

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 205
5305280

BETWEEN

KEE (KEITH) CHAN
Applicant

AND

COMPASS PROPERTY
INVESTMENTS LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: R Harrison, counsel for applicant
J Cox, counsel for respondent

Investigation meeting: 28 March 2011

Determination: 13 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kee (Keith) Chan says his former employer, Compass Property Investments Limited (CPIL) affected his employment to his disadvantage by its unjustified action in embarking on a disciplinary investigation process when it was unable to pressure Mr Chan to resign or be demoted, and by further unjustified action in suspending him. Mr Chan also says that he was dismissed unjustifiably.

[2] CPIL denies pressuring Mr Chan to resign or be demoted. It also says the commencement of a disciplinary process and the resulting dismissal were justified in that Mr Chan: misused confidential information; undermined the relationship of trust and confidence by disputing management decisions regarding training and marketing; incited fellow employees to challenge company management decisions regarding promotional campaigns; incited other employees to challenge company management decisions at a staff meeting; and conducted himself inappropriately towards employees he was either supervising or working alongside.

[3] CPIL has also lodged a counterclaim for damages against Mr Chan in respect of the above matters, as well as an allegation that he caused loss to it by failing to meet performance targets.

Preliminary matters

1. Amended statement problem and the raising of grievance out of time

[4] The above summary of Mr Chan's employment relationship problem was taken from an amended statement of problem filed in November 2010.

[5] Prior to the investigation meeting CPIL raised an objection to the hearing of the unjustified dismissal grievance on the ground that the grievance was raised for the first time in the amended statement of problem. This was outside the 90 day period specified in s 114(1) of the Employment Relations Act 2000. Mr Harrison said the grievance was raised before November, and within the 90 day period. Since the matter involved possible reference to what occurred during mediation the parties were to resolve the question of whether there was a live issue under s 114 themselves. The Authority's investigation proceeded on the basis that they had done so.

[6] Mr Cox raised the matter again in submissions, during which it was revealed that the dismissal was tabled as an issue at mediation. Comment was then made about the extent to which the matter was addressed at mediation. For the information of CPIL it is in general unacceptable to include evidence in submissions, and s 148 of the Employment Relations Act makes it even less acceptable to seek to discuss what occurred during mediation in any event. Overall - with reference to the indication given to the Authority and the absence from the evidence of anything indicating CPIL intended otherwise - I proceed on the basis that the grievance was raised in time.

2. The counterclaim

[7] CPIL's counterclaim against Mr Chan was to have been heard together with the personal grievances. It was adjourned prior to the investigation meeting.

[8] At the time the adjournment resulted from the absence from the material filed of any evidence in support of the causation of loss and the quantification of damages. Damages were sought in the sum of: \$540,000 for loss of anticipated gross sales over 18 months; \$20,000 for breach of confidentiality and misuse of confidential information; and \$20,000 for inciting employees to breach of contract. Having now heard the evidence likely to be invoked in support of Mr Chan's liability, I suggest CPIL give careful consideration to the utility of proceeding with the counterclaim.

[9] I direct that CPIL inform the Authority by the close of business 28 days from the date of this determination of whether it wishes to proceed with the counterclaim.

Background

[10] CPIL is in the business of providing mortgage broking and property management services. It also has a property investment arm, which involves it in purchasing investment properties and re-selling contemporaneously to investors. To that end it engaged a telesales team, whose tasks were to generate leads and make appointments for visits from salespeople, with a view to securing interest from purchasers and an eventual purchase. The property investment activities were supplemented by property investment seminars featuring one or more speakers, and which were open to the public.

[11] Mr Chan was employed as a casual telemarketer in February 2007. In August 2008 he was given the position of telemarketing manager. Although CPIL said in its original statement in reply that Mr Chan was a casual employee, that issue was not pursued during the investigation and it was accepted that at the relevant time Mr Chan was a full time permanent employee.

1. Performance targets

[12] In December 2009 Mr Chan had a meeting with Mike Hackett, the managing director, and Harry Somaraju, the marketing director, during which targets were discussed. Either then or previously Mr Chan had nominated a figure of 32 appointments per week, but in December 2009 at least that target was not being met.

