

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 10  
5418181 & 5418179

BETWEEN IAN DAVID CARDNO  
First Applicant

AND JOHN JOSEPH WOLYNCEWICZ  
Second Applicant

AND NCF INTERNATIONAL LIMITED  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Denise K Evans, for the Applicants  
Zhenzhen Chen and Andrew Lin, for the Respondent

Investigation Meeting: 25 and 26 September 2013

Submissions Received: Orally and in writing by the Applicants and Respondent  
on 26 September 2013

Determination: 28 January 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ian David Cardno and John Joseph Wolyncewicz were employed respectively as General Manager and Marketing Director of NCF International Limited until 5 April 2013 when they were both dismissed with immediate effect. They both claim personal grievances for unjustifiable dismissal against their former employer, and seek remedies including unpaid remuneration and holiday pay, compensation for distress and humiliation, and costs.

[2] Mr Wolyncewicz additionally claims the reimbursement of some business expenses he paid on behalf of NCF International Limited. These include expenses

incurred in incorporating the company and arranging a Post Office box. NCF International Limited (NCF) says it has agreed in writing to reimburse Mr Wolyncewicz those two expenses but could not do so as he had declined to provide a bank account number. It denies authorising other expenses for which reimbursement is sought by Mr Wolyncewicz, including the services of his son as a driver for the Chinese directors, and legal expenses in respect of a separate project in which those directors had some interest.

[3] NCF was formed and registered in January 2013 to take advantage of export opportunities to China for milk products. When it was incorporated NCF had a mixture of New Zealand-based and China-based directors. Messrs Cardno and Wolyncewicz were two of three New Zealand-based directors. NCF says its dismissal of Mr Cardno and Mr Wolyncewicz was justified as the Board of the company had decided it no longer had trust and confidence in them.

[4] Mr Cardno and Mr Wolyncewicz raised their personal grievances separately and filed separate applications in the Authority. The two applications were investigated together over two days to ensure an efficient use of resources.

#### **Events leading to the dismissal of Mr Cardno and Mr Wolyncewicz**

[5] Mr Cardno and Mr Wolyncewicz were business partners before their employment with NCF. Each applicant gave evidence that in the two years before NCF was formed he had a business relationship, as a broker, with a company that procured and exported milk powder products to China. The Managing Director of that company was Mr Bihua Fu.

[6] After Mr Bihua was removed as a director of that company he discussed with Mr Cardno and Mr Wolyncewicz the possibility of starting a new business to export milk powder products to China. The new venture would involve Mr Bihua, Mr Wolyncewicz, Mr Cardno, a Mr Li Bing, whom both applicants had previously met, and others from China. Discussions regarding the formation of a new company took place throughout December 2012. Mr Cardno and Mr Wolyncewicz say that during this time they saw their roles as those of brokers.

[7] The discussions involved a number of mainland Chinese business persons who travelled to New Zealand on 9 January 2013 where they were met by Mr Cardno and

Mr Bihua. They held discussions in Auckland and then travelled to Wellington where they were joined by John Wolyncewicz.

[8] On 11 January 2013 the group, including Mr Cardno and Mr Wolyncewicz, looked at various business premises in Wellington and decided where the office for the new business venture would be established. That day the group determined the name of the company and Mr Cardno's and Mr Wolyncewicz's involvement in it. In addition to their positions within the company, each was to be a director and a shareholder of 2.5% shares. The Managing Director would be Mr Bihua, who lived in Wellington.

[9] Mr Bihua translated to and from English and Mandarin among the group. In the course of the afternoon terms of employment were agreed for each applicant. Mr Cardno was to be employed full time on an annual salary of \$120,000 and Mr Wolyncewicz would be employed part-time on a salary of \$50,000 per annum to reflect the reduced hours he would work. Both say they were told they would be recompensed for creating the business and product for the benefit of the new company.

[10] Over the next week the applicants travelled to Auckland with the Chinese business group where they met with the manufacturer of the milk powder products to discuss a supply agreement. They also worked on document preparation for the incorporation of the company and on the preparation of budgets for 2013. Mr Wolyncewicz says the budget was discussed and approved by Mr Li and Mr Lai Yebin, who was another of the Chinese business contingent who would be a director of the company.

