an employee of HES not AIL. In November 2009 Mr Brewer met Tane at a local bar in Hamilton where he was given a trial run.

[8] The following week Mr Brewer met with Mr McDowall at AIL's offices where he was provided with various documents to fill in and return.

[9] On or about 10 December 2009 Mr Brewer filled in an application for employment form headed "Allied Security Application for Employment".

[10] On or about 14 December 2009 Mr Brewer filled in an Allied Security Employment Information form with his name, address, emergency contact and bank account details.

[11] On the same day Mr Brewer signed and returned an individual employment agreement. The employment agreement named HES as the employer and Mr Brewer as the employee ("the HES agreement").

[12] Mr Brewer's wages were paid by direct credit into his bank account by AIL. Tax was deducted and paid to the Inland Revenue Department (IRD) by AIL. AIL was recorded by the IRD as Mr Brewer's "employer or payer". Mr Black and Mr McDowall gave evidence the payroll was administered by AIL on behalf of HES for which it was reimbursed. Mr Black referred to a sample HES profit share spreadsheet. He explained the expenses column recorded payments to AIL for expenses incurred by HES and paid to AIL, including administration of the payroll ("Accounts") and the use of AIL's offices ("Office expenses").

[13] Mr Brewer's work during 2009 to May/June 2010 was primarily providing security at bars and hospitality events. Occasionally he worked at non-hospitality businesses as and when required by AIL.

[14] Although there was a dispute regarding the uniform used by Mr Brewer during his employment between 2009 to 2011, Mr McDowall and Mr Brewer agreed the common uniform was a black shirt with the word "security" on the back but during events undertaken for AIL a uniform with AIL's logo would be worn.

[15] On or about 25 May 2010 Mr Brewer signed a form headed "Hospitality and Event Security" giving permission for HES to hold a $40 uniform bond.

[16] During this period Mr Brewer applied for a certificate of authority from the Ministry of Justice to allow him to work in the private security industry. A spreadsheet from the Ministry of Justice website listed certificates of authority issued

as at 4 November 2010. Mr Brewer was listed as a holder of certificate of authority 761049 and his employer's number was 700277. An email from the Ministry of Justice confirmed the employer's number 700277 belonged to AIL.

[17] Mr Brewer's worked as a casual security guard with Tane as his supervisor until February 2010. From February until May/June 2010 Mr Brewer was supervised by another employee of AIL and Mr McDowall. In May/June 2010 he stopped work due to injury and received accident compensation.

[18] In 2011 Mr Brewer returned to work but casual security guard work had become infrequent. Mr McDowall then offered Mr Brewer a permanent position with AIL working exclusively with one of its clients.

[19] On or about 14 January 2012 Mr Brewer signed an employment agreement naming AIL as his employer only.

[20] The agreement included the following termination and personal grievance clauses:

> *16.* ***Termination of employment***
>
> *16.1 Two weeks' notice of termination of employment shall be given on either side; but, this shall not prevent summary termination of employment for misconduct.*
>
> *16.2 Where the appropriate notice is not given the appropriate wages shall be paid or forfeited as the case may require.*
>
> *…*
>
> *17.* ***Termination by client and frustration of contract***
>
> *17.1 The employee acknowledges that the client may request the employer to cease provision of the services of the employee at any time.*
>
> *If requested to cease supply of the employee's services the employer will act reasonably to assist the employee in finding alternative work with the employer where practicable.*
>
> *The employer or employee may decide to end the employment at this point as they may decide. If the employment is terminated this will be effective immediately and clause 16(1-8) may not apply at the employer's sole discretion.*

If no alternative work is available and the employee is not terminated the employee will remain as an employee of the employer and move to the employment "on a casual basis" and may be offered on a time by time arrangement.

The employer will not be liable for any wage or salary payments nor any termination payment as above clause 16(1-8).

The payment for wages and salary will be on a work performed basis at all times and if no work is performed no payments will be made nor required.

17.2 The employee has been offered employment at the following venue/site:

_____

The ongoing employment and continuation of employment is reliant upon the continuation of the contract for service between the client and Allied Security. If the client terminates the contract for service with Allied Security this employment contract will terminate immediately. Upon immediate termination as a result of the cancellation of contract for service the employer will not be liable for any future wage or salary payments nor any termination period or payments as above in clause 16(1-8).