Mr Chan was permitted to engage the staff he considered necessary to meet the target, and to that end some new telemarketers were engaged in early 2010.

[13] Messrs Hackett and Somaraju said that the target was not met in subsequent months, and that they raised the matter with Mr Chan on approximately a monthly basis. At a meeting on 4 March 2010 Messrs Hackett and Somaraju again discussed the team's performance with Mr Chan, and in particular the failure of the team to meet the appointment target. They referred to the attempts to build a successful team and the financial burden the inability to achieve the goal was placing on the company. In addition Messrs Hackett and Somaraju believed that aspects of Mr Chan's approach to allocating roles to his staff were not successful, but they agreed to trial a new arrangement Mr Chan had suggested. Mr Chan's performance would be reviewed on 31 March.

[14] These discussions were summarised in a letter to Mr Chan of the same date. It was common ground that the letter was an accurate account of the discussion. I accept CPIL's assertion that Mr Chan was told in writing on 4 March that the inability to achieve targets was causing hardship to the company, but the letter did not go on to say that if this was to continue the company would have no alternative but to find alternative leadership. Nor was there anything in the evidence to indicate that the discussion went beyond the need for a performance review, and amounted to a disciplinary warning. I do not construe the 4 March letter, or the evidence of the surrounding discussions, as a disciplinary warning.

2. Pressuring Mr Chan to resign or be demoted

[15] The review went ahead on the morning of 31 March. Mr Chan appears to have approached it as if it were disciplinary in nature in that he gave a presentation summarising his achievements to date, and explained that although he had not met the targeted number of appointments his yearly performance had exceeded that of the previous year. He also raised the fact that he was still training a new team. At the end of the meeting he produced written 'testimonials' obtained from staff members. The testimonials spoke very positively about their experience of Mr Chan as a manager, although several contained expressions of dissatisfaction with 'meetings' that had been conducted recently.

[16] Mr Chan said that, instead of considering the points he raised, Mr Hackett asked for his resignation. When Mr Chan expressed concern, Mr Somaraju said Mr Chan was not being dismissed, but that the dissatisfaction with the marketing team's performance meant an alternative position was being offered. The position would have a lower salary, and did not involve direct line management.

[17] Messrs Hackett and Somaraju denied that Mr Chan's resignation was sought, but accepted that the possibility of an alternative position better suited to Mr Chan's skills was raised. Mr Chan was to consider the proposal and respond by 6 April. However the following events pre-empted the response.

3. The suspension

[18] As further background to these events, CPIL had engaged Lance Spaulding, a business development consultant, to provide services to it. Among other things Mr Spaulding was to provide a series of training sessions to the telemarketing staff. I understand the references to dissatisfaction with 'meetings', which appeared in the testimonials Mr Chan produced on 31 March, were references to these sessions. Some of the staff did not see the need for them, considered them a waste of time and would have preferred to keep working, and did not appreciate Mr Spaulding's upbeat motivational approach.

[19] A second activity in which Mr Spaulding was involved was a marketing initiative centred on the suburb of Browns Bay. In or about early 2010 a standard promotional letter was mailed to addresses in that area, and the telemarketers were to follow up on the letters. Again some of the staff did not support the initiative, and considered it a waste of time, particularly as they considered the Browns Bay demographic meant there was limited scope in the area for developing CPIL's business.

[20] One of Mr Spaulding's training sessions with the telemarketing staff commenced at or about 4.30 pm on 31 March. Mr Spaulding later reported to Messrs Hackett and Somaraju that the meeting had been disrupted by P, a member of the staff. P had said at the meeting that the Browns Bay campaign was not working and was a waste of money, and that CPIL was wasting its money on Mr Spaulding. She

also quoted a figure for the number of sales achieved from property investment seminars which CPIL believed she should not have known.

[21] Messrs Hackett and Somaraju concluded that P could have obtained the financial information to which she referred only from Mr Chan. They also believed that P's reported conduct at the meeting was so different from her recent behaviour that Mr Chan must have incited or encouraged her. Finally they believed there was a link between the performance review, Mr Chan's presentation of testimonials at the review, and the events at the training meeting. They said in evidence they concluded there was a prima facie case that Mr Chan had:

- (i) misused confidential information and provided the same to unauthorised employees, for an ulterior motive;
- (ii) not acted in good faith, and undermined the relationship of trust and confidence, by disputing management decisions about training and marketing;
- (iii) incited fellow employees to challenge management decisions about promotional campaigns;
- (iv) incited other employees to discord, and to challenge management decisions at a staff meeting; and
- (v) inappropriately conducted himself towards employees he was supervising.