[11] NCF was incorporated on 25 January 2013. The lease for the Wellington premises was signed; bank accounts were opened; and a Post Office box secured for the company. Mr Cardno travelled with Mr Bihua, Mr Li, and Mr Lai to Auckland where they signed a supply agreement and a Memorandum of Understanding with the manufacturer of milk power products. Mr Lai and Mr Li then returned to China.

[12] Mr Cardno signed his employment agreement with Mr Bihua on 28 January 2013. Mr Wolyncewicz signed his employment agreement on that day but it was not signed by Mr Bihua. Mr Wolyncewicz says he asked Mr Bihua on many occasions to sign it but, for reasons which remain unclear, he did not.

[13] Neither applicant's employment agreement contained a starting date and the date from which their employment commenced is a matter of dispute. Both applicants say they were working towards the establishment of the company from early January and the latest date their employment commenced was 11 January 2013.

[14] Mr Cardno says that, when signing his employment agreement, he made it clear to Mr Bihua that the agreement provided for salary to be paid monthly in arrears, and that the first salary payment to him, and to Mr Wolyncewicz, would be to cover the month of January 2013. Mr Cardno says that Mr Bihua made no comment on that at the time. The evidence of both applicants is that the budget approved by all directors on 24 January 2013 made provision for the payment of salaries for that month. This is a matter that was later contested by NCF, although it provided no documentary evidence to support its view.

[15] Mr Cardno and Mr Wolyncewicz each gave evidence of a meeting they attended with Mr Bihua on 1 March 2013 to introduce NCF to the Minister of Primary Industries and to advise him of the significant exports that the new company anticipated undertaking. Immediately after that meeting the applicants say they met with Mr Bihua who informed them that the directors in China had agreed that the three of them could retain \$1.70 profit margin on each can of milk product exported. They calculated the worth of this to be in excess of \$578,000 on the first shipment alone.

[16] Both applicants say Mr Bihua also promised they would be provided with company vehicles to the value of around \$80,000, which would be purchased from the first shipment scheduled for August 2013.

[17] Mr Bihua did not give evidence for NCF in the investigation meeting. The only witness for NCF was Mr Li whose evidence was arranged to be given by video link, but was ultimately given by way of Skype, from China. It was translated by a Mandarin-speaking interpreter provided by the Authority. I am grateful for the patience, perseverance and courtesy she demonstrated throughout the two days.

[18] Mr Li says there was no agreement that Mr Cardno or Mr Wolyncewicz would be paid for any services they provided before NCF was registered as a company. In his view, the agreement was that employment would commence once the company signed its first formal contract. That occurred on 29 January 2013. When asked if it

was fair to expect Mr Cardno and Mr Wolyncewicz to have worked for no recompense throughout the month of January, Mr Bing Li replied that each was helping as “*a friend*” during that time.

[19] He acknowledged the applicants were offered, and accepted, employment as General Manager and Marketing Director respectively on 11 January 2013, but says that their employment arrangements were not finalised at that time. In his view the parties established their intentions to form employment relationships on 11 January, but did not commence the relationships until later that month. Mr Li contends the earliest date the applicants commenced employment with NCF was 28 January 2013, which was the date he signed Mr Cardno’s employment agreement.

[20] Mr Cardno says he was busy getting the new company up and running as a business entity during January and February 2013. He was responsible for matters relating to the product, and Mr Wolyncewicz was responsible for corporate services, including banking, administrative and secretarial functions. Both applicants say their understanding from the budget agreement reached in January was that the Chinese directors would transfer funds of NZ\$300,000 to meet the set-up, salaries, and ongoing operational costs of the company. However, the only transfers made totalled approximately \$65,000. Mr Cardno says there were many communications between the directors in China and New Zealand about the lack of funds and the delays in receiving them.

[21] Mr Li’s evidence is that the Board agreed initially to fund 300,000 RMB<sup>1</sup> (at the time equivalent to approximately NZ\$60,000) for the start-up period and for subsequent funding to flow when required. He rejects Mr Cardno’s evidence of the Board agreeing to provide NZ\$300,000 upfront. Mr Wolyncewicz’s recollection of the amount to be transferred supports Mr Cardno’s that the currency was to be New Zealand dollars.