…

18. ***<u>Personal grievances and disputes procedures</u>***

18.1 The procedures for the resolution of personal grievances and disputes shall be in accordance with Part 9 of the Employment Relations Act 2000.

18.2 Information on procedure and services available for the resolution of employment relationship problems.

Definitions.

An "employment relationship problem" is defined in the Employment Relations Act 2000 and includes:

- *A personal grievance.*

…

A "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because for [sic] *a claim that the employee:*

- *Has been unjustifiably dismissed;*

…

Raising employment relationship problems

An employment relationship problem is raised with the employer when the employee makes the employer or a representative of the employer ware [sic] *of the problem. …*

Time limit on raising a personal grievance

An employee who believes that he/she has a personal grievance must raise it with the employer within a period of 90 days beginning on the date on which the action alleged to amount of [sic] *a personal grievance occurred or came to the notice of an employee.*

Mediation

If the problem is not resolved, a party to the problem may seek the assistance of the mediation services provided by the Department of Labour. …

Employment Relations Authority

If the problem is not resolved by mediation, it may be referred to the Employment Relations Authority. …

28. ***90 day trial period***

It is agreed by both the employer and the employee that a 90 day employment trial period will be included in this agreement. During this 90 day period the employee may be terminated or dismissed at the discretion of the employer.

The 90 day period will commence from the date of commencement of employment until a 90 day period has elapsed.

[21] Between 25 March and 10 April 2012 matters rapidly escalated between the parties resulting in these proceedings.

[22] On 25 March 2012, Mr Brewer emailed Mr Gordon Raroa, his supervisor and an employee of AIL, regarding a dispute he had about the wages and overtime clauses contained in the agreement. Mr Raroa forwarded this by email to Mr Black. Mr Black requested a written description of the dispute which Mr Brewer duly emailed on 26 March 2012.

[23] On 28 March 2012, Mr Brewer and two other employees including his cousin, Mr Titus Kalani (aka Miles Kalani), were part of a 3 person security team at a clients worksite. Mr Raroa deposed it was usual to have an employee of the clients undertake the Team Leader role to inform and direct the work for that shift.

Unfortunately no Team Leader was available. Taking on the Team Leader role was optional, but Mr Raroa expected Mr Kalani would again fulfil this role on 28 March as he had previously fulfilled this role on an earlier shift. Mr Kalani declined to take on the Team Leader role and informed the client's Manager of Security, Mr Dean Ria, of his decision who then told Mr Raroa. As a result of Mr Kalani's decision, a replacement Team Leader was required to be brought in from elsewhere.

[24] Mr Raroa spoke to Mr Kalani regarding the incident. He was told Mr Kalani *"didn't feel comfortable doing that role"* and that he *"supported his team mates"*. When Mr Raroa inquired in what way he supported his team mates, Mr Kalani indicated it was about hassles with pay and that it *"didn't feel fair to take on extra shifts"*.

[25] From his discussions with Mr Kalani, Mr Raroa concluded this was connected to Mr Brewer's dispute raised in his emails dated 25 and 26 March 2012 although Mr Kalani did not state that there was any such connection.

[26] Mr Brewer was not spoken to by AIL at all in respect of the 28 March 2012 incident.

[27] Mr Raroa subsequently became aware of discussions between Mr Brewer and other staff regarding his wages and overtime dispute. He believed Mr Brewer had drafted a petition or letter seeking signatures from other employees regarding his concerns. At the hearing Mr Brewer denied any petition or letter existed but confirmed he had spoken to other team members about his concerns, seeking their opinion on what to do next. No letter or petition was produced nor evidence of affected staff members provided.

[28] The client's employee Mr Ria spoke to Mr Raroa regarding the 28 March incident. From their discussions, Mr Raroa formed the opinion Mr Brewer had convinced the rest of his team to refuse to step in for the Team Leader because of the issues he was having and the way he was paid.

[29] Mr Ria informed Mr Raroa *"if [AIL] can't sort it"* he would send an email on behalf of the client invoking the frustration clause 17 in the agreement. Mr Raroa understood this meant AIL had to use Mr Brewers 90 day trial clause 28 as a way of *"sorting it"*. Mr Raroa confirmed no email had been received by him regarding

removal of Mr Brewer pursuant to clause 17. Mr Raroa relayed the client's concerns to Mr McDowall who discussed this with Mr Black.