[22] Accordingly on 1 April Mr Hackett handed Mr Chan a letter of suspension. I record that the parties' employment agreement provided for suspension as follows:

16. Other provisions

..

The employee shall not harass or traumatise other co employees while at work or after working hours and always maintain congenial working atmosphere. Failing which employer can suspend the employee and initiate disciplinary proceedings against him/her. Pending disciplinary proceedings salary will not be paid to him/her..

[23] The 1 April letter did not specify the allegations on which the suspension was based. It simply advised that a suspension was being imposed with immediate effect, to allow the company to:

undertake an investigation into disciplinary matters which have arisen at, and subsequent to, your performance review on 31st March.

4. The disciplinary investigation

[24] The investigation which followed amounted to a series of interviews with members of the telemarketing staff on the evening of 8 April 2010.

[25] With minor exceptions each employee was asked a set of questions from a prepared list. The employees were asked for: their views on the performance of the telemarketing section and how they felt about their jobs; their ideas on improvement; their views on the adequacy and method of conducting the training offered, including by Mr Spaulding and Mr Chan; the extent of their information about the cost of seminars and marketing campaigns, and how they obtained the information; whether and how they knew the number of sales obtained from seminars; and (of those who did so) why they wrote their letters (the testimonials) in support of Mr Chan and whether he told them what to write.

[26] If, as the letter of suspension suggested, the investigation concerned matters arising at and subsequent to the performance review, the interviews should have more directly addressed what occurred and why during the incident at the 31 March training session for example. The suspicion that the incident was connected with the earlier performance review should also have been the subject of questioning. Next the interviews should have addressed more directly the concern that Mr Chan had solicited the testimonials he presented at the performance review. Finally, the facts underlying the concerns that Mr Chan had 'incited' or 'orchestrated' certain actions should have been raised and explored directly with the employees.

[27] The responses were reduced to note form and were brief. The interviews themselves were also brief, and took a question and answer approach. There was no follow up.

[28] The responses to many of the earlier questions fell within a range that might be expected when employees are asked in a general way for their views about aspects of how their work is going and how it might be improved. In such brief questioning, and without any exploration of the context in which the questions had been put, I do not consider the answers disclosed any possible misconduct.

[29] Of the responses relevant to the allegations put to Mr Chan in the disciplinary context: P felt hampered by the Brown's Bay campaign and said Mr Chan told her it was 'Lance's baby'; said Mr Chan gave her the number of sales generated from seminars; and said Mr Chan commented adversely on Mr Spaulding's performance. One other said Mr Chan had mentioned the number of sales generated from seminars but did not recall the number, while a second person advised that her information on the matter came from P. One person alleged Mr Chan had said a great deal of money was being spent on seminars without good results. Another said Mr Chan told her how much Mr Spaulding was paid. As for the concern about the testimonials, P later said she wrote hers at Mr Chan's request, and the others who responded said their letters were written at P's request.

[30] By letter dated 14 April Mr Chan was advised that initial inquiries had given rise to concerns about his conduct, including:

- . undermining and sabotage of the marketing initiative in Browns Bay, by telling team members the campaign was a waste of resources, would not work, and was being driven unsuccessfully by Mr Spaulding;
- . undermining and sabotage of the training initiative affecting telemarketing staff, with particular reference to Mr Spaulding's part in the initiative and adverse comments about his performance;
- . disclosing confidential information to the staff, including Mr Spaulding's rate of pay and the sales achieved from seminars;
- . orchestrating the staff to question the wisdom and effectiveness of the Brown's Bay campaign by providing P with confidential information and encouraging her to speak out, in turn undermining the campaign.