[22] By March 2013 Mr Cardno and Mr Wolyncewicz say they were becoming increasingly concerned about the lack of funds in the company’s bank account. Mr Cardno raised this with Mr Lai and other directors, informing them of the difficulties NCF faced in the absence of financial resources. He provided financial information about the March/April 2013 period and noted that he looked forward to receiving the

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<sup>1</sup> Renminbi, the official currency of China

next instalments of the budgeted finance in order that the company could continue trading.

[23] Mr Wolyncewicz says that there were discussions between the directors in China and New Zealand about the lack of funds and the delays it caused in finalising arrangements for resources needed for the Wellington office. Mr Cardno says they were assured on 5 March 2013 that the money would be coming through that month.

[24] Around the middle of March Mr Lai informed Mr Cardno that a Violet Zhan would be arriving at the NCF office in Wellington. Mr Cardno says he had been told she was from China and was Mr Lai's representative. Her purpose for being in New Zealand was to improve communication between directors based in China and those based in New Zealand. Ms Zhan duly arrived and informed the applicants that the financial information they had previously supplied to the Chinese directors did not meet those directors' formatting requirements. They worked with her to ensure that the information was reformatted to meet the new requirements. Mr Wolyncewicz says none of this information was new as he had consistently kept the Chinese directors informed of all matters relating to the company.

[25] On Saturday 23 March 2013 Mr Lai raised a number of issues by email with Mr Cardno. Ms Zhan translated the contents into English. Mr Lai queried aspects of the budget, including computing equipment, payroll payments, and the formatting of budget information. His email clarified the expectations of the Chinese directors about the tasks they required to be undertaken and the order in which they should be completed.

[26] These included financial information, the company's shareholders' agreement, and an employment agreement for NCF staff. Mr Cardno responded to the email on Tuesday 26 March following a meeting that day with Ms Zhan. With her assistance the computer systems quotations that had previously been supplied to Mr Lai had been reformatted as required by the Chinese directors, and resubmitted. All other financial information had been similarly reformatted to meet the new expectations.

[27] In his emailed response, which was copied to the other directors, Mr Cardno clarified the salary situation that Mr Lai had queried, noting that he and Mr Wolyncewicz had received salary payments for the months of January and February 2013 as provided for in the budget. Mr Cardno explained that they had been

extremely busy on NCF business throughout the month of January, and had worked on weekends and public holidays. He noted that Mr Bihua had elected not to take his salary in January or February because of the cash flow situation, but that he was owed salary for those months as well as the current month.

[28] Mr Cardno's response addressed all the issues raised in Mr Lai's email and reiterated the dire financial situation of NCF, noting that the company had debts it could not pay. He advised it was unlawful in New Zealand for a company to operate while insolvent. He expressed his concern that NCF would find itself in that position unless an injection of funds was received immediately.

[29] Mr Cardno ended his email by saying that "*we at NCF are desperately keen to develop a strong, efficient and effective business*" and that it would be "*impossible to produce results without the resources necessary to set up and run a business.*" He asked for an indication when the required funds would be provided.

[30] Mr Cardno also emailed Ms Zhan the following morning, further reiterating the financial difficulties faced by the company and by the three directors based in New Zealand, all of whom were owed salaries. He referred to the difficulty of receiving no feedback from the directors based in China. Mr Cardno asked Ms Zhan to translate his email and forward it to Mr Lai that day.

[31] Ms Zhan emailed Mr Cardno on 3 April 2013, requesting a meeting with him and Mr Wolyncewicz the following day. After an exchange of emails it was decided that the meeting would take place on 5 April 2013. Ms Zhan informed Mr Cardno they would be meeting a new person sent by Mr Lai to talk to them. When Mr Cardno asked for the name of the person and what his task and his agenda would be, he was informed that the only message Ms Zhan had received from Mr Lai was that the person was going to sort out the outstanding issues raised in Mr Cardno's emails to the directors in China. The person was referred to as "*an important person*".

[32] On Friday 5 April 2013 Mr Cardno, Mr Wolyncewicz and Ms Zhan met at the company's office. They were joined by two people, one of whom introduced himself as Michael Leggat. The other was a Mr Darryl Stonnell, a security consultant.