[30] Mr Black gave evidence about the effect upon AIL's contract with their client if the frustration clause 17 was invoked in the agreement. In short there were key performance indicators (KPIs) within the client contract which would be affected to AIL's detriment if Mr Brewer was removed under the frustration clause 17. In Mr Blacks words this *"wasn't a request but an instruction"* with *"no room to negotiate a different outcome"* although he did not speak to the client directly relying on Mr McDowall's information relayed from Mr Raroa.

[31] As a consequence Mr Black and Mr McDowall agreed AIL would use the 90 day trial clause 28 to dismiss Mr Brewer. This would avoid the client invoking the frustration clause 17 requiring Mr Brewer's removal and detrimentally affecting the achievement of the KPI's.

[32] On 10 April 2012, AIL served Mr Brewer with a letter terminating his employment effective immediately pursuant to clause 28 (90 day trial period) of the agreement.

Is the dismissal justified?

[33] There is no dispute Mr Brewer was dismissed. AIL primarily relies upon s67A and 67B of the Act and clause 28 (90 day trial) in the agreement to 'justify' the dismissal. Section 67B removes the Authority's jurisdiction to enquire into any personal grievance arising from the dismissal.

[34] Section 67A of the Act sets out the written requirements of a "trial provision" within an employment agreement and defines the type of employee trial provisions apply to:

> *[67A]* ***When employment may contain provision for trial period for 90 days or less***
>
> *(1)* *...*
>
> *(2)* ***Trial provision*** *means a written provision in an employment agreement that states, or is to the effect, that –*
>
> *(a)* *For a specified period (not exceeding 90 days), starting at the beginning of the employee's*

> *employment, the employee is to serve a trial period; and*
>
> *(b) During that period the employer may dismiss the employee; and*
>
> *(c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*
>
> *(3)* ***Employee*** *means an employee who has not been previously employed by the employer.*

[35] Subject to compliance with s67A "giving the employee notice of the termination before the end of the trial period" will mean "an employee … may not bring a personal grievance or legal proceedings in respect of the dismissal"(s67B). There is no dispute Mr Brewer was given notice of termination within the statutory timeframe.

[36] If clause 28 does not comply with s67A then 67B does not apply and Mr Brewer may bring a personal grievance relating to the dismissal before the Authority.

[37] In those circumstances, the dismissal must then be tested for justification under s103A of the Act. This is determined on an objective basis applying the test set out in s103A(2) namely "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred." In applying the test in subsection (2), the Authority must consider the following (s103A(3):

> *"(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee."*

[38] There is little or no evidence of AIL addressing any of the matters set out in s103A(3)(a) to (d). This is due to AIL's reliance upon clause 28 to justify the dismissal. Accordingly if the Authority determines clause 28 is not a trial provision and/or Mr Brewer is not an employee as defined by s67A, the failure by AIL to

address any of the matters set out in s103A(3)(a) to (d) inevitably leads to the conclusion AIL did not do what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This shall render the dismissal unjustified.

Is clause 28 (90 day trial period) in the agreement a 'trial provision' as defined by s67A?

[39] At the start of hearing, the Authority provided parties with copies of s.67A and 67B of the Act together with Brookers Commentary and copies of the Employment Court decision *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 and a determination of the Authority *Wilson v. Promotional Systems Ltd* [2011] NZERA Auckland 166 dated 26 April 2011. The Authority invited submissions from counsel on the enforceability of clause 28 as a consequence.

[40] Written submissions were received from Mr Brewer. No further written submissions were received from AIL despite a time extension to 10 September 2012.

[41] The Employment Court in *Smith v. Stokes Valley Pharmacy* (ibid) at para.[48] held where legislation such as s67A and 67B removes access to courts and tribunals it "should be strictly interpreted and as having that consequence only to the extent that is clearly articulated." The Court went further to hold at para.[83]:

> *[83] ... [Sections 67A and 67B] provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.*

[42] This Authority in *Wilson v. Promotional Systems* (ibid) considered a 90 day trial period clause. The clause provided for the termination of employment by two weeks' written notice within the 90 day period but omitted reference to the inability of the employee to bring a personal grievance or other legal proceedings in respect of the dismissal. The Authority held this omission in the clause was fatal and it "was not a 'trial provision,' because an essential step had been missed out of it when it was drafted" at [22].