[31] Even taking into account Mr Chan's subsequent refusal to participate in the disciplinary investigation, for the reasons indicated the questions and answers were not an adequate basis for concerns of the kind expressed in the letter. I note, too, that the letter contains reference to alleged statements not apparently obtained during the interview process. Overall I find the allegations of 'sabotage' and the 'orchestrating' of staff in particular were an overstatement of the information obtained from Mr Spaulding and during the questioning of the staff. Messrs Hackett and Someraju said they were trying to take a 'softly, softly' approach to the questioning, and while I

accept the need for care, such detail as was available was too limited and fragmented to warrant extrapolations of the kind that occurred.

[32] The 14 April letter sought a reply within 3 days, and suggested a meeting. It referred to possible dismissal if Mr Chan was found to be guilty of misconduct.

[33] By letter dated 19 April Mr Chan's then-representative denied the allegations and asserted that the outcome of the employer's investigation had already been determined. He said a detailed response would be provided 'at the appropriate time'. Personal grievances were raised in respect of: the unfair conduct of the performance review; the unjustified suspension; and the unfair and unreasonable exercise of the right to undertake a disciplinary investigation and take disciplinary action.

[34] By further letter to Mr Chan's then-representative, dated 22 April, CPIL denied the performance review was unfair and that Mr Chan was asked to resign or be demoted, said suspension was justified because of the serious nature of the allegations against Mr Chan, and denied that the outcome of its disciplinary investigation was predetermined. It attached the notes of the 8 April interviews and sought a response.

[35] There followed an unfortunate stand off in which Mr Chan adhered to the view that the disciplinary investigation was unlawful and insisted on mediation, while CPIL persisted unsuccessfully in attempting to obtain a reply from Mr Chan to its allegations.

[36] In the course of the relevant exchanges, by letter dated 5 May 2010 CPIL's solicitors suggested Mr Chan engage in the investigation process and sought a meeting. In a further letter dated 7 May 2010 the solicitors referred to a telephone conversation and repeated the view that the investigation process had not been completed. They required Mr Chan to attend a meeting on 11 May. In a letter of response also dated 7 May Mr Chan's then-representative asserted that Mr Chan was within his rights not to participate in an investigation which arose from unfair processes, being the unfair performance review and the suspension. The letter repeated that the outcome was predetermined and advised that Mr Chan's response would be provided, but not as part of a flawed process.

[37] On 9 May 2010 Mr Chan's then-representative lodged a statement of problem in the Authority in respect of the disadvantage grievances then-identified. The statement of problem included an assertion that Mr Chan would not attend the 11 May meeting because the instruction to do so was unreasonable in the light of the unfair disciplinary process.

[38] Since the stand off between the parties remained unresolved, by letter dated 17 May 2010 CPIL asserted it had conducted a full and fair investigation and noted 'the failure of Mr Chan to refute the evidence against him.' It said that on the evidence available to it Mr Chan had:

- (i) misused confidential information and provided the same to unauthorised employees, for an ulterior motive;
- (ii) not acted in good faith, and undermined the relationship of trust and confidence, by disputing management decisions about training and marketing;
- (iii) incited fellow employees to challenge management decisions about promotional campaigns;
- (iv) incited other employees to discord, and to challenge management decisions at a staff meeting; and
- (v) inappropriately conducted himself towards employees he was supervising.

[39] The letter concluded that the actions amounted to serious misconduct. It observed that Mr Chan appeared to have decided to abandon his employment already, and that Mr Chan was a casual employee and not entitled to further employment. It confirmed that Mr Chan's employment was terminated with effect from 14 May 2010.

The disadvantage grievances

1. The pressure to resign or be demoted

[40] The disadvantage grievance in respect of the performance review, and in particular the allegation that Mr Chan was pressured to resign or be demoted, was re-framed in the amended statement of problem. As reframed, it addresses the genuineness of the reasons for embarking on the disciplinary process.

[41] I consider that the suspension letter is worded so vaguely that, together with the timing of the suspension, Mr Chan had reason in early April to doubt the purpose of the disciplinary investigation. However the concerns leading to the disciplinary process were explained in more detail in the 14 April letter. I accept that the concerns were genuinely held, and that the disciplinary process was embarked upon for genuine reasons. I do not accept that it was embarked upon because CPIL had been unable to pressure Mr Chan to resign or be demoted.