[33] The applicants say Ms Zhan left the room at the direction of Mr Leggat who then identified himself as a lawyer acting under instruction from Mr Bihua. He handed Mr Cardno and Mr Wolyncewicz almost identical letters of dismissal, signed

by Mr Bihua, informing them of the termination of their employment with effect from that day. The only reason given was that the Board of the company had “*decided that it no longer has the trust and confidence in you which is necessary for you to continue in your role*”. No reasons were provided for the Board coming to that decision.

[34] The applicants were required to release immediately to Mr Leggat all company property in their possession. Messrs Cardno and Wolyncewicz say that once they had complied, Mr Leggat and Mr Stonnell asked them to leave the premises immediately. Shortly after their dismissal, both applicants were removed as directors of NCF.

[35] Mr Li told the Authority that Mr Bihua and the directors and shareholders based in China lost confidence in Mr Cardno because of his actions and conduct. Specific issues of conduct were:

- a. The salary payments he had made to himself and Mr Wolyncewicz on 4 and 27 February 2013 without the approval of other directors;
- b. Mr Cardno’s withholding from Mr Bihua of an online banking security device;
- c. The direction he gave to a designer, without authorisation and against NCF’s interests, to stop work on a project the designer had been undertaking for the company;
- d. Mr Cardno’s opening, or causing to be opened, unauthorised bank accounts;
- e. His misleading of other directors regarding a quotation he had obtained from the infant formula supplier;
- f. The substantial increases he had sought to the budget he had formerly submitted to the company’s directors;
- g. Mr Cardno’s refusal initially to comply with express requirements of the directors for approval of expenditure, and his later reluctant compliance.

[36] He said Mr Bihua and the directors in China were justified in terminating Mr Wolyncewicz’s employment because his actions and conduct caused them to lose trust and confidence in him. Mr Li cited in particular the following instances of Mr Wolyncewicz’s conduct:

- a. The salary payments he had made to himself and Mr Cardno on 4 and 27 February 2013 without the approval of other directors and contrary to his terms of employment;

- b. His withholding from Mr Bihua of NCF's Companies Office password;
- c. His withholding from Mr Bihua of information to enable him to access NCF's bank for online banking;
- d. His direction to a designer, without authorisation and against NCF's interests, to stop work on a project the designer had been undertaking for the company;
- e. His opening, or causing to be opened, additional bank accounts for NCF without the approval of directors;
- f. His misleading of other directors of NCF as to the obtaining of a quotation from a named company;
- g. His refusal initially to comply with express requirements of the directors for approval of expenditure, and his later reluctant compliance; and
- h. The substantial increases he had sought to the budget he had formerly submitted to the company's directors.

[37] Mr Li said the actions of Mr Cardno and Mr Wolyncewicz “*resulted in a level of incompatibility between (Mr Wolyncewicz) and Mr Cardno, on the one hand, and the other director shareholders which necessitated their removal from the Respondent as directors and employees*”.

### **Issues**

[38] The issues for the Authority to determine are:

- a. The date from which Mr Cardno's and Mr Wolyncewicz's employment commenced;
- b. Whether NCF was justified in dismissing Mr Cardno and Mr Wolyncewicz; and
- c. Whether NCF owes remuneration or other monies to Mr Cardno and Mr Wolyncewicz and, if so, what it owes.

**When did the applicants' employment with NCF commence?**

[39] I accept Mr Cardno's and Mr Wolyncewicz's evidence that their roles were those of brokers during the preliminary discussions undertaken in December 2012. I find that any work they undertook in January 2013, up to and including 10 January, was in the hope and anticipation of obtaining employment, but was not undertaken as employees.

[40] That changed when Mr Cardno and Mr Wolyncewicz were offered, and accepted, employment with the new business respectively as General Manager and Marketing Director on 11 January 2013.

[41] I do not accept Mr Li's evidence that all work they undertook to establish the new business was provided "*as a friend*" until the first supply contract was signed. I infer from his evidence that Mr Li saw Mr Cardno and Mr Wolyncewicz as volunteers up to 27 January 2013. Although Mr Li did not refer to them as volunteers, i.e. unpaid persons who provide their services with no expectation of payment, that is essentially how he claimed to understand their positions.

[42] I find it unreasonable that Mr Li expected Mr Cardno and Mr Wolyncewicz to act in an unpaid capacity after they had accepted employment in the new venture. From the evidence before me it was clear they were undertaking a significant amount of work to establish NCF from 11 January 2013. I find they were employees from that date and entitled to be paid for the work they provided.