[43] Clause 28 of the agreement omits reference to the inability of Mr Brewer to bring a personal grievance or other legal proceedings in respect of the dismissal. Instead clause 18 sets out a personal grievance and disputes procedure inferring Mr

Brewer remains entitled to bring a personal grievance for investigation by the Authority despite termination of employment pursuant to clause 28.

[44] The omission from clause 28 of any reference to the inability of Mr Brewer to bring a personal grievance or other legal proceedings in respect of the dismissal means this clause cannot be a "trial provision" as set out in s67A of the Act. As a result the Authority determines it has jurisdiction to consider Mr Brewers personal grievance.

[45] For the reasons set out in paragraphs [42] to [44] above the Authority determines the dismissal was also unjustified.

Was Mr Brewer an 'employee' as defined by s67A when he signed the AIL employment agreement dated 14 January 2012?

[46] In the event the Authority is wrong in its above determination, it turns to consider the second issue. AIL submits Mr Brewer's previous employer was HES as set out in the HES agreement dated 14 December 2009. Accordingly Mr Brewer was a new employee as defined by s67A when he signed the employment agreement dated 14 January 2012.

[47] HES was an unincorporated joint venture partnership between AIL and Mr McDowall. No partnership deed was produced. Accordingly the partnership is governed by the Partnership Act 1908.

[48] Section 9 of the Partnership Act 1908 provides for partners to be bound by acts on behalf of the firm. Section 12 of the Partnership Act 1908 provides for partners to be liable jointly with other partners for all debts and obligations of the firm.

[49] The Employment Court in *Muollo v Rotaru* [1995] 2 ERNZ 414 at p 6 confirmed partnerships and joint ventures made up of companies can be employers. The Court referred to the decision of the Supreme Court *NZ Federated Labourers IAOW v Tyndall* [1964] NZLR 408 where a full Court held "a joint venture consisting of three companies (including two that were already employers) constituted a new employer, although not a new legal entity."

[50] The Employment Court in *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC) determined the question to ask when identifying an employer is whether the

individual said to be the employer has held themselves out to be the employer. The Authority in *Mawley v Jorgensen t/a Barista the Espresso Bar* ERA Wellington WA120/09, 28 August 2009, considered the test set out in *Colosimo* and posed it as a question: Who would an independent but knowledgeable observer have said was the employer?

[51] HES is an unincorporated joint venture partnership between AIL and Mr McDowall. AIL as a partner in HES is bound by the acts and liable for the obligations of HES including the employment obligations to Mr Brewer.

[52] Evidence of the employment relationship between Mr Brewer and AIL at the time can also be found in the employment forms, Mr Brewer's dealings with AIL's employees including Mr McDowall, naming of AIL as the employer for IRD and the application for certificate of authority purposes, working at AIL's clients' sites using its uniforms and use of AIL's offices. It is the cumulative effect of this factual background which standing back as an independent observer leads to the conclusion AIL was Mr Brewer's employer at all material times either solely or in partnership with Mr McDowall trading as HES.

[53] Given the above finding, Mr Brewer cannot be considered an "employee" as defined by s67A having been previously employed by AIL in 2009 onwards. Clause 28 is therefore unenforceable and the Authority determines it has jurisdiction to consider Mr Brewers personal grievance.

[54] For the reasons set out in paragraphs [42] to [44] above the Authority determines the dismissal was also unjustified.

Was there conduct by Mr Brewer such as to enable clause 17 (frustration of contract) to be invoked and/or reduce the remedies sought?

[55] The wording of clause 17 requires the client to make a "request" if they wish to have an employee removed from the worksite. No such request had been made. The conduct of Mr Brewer alone could not enable clause 17 to be invoked. It would require a written request to be made by the client which was never received.

[56] From the evidence AIL was not at the time dismissing Mr Brewer under clause 17. Instead it had decided to terminate Mr Brewer's employment pursuant to clause 28 (90 day trial period) to avoid the client invoking clause 17 and detrimentally affecting its KPI's. AIL cannot now seek to rewrite history by relying upon clause 17.

[57] However an applicant's conduct may be relevant to remedies. The Authority is required by s124 to *"consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance"* in deciding the nature and extent of remedies to be provided in respect of a personal grievance.

[58] In order for contributing behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].