[42] Accordingly I do not accept Mr Chan has a personal grievance on this ground.

2. The suspension

[43] The statutory test of justification for a dismissal or other action, as set out in s 103A of the Employment Relations Act, applies to the justification for a suspension. In addition, principles relevant to the justification for a suspension have been summarised as follows by the Employment Court:

*[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of an employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from **Tawhiwhirangi** ... confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.¹*

[44] In a subsequent case² the Court expressed the view that only in rare cases would an employer be justified in imposing a suspension without the employee having an informed opportunity to be heard before the decision was made.

[45] The terms of the parties' employment agreement are relevant to the justification for a suspension. The suspension provision here is located in a clause whose purpose appears to be to identify conduct which will be regarded as

¹ **Graham v Airways Corporation of New Zealand** [2005] ERNZ 587, 613

² *B & D Doors Limited v Hamilton* CC 28/07, 18 December 2007

misconduct. Within that framework there is a provision addressing employees' relationships with other employees. The suspension provision accompanies that provision. Accordingly I construe the agreement as permitting suspension when one employee is alleged to be harassing, or probably bullying, other employees, but I do not construe the agreed ability to suspend as extending to other allegations of misconduct. This is so whether or not a suspension was to be on pay.

[46] Secondly, Mr Chan was not given an opportunity to be heard before he was suspended. There was no imminent danger, or risk to safety sensitive operations in the workplace. In addition, concerns about access to and the risk of misuse of confidential information may in general be capable of justifying a suspension without the employee first being heard on the matter, but with the benefit of the evidence and argument regarding confidential information here I do not consider this is such a case.

[47] For these reasons I find the suspension was not an action a fair and reasonable employer would have taken, and it was unjustified.

Whether the dismissal was justified

[48] The s 103A test of justification is one of whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances. I now address the grounds of dismissal as they were framed.

1. Misuse of confidential information

[49] The alleged misuse of confidential information arose out of allegations that Mr Chan informed the staff of: the number of sales achieved from seminars; the rate at which Mr Spaulding was paid; and a weekly payment to a telemarketing company. There was also an allegation that Mr Chan made a general comment that the seminars were unduly costly. P was in effect the principal recipient of the information, although no-one was alleged to have received all of the information and some did not receive any of it.

[50] To be justified in concluding Mr Chan was guilty of misconduct in this respect CPIL must show at least that the information in question was appropriately described

as confidential, that it had reasonable grounds for its conclusion that Mr Chan used the information as he was alleged to have done, that it had reasonable grounds for its conclusion that such use amounted to misuse, and that the overall conclusion that Mr Chan's actions in this regard amounted to misconduct was one a fair and reasonable employer would have reached.

(a) Sales achieved from seminars

[51] Mr Chan admitted providing the telemarketing staff with the information about the sales achieved from seminars. He also said such information would have been readily available to them in any event, which CPIL disputed hotly. Even so, it accepted that the information was on a whiteboard in a room that was accessible to the telemarketers even if not frequented by them.

[52] Further, although the number of sales achieved from seminars could be commercially sensitive information in certain hands, when I asked CPIL why it was concerned about Mr Chan's disclosure of the information to telemarketing staff the response was that Mr Chan must have disclosed it as a comment on Mr Spaulding's lack of success. That answer cast doubt on whether the concern was really with the sensitivity of the information, and suggested that true concern was with Mr Chan's motive in using the information as he did. If so, the matter should have been put to Mr Chan in that way, rather than through the more serious allegation that was made.

(b) Mr Spaulding's rate of pay

[53] Mr Spaulding was a supplier of services. While the information about the rate at which he was paid might be private and personal to him, and although in particular circumstances information of that kind may have a special sensitivity, I would in general consider the information to be confidential but at the low end of the scale. Not only that, the information disseminated was wrong and Mr Chan's evidence was that he did make comment but he said only what he thought the rate would be. The matter should have been addressed as one of the appropriateness of indulging in speculation about Mr Spaulding's remuneration.

(c) Payment to telemarketing company

[54] Mr Chan admitted providing an employee, R, with information about the payment made to the telemarketing company. He said he did so on the basis that the information was confidential, as he considered R to be an ally and that the two shared a similar approach to telemarketing.