[43] They had already been undertaking work in preparation for establishing the business. The nature of their work changed and intensified as they began to convert ideas and plans into action in their new roles as employees. They immediately prepared for the incorporation of the new business, arranging meetings with suppliers and government agencies, making the necessary arrangements for the lease of the company's premises, arranging legal assistance and organising travel and visits to places of interest for the contingent from China.

[44] Mr Li claims that terms of employment were not finalised until later in January and the applicants' employment could not have started any earlier than 28 January 2013. I reject that claim and accept the applicants' evidence that terms of employment were substantially agreed on 11 January 2013. The fact that further refinement to terms may have continued over the following weeks does not affect the

formation of the employment agreement on the earlier date. As then Chief Judge Goddard stated in *Baker v Armourguard Security Limited*<sup>2</sup>:

*It is elementary to employment law that there is an important distinction between the formation of the employment contract itself and the formation or articulation of its terms. The employment contract can be and often is formed in an informal way by conduct, or words of agreement and conduct. There is no requirement for writing at the formation stage.*

### **Was NCF justified in dismissing Mr Cardno and Mr Wolyncewicz?**

[45] The test for assessing whether the dismissals were justified is whether, on an objective assessment, NCF's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Mr Cardno and Mr Wolyncewicz<sup>3</sup>.

[46] The Act requires me to consider the following factors, in addition to any others I consider appropriate:

- a. Whether NCF sufficiently investigated the matter before dismissing each of the applicants, taking into account the resources available to it; and
- b. Whether it raised its concerns with each of the applicants before dismissing them; and
- c. Whether it gave each of the applicants a reasonable opportunity to respond to its concerns before dismissing them; and
- d. Whether NCF genuinely considered each of the applicants' explanations in relation to the matter before dismissing them.

[47] The Act precludes the Authority from finding a dismissal to be unjustifiable solely because of defects in the employer's process if the defects were minor, and if they did not result in the employee being treated unfairly.<sup>4</sup>

[48] Both Mr Cardno and Mr Wolyncewicz say they were given no notification that their employment was in jeopardy before the meeting in which Mr Leggat handed them letters of dismissal without informing them of the reasons. Mr Leggat simply told the applicants he was acting under instruction from Mr Bihua who was in China at the time.

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<sup>2</sup> [1998] 1 ERNZ 424 at 432

<sup>3</sup> S. 103A Employment Relations Act 2000.

<sup>4</sup> Section 103A(5)

[49] Mr Li says Mr Cardno should have known from his dealings with Chinese business persons that Mr Lai's email of 23 March 2013 was as good as telling him he had lost, or was about to lose, his job. Mr Cardno disputes this and says he did not view Mr Lai's email as an indication of his employer's dissatisfaction with him or as a threat to his employment.

[50] If Mr Lai's email was intended to convey to Mr Cardno that he had been dismissed, not only did it fail in its intention but such a dismissal would clearly have failed to comply with the natural justice requirements of the test of justification in the Act. If the email was intended as notification to him that his employment was in jeopardy, it also failed as it was received by Mr Cardno as a request for information and clarification of certain matters with which he promptly complied.

[51] Mr Li told the Authority the directors in China had not raised directly with Mr Cardno or Mr Wolyncewicz the issues they relied on to terminate their employment. He said they had doubts about the work of both applicants and asked Mr Bihua to raise those issues with them. Also, because they were unfamiliar with New Zealand law, they engaged lawyers in this country in the hope that they would "*follow through this process*".

[52] There was no evidence that Mr Bihua had raised concerns with either applicant, both of whom denied that he had done so. As Mr Bihua did not give evidence to the Authority I accept the evidence of Mr Cardno and Mr Wolyncewicz in that matter.

[53] I find that NCF treated Mr Cardno and Mr Wolyncewicz unfairly and unreasonably in dismissing them abruptly without notification that the Managing Director and the overseas directors had serious concerns over the way they were conducting NCF's business affairs. I accept their evidence that they became aware of the reasons for their dismissal only when NCF filed statements in reply to these proceedings on 25 June 2013.