[59] The conduct of Mr Brewer is set out in [27] to [38] above. The emails dated 25 and 26 March 2012 cannot alone be seen as conduct by Mr Brewer causative of the outcome. Mr Brewer was entitled by clause 18 of the agreement to raise a personal grievance with his employer in this manner. Further Mr Brewers speaking to other affected employees about his personal grievance cannot amount to conduct which breached trust or confidence causing this outcome.

[60] It is clearly the situation brought about by Mr Kalani on 28 March 2012 which has brought matters for Mr Brewer to a head. Mr Brewer denied in cross-examination making Mr Kalani call Mr Ria or Mr Raroa or to use the Team Leader issue to leverage his pay dispute. Mr Brewer accepted he may have impliedly supported Mr Kalani's decision by doing nothing to stop him but when he was asked in cross-examination what he would have done in Mr Kalani's situation, he said "*I would have possibly stayed if I was Team Leader*".

[61] There is no evidence from other employees who were involved including in particular Mr Kalani. The only direct evidence of Mr Brewers conduct on the night has been given by Mr Brewer alone. Accordingly his evidence is preferred. The inferences of any causal link based on Mr Brewers conduct and the outcome is at best speculative and insufficient to warrant reduction of remedies pursuant to s124 of the Act.

[62] The Authority determines there was no conduct by Mr Brewer such as to enable clause 17 (frustration of contract) to be invoked and/or reduce the remedies sought.

Remedies

[63] Mr Brewer confirmed at the beginning of the hearing he no longer sought the remedy of reinstatement.

[64] The termination of employment was effected immediately relying upon clause 28 and/or 17. Pursuant to clause 16 of the agreement Mr Brewer was entitled to receive two weeks pay in lieu of notice given. Any payment shall be incorporated into the remuneration order below.

[65] Where s128(1) applies the Authority must order AIL pay Mr Brewer "… the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration." (s128(2). Three months ordinary time remuneration would be $9,000 based upon Mr Brewer's salary of $36,000 per annum.

[66] In considering an order for remuneration under s128, Mr Brewer has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement (refer *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05). An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance (s128(1)(b). The Court in *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977 held "if the remuneration has been lost because of a failure to mitigate … there is no statutory requirement to order reimbursement".

[67] On the facts Mr Brewer immediately obtained some casual security work but deposed to there being very little work available in his field. There was little evidence on the availability of work other than Mr Brewer's evidence which was unchallenged. At times he was in receipt of a benefit. On 17 July 2012 Mr Brewer advised the Authority he was required to travel to Hawai'i to see his mother whom was unwell.

[68] Mr Brewer was directed to provide an IRD printout of his gross income for the 3 month period of April to July 2012. He earned wages of $496.80 between April to May 2012 then received a benefit from May to July 2012. The receipt of a benefit is not considered in mitigation of loss.

[69] The Authority accepts Mr Brewer has taken some steps to mitigate his losses by finding alternative work but declines to award higher than the statutory provision of 3 months ordinary remuneration of $9,000 less $496.80 pursuant to s128(2).

[70] In considering an award under s123(1)(c)(i) the Court of Appeal in *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA), assessed the quantum of compensation payable to an employee where he was not humiliated or "brutally dismissed" but he was dismissed "insensitively" (at [44]). He had suffered some stress, but no medical evidence was called. The range of awards in similar cases for distress compensation was between $10,000 and $27,000. The Court could not accept that the circumstances of B's case put it in the top 2.5 per cent of awards for non-economic loss and awarded $7,000.

[71] Mr Brewer provided some evidence of his hurt and humiliation at the dismissal. No medical evidence was provided of any lasting injury. Accordingly a more modest award of $5,000 is appropriate.

Determination

[72] In summary, the Authority's determination is:

a. Mr Brewer was dismissed unjustifiably;

b. AIL is ordered to pay Mr Brewer the sum of $8,530.20 pursuant to s.128(2) of the Act;

c. AIL is ordered to pay Mr Brewer $5,000 by way of compensation pursuant to s.123(1)(c)(i) of the Act.

Costs

[73] As the successful party Mr Brewer is entitled to a contribution towards his costs. He was self-represented but incurred disbursements such as the filing fee of $71.56. AIL is ordered to pay $71.56 as a contribution towards Mr Brewers costs.

Tania Tetitaha
Member of the Employment Relations Authority