(d) Cost of seminars

[55] I regard the statements about the cost of seminars to be too broadly-stated to warrant an accusation that confidential information was thereby wrongly disclosed. Indeed Mr Chan admitted that he may have commented that the seminars would not be cheap, but said further that he was not aware of the actual costs himself. He merely made assumptions.

(e) 'Ulterior purpose'

[56] A further element in this ground of misconduct was CPIL's belief that Mr Chan's disclosure of information was for the 'ulterior purpose' of protecting his own position and deflecting concerns about his performance.

[57] This belief was based on speculation, and was not expressly put to Mr Chan for a response. I do not accept there were reasonable grounds for it. At the same time, on the evidence I heard, Mr Chan was being disloyal and mischievous in his use of the information. He was seeking in effect to criticise his employer, rather than to inform, assist or enhance the performance of the telemarketing staff.

(f) Conclusion

[58] Mr Cox cited two judgments of the Employment Court in support of the justification for a dismissal on this ground. The first was *Power Beat International Limited v Andersen*³. The employee concerned was married to a former employee who had recently been dismissed and had threatened legal action. The employer became concerned about the employee's access to sensitive information in its files

³ [2001] ERNZ 114.

and imposed a redundancy. The second was *Williams v The Warehouse Limited*.⁴ There the employee was dismissed because he disclosed to his partner, who was also an employee, confidential information about her which he had obtained during a management meeting. Relevant to the issue of the employer's ability to maintain trust and confidence in the employee was the employee's inability to separate personal and professional interests.

[59] Other than to the extent that *Williams* involved the disclosure of information by one current employee to another, I do not consider the facts in the cases to be comparable. For the reasons discussed above I do not accept that the information in question here has the level of confidentiality of the information in the cases cited, and I do not accept that such disclosure as occurred here could reasonably be said to amount to a disclosure of confidential information warranting dismissal.

2. Lack of good faith and undermining conduct in disputing management decisions

[60] This ground of misconduct was concerned with Mr Chan's allegedly disputing management decisions about training and marketing. CPIL said in evidence that its conclusions were based on comments Mr Chan made to staff members and set out in the 14 April letter, although the source of some of its information is not apparent from the 8 April interview notes.

[61] The comments in question included Mr Chan's criticisms of the Browns Bay initiative and of Mr Spaulding. Mr Chan admitted to some of this conduct in evidence. In particular he admitted commenting to P that the Browns Bay campaign was Mr Spaulding's 'baby' and that he did not believe the initiative was well executed.

[62] While Mr Chan's evidence was indicative of a disloyal attitude, I find CPIL's approach to the matter at the time was too reliant on snippets of allegations about what had been said, and which were obtained in not always clear circumstances. The information was not sufficient to justify a finding of misconduct even in the absence of a response from Mr Chan.

⁴ AC 32/08, 5 September 2008.

3. Inciting fellow employees to challenge decisions about promotional campaigns

[63] This ground concerned CPIL's view that Mr Chan incited P to act as she did at the 31 March staff meeting. There was no evidence in support of that allegation, and the basis was speculative. Further, P was not asked about the matter when she was interviewed. She did not give evidence. Even in the absence of a response from Mr Chan, there were no reasonable grounds for CPIL's conclusion.

4. Inciting fellow employees to discord and to challenge management decisions

[64] CPIL held the view that P and three other newly-employed telemarketers were at the heart of the discord, and that Mr Chan influenced P who in turn influenced the others. There was no evidence in support of this allegation, and I do not accept that anything in the 8 April interviews was capable of supporting it. Again, the allegation was largely based on speculation. Even in the absence of a response from Mr Chan at the time, there were no reasonable grounds for this conclusion.

5. Inappropriate conduct towards other employees

[65] None of the facts in support of this allegation were put to Mr Chan in the correspondence. There was only one employee involved, and she neither raised any concern nor was asked about inappropriate conduct during the 8 April interviews. There was no indication that she was asked about the matter in the context of a disciplinary investigation at any other time. She did not give evidence.

[66] It was common ground that Mr Chan would spend time with the employee in his office, discussing difficulties he was experiencing with his marriage. That was the conduct of concern. There were no more than vague assertions as to the duration and frequency of the conversations, and minimal details of the content. For his part Mr Chan said he considered the employee a friend, and he was confiding in her.