[54] The applicants went into the meeting of 5 April 2013 with the expectation of a positive outcome, following advice from Ms Zhan that Mr Lai wished them to meet an important person who would sort out the issues raised in Mr Cardno's response to Mr Lai's email. I accept they were shocked to receive letters of dismissal from Mr

Bihua via his agent, Mr Leggat, instead of the practical resolution of the issues Mr Cardno had raised with Mr Lai.

***Reasons for Mr Cardno's dismissal***

[55] Of the seven reasons given by NCF for its loss of trust and confidence in Mr Cardno, only two had been raised in Mr Lai's email to Mr Cardno of 23 March 2013. These were the salary payments made to Mr Cardno and Mr Wolyncewicz in February 2013 and the formatting of financial information.

[56] They were brought to Mr Cardno's attention as items for clarification and explanation, but not in a disciplinary context. Mr Cardno responded in detail providing the information sought by Mr Lai and confirming that Ms Zhan had worked with the New Zealand company personnel to ensure that financial data was compliant with the new requirements. In the absence of a response from Mr Lai, Mr Cardno had no reason to believe his responses to those matters were unsatisfactory to his employer.

[57] Mr Li provided no credible evidence to support the other five matters specified as reasons for Mr Cardno's dismissal, none of which had been raised as concerns with him before 5 April 2013.

***Reasons for Mr Wolyncewicz's dismissal***

[58] None of the eight reasons given by NCF for its loss of trust and confidence in Mr Wolyncewicz had been raised with him before his dismissal. Seven of the reasons were the same as those for which Mr Cardno was dismissed. The additional reason for Mr Wolyncewicz's dismissal was the withholding of a Companies Office password. Mr Li provided no evidence of any request being made to Mr Wolyncewicz for the password.

[59] It was Mr Wolyncewicz's evidence that Mr Cardno communicated with the directors in China, while he and Mr Cardno had day to day contact with the Managing Director. In the course of that contact Mr Wolyncewicz said Mr Bihua led them to believe he had lost favour with his fellow directors in China and they had stopped communicating with him.

[60] Mr Wolyncewicz responded in the investigation meeting to the reasons for his dismissal. It is not necessary for me to record those responses. I note, however, that if the matters had been put to him during his employment, as they should have been, he would have been able to provide simple explanations for some of those matters, and clarify that he had not been involved in others.

[61] NCF's dismissals of Mr Cardno and Mr Wolyncewicz were unjustified. The applicants were given no notification of their employer's concerns and no opportunity to respond to those concerns and have their explanations considered before they were dismissed. The defects in the employer's procedure were major. Its actions were not those a fair and reasonable employer could have taken in all the circumstances at the time it effected the dismissals.

[62] NCF's failure to follow a fair and reasonable procedure is not excusable by a lack of familiarity with New Zealand employment law and practice. Its Managing Director was resident in New Zealand and engaged legal counsel to convey Mr Cardno's and Mr Wolyncewicz's dismissals to them. This is evidence that the company had the resources and ability to inform itself of its legal requirements towards its employees.

**Does NCF owe monies to Mr Cardno and Mr Wolyncewicz?**

[63] Mr Cardno's evidence was that he had been paid \$20,000 gross for the work he undertook for NCF to 5 April 2013, comprising \$10,000 gross for each of the months of January and February 2013. This was as provided in the company's budget. He is entitled to receive payment for the month of March and for the first week of April plus holiday pay based on his remuneration from 11 January 2013.

[64] Mr Wolyncewicz's evidence was that his only payments from NCF were \$8,400 gross, comprising salary for January and February 2013, and that he had not been paid for the work he performed in March or April 2013. He is entitled to be paid for March 2013 and for the first week of April 2013.

[65] As I have found the employment of the applicants started on 11 January 2013, the additional six days' payment Messrs Cardno and Wolyncewicz received for January 2013 should be deducted from their entitlement. Calculations of remuneration owing to Mr Cardno are based on \$10,000 gross per month for Mr Cardno and \$4,167 per month for Mr Wolyncewicz.

[66] As acknowledged by NCF, Mr Wolyncewicz is also entitled to be reimbursed for the Companies Office expenses he incurred in incorporating NCF and for the cost of the Post Office box he set up for his employer. I understand from Mr Wolyncewicz's evidence that he has obtained a Disputes Tribunal ruling in his favour in respect of one of the claims for reimbursement he has made. I have insufficient evidence of other expenses for which he seeks reimbursement and therefore decline to find that further monies are owing to him.