[67] This allegation appears to be a makeweight. I do not in any event accept that a finding of misconduct in respect of it was a finding open to an employer acting fairly and reasonably.

6. Conclusion

[68] The real nature of CPIL's concerns with Mr Chan's conduct was that he was undermining training and marketing initiatives in the first quarter of 2010, through a small group of telemarketers in particular, and in order to deflect attention from his performance.

[69] However with reference to the grounds of dismissal it specified, and for the above reasons, I do not consider that the decision to dismiss was one a fair and reasonable employer would have made.

[70] The dismissal was unjustified.

Remedies

1. Unjustified suspension

[71] Since Mr Chan was paid for the period of his suspension, the remedy available for his personal grievance is of compensation for injury to his feelings resulting from the unjustified suspension.

[72] The suspension was handled poorly, and Mr Chan was required to clear his desk and leave the premises immediately. I accept this was humiliating, and find nothing in the circumstances to warrant any finding of contributory conduct.

[73] CPIL is therefore ordered to compensate Mr Chan for the associated injury to his feelings in the sum of \$3,000.

2. Unjustified dismissal

(a) reimbursement of lost remuneration

[74] Mr Chan lost remuneration calculated as his salary of \$50,000 pa for the period from his dismissal on 14 May 2010 to the date of hearing.

[75] I take into account that Mr Chan declined the opportunity to be heard during the disciplinary investigation. CPIL was entitled to embark on the investigation. It could not do other than express to Mr Chan its concerns and why it held them, as it did in the 14 April letter. I do not accept that in the communications at the time it went further and expressed a final conclusion, and nor do I accept that anything said during the performance review meant the outcome of the disciplinary process was predetermined. Overall I do not accept Mr Chan had grounds for asserting that the outcome of the investigation was already determined.

[76] Secondly, any uncertainty about the subject matter of the disciplinary investigation was addressed in the 14 April letter. I do not accept that Mr Chan was entitled to refuse to participate in CPIL's attempts to obtain his response to the contents.

[77] I have found the dismissal unjustified because, despite Mr Chan's lack of response, I found the substantive grounds for it were misconceived or overstated and the available material was not sufficient to support the conclusions reached. At the same time I find Mr Chan failed to engage in the disciplinary process in breach of his obligation to respond communicatively⁵. In addition he was guilty of disloyal conduct in breach of his obligations to his employer when referring to financial information and expressing his views of the Brown's Bay initiative and of Mr Spaulding as he did. Taken cumulatively the foregoing amounts to contributory conduct warranting a substantial reduction in the remedies to which Mr Chan would otherwise have been entitled.

[78] I impose a 75% reduction so that the reimbursement of Mr Chan's lost remuneration is calculated as:

$$.25 \times 10/12 \times \$50,000 = \$10,417.$$

[79] Payment is ordered accordingly.

(b) compensation for injury to feelings

⁵ As discussed in *Radius Residential Care Ltd v McLeay* [2010] NZ EMPC 149

[80] I apply a similar reduction to the compensation awarded for injury to Mr Chan's feelings.

[81] CPIL is ordered to compensate Mr Chan in the sum of \$2,000.

Summary of orders

[82] CPIL is ordered to pay to Mr Chan:

- i. \$3,000 as compensation for injury to feelings arising from the unjustified suspension;
- ii. \$10,417 as reimbursement of remuneration lost as a result of his personal grievance; and
- iii. \$2,000 as compensation for injury to feelings arising from the unjustified dismissal.

Costs

[83] The parties agreed that costs should be dealt with in this determination.

[84] Mr Harrison advised that Mr Chan is in receipt of a grant of legal aid.

[85] I approach the matter with reference to the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*⁶. As the successful party Mr Chan is entitled to a contribution to his costs based on a notional daily rate of \$3,500 for a one-day meeting in the Authority.

[86] Since I find no reason to adjust the rate CPIL is further ordered to contribute to Mr Chan's costs in the sum of \$3,500.

R A Monaghan

Member of the Employment Relations Authority

⁶ [2005] ERNZ 808