### **Remedies and contribution**

[67] When assessing remedies I am required to consider whether Mr Cardno and Mr Wolyncewicz contributed to the situation that led to their personal grievances. I have already noted that both applicants were unaware of the reasons for their dismissal until 25 June 2013, more than two and a half months after the event. NCF had not previously raised with Mr Cardno most of the matters for which it says it dismissed him. Those it had raised were not in a disciplinary context. The employer had not raised any matters with Mr Wolyncewicz before dismissing him.

[68] I am satisfied that neither Mr Cardno nor Mr Wolyncewicz contributed to the situation that led to their personal grievances and there should be no reduction in remedies awarded to them.

[69] Each applicant seeks the reimbursement of salary lost as a result of his dismissal and significant compensation for the distress and humiliation suffered from it. Mr Cardno gave evidence of the effect the loss of income had on his family and his inability to find ongoing alternative work since his dismissal. He believed the damage to his reputation from his dismissal had been responsible for the difficulty he was experiencing in obtaining work. He sought to be reimbursed salary to the date of the Authority's investigation.

[70] Mr Wolyncewicz gave evidence of the loss of confidence he suffered as a result of his dismissal and the way it had impacted on his confidence. This resulted in a far greater loss of income than the loss of salary for his part-time position at NCF might suggest. He said the sudden and unexpected loss of his employment affected his reputation and closed doors on business opportunities that had previously been open to him. His health also suffered as a result.

[71] I find it appropriate that Mr Cardno and Mr Wolyncewicz are reimbursed remuneration lost as a result of their personal grievances, but I am not satisfied that it should be to the date of the investigation meeting as they have submitted. The starting point under the Act where the Authority determines that an employee has a personal grievance and has lost remuneration as a result of it is the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration<sup>5</sup>.

[72] There was little evidence, other than oral, from either applicant of their attempts to obtain alternative work following their dismissals. Mr Cardno obtained some contract work. Mr Wolyncewicz said he worked harder at the brokerage work he had continued to undertake while employed part-time by NCF. His earnings from that work were substantially reduced from those of the previous year.

[73] I have insufficient evidence to conclude that either applicant should be awarded more than three months' lost remuneration. From that should be deducted any remuneration earned in that period, other than remuneration from external work that had been ongoing throughout the employment with NCF. As I have no evidence that Mr Wolyncewicz increased the remuneration he would have earned in that period, no deduction is to be made from his award.

[74] I accept that Mr Cardno and Mr Wolyncewicz suffered humiliation, loss of dignity and injury to feelings from the fact and manner of their dismissals and that a substantial award of compensation is merited. I find the sum of \$10,000 to be appropriate for each of Mr Cardno and Mr Wolyncewicz.

### **Determination**

[75] Mr Cardno and Mr Wolyncewicz were unjustifiably dismissed and are also owed remuneration and holiday pay. NCF International Limited is to pay Mr Cardno the following sums:

- a. \$8,615.37 gross, being remuneration of \$12,307.69 owing for March and 5 days in April 2013, less \$3,692.32 paid for 1 – 10 January 2013;
- b. \$2,289.23 gross, being holiday pay owing on total remuneration earned in accordance with s. 23 of the Holidays Act 2003;

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<sup>5</sup> Section 128(2) of the Act

- c. \$27,981.89 gross, being lost remuneration of three months under s. 128(2) of the Act less \$2,018.11 remuneration earned in that time;
- d. \$10,000 without deduction under s. 123(1)(c)(i) of the Act.

[76] NCF International Limited is to reimburse Mr Wolyncewicz the sum of \$330.22, being \$170 for the costs he incurred on behalf of NCF in setting up its Post Office box and \$160.22 in registering the company. In addition NCF is to pay Mr Wolyncewicz the following sums:

- a. \$3,589.74 gross, being remuneration of \$5,128.22 owing for March and 5 days in April 2013, less \$1,538.48 paid for 1 – 10 January 2013;
- b. \$959.18 gross, being holiday pay owing on total remuneration earned in accordance with s. 23 of the Holidays Act 2003;
- c. \$12,500 gross, being lost remuneration of three months under s. 128(2) of the Act.
- d. \$10,000 without deduction under s. 123(1)(c)(i) of the Act.

### **Costs**

[77] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority