

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 432
3127956

BETWEEN PHATCHARIN CHARUMEE
Applicant

AND THAI HOLDINGS LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Chrissy Gordon and Andrew McInnes, advocates for the
Applicant
Phillip de Wattignar, advocate for the Respondent,

Investigation Meeting: 8 July 2021 in Christchurch

Submissions Received: 26 July 2021 from the Applicant
26 July 2021 from the Respondent

Date of Determination: 4 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Phatacharin Charumee was employed by Thai Holdings Limited (Thai Holdings) in a position designated as “waitress” at the Thai Siam restaurant in Kaikoura until she was summarily dismissed on 26 October 2019.

[2] Ms Charumee raised a personal grievance by letter of 18 December 2019 alleging an unjustified suspension and unjustified dismissal and it cited withholding of final pay and holiday pay claims. The letter made a request under s 120 Employment Relations Act 2000 (the Act) for the written reasons for Ms Charumee's dismissal.

[3] Graham McCarthy, director of Thai Holdings responded by letter of 14 January 2020 to the request for reasons for the dismissal. Mr McCarthy indicated that Ms Charumee had initially been the subject of allegations related to cash handling inconsistencies that she had refused to answer and had then attended a meeting of 25 October 2019, where she was asked to respond to an allegation of theft captured on a CCTV recording. Mr McCarthy noted that as Ms Charumee was "unresponsive and evasive", the employer had "reached a finding of serious misconduct due to her dishonest behaviour".

[4] In a separate letter of 14 January 2020, Mr McCarthy detailed a response to the personal grievance contesting Ms Charumee's account of the facts leading up to her dismissal. Mr McCarthy cited disclosed video footage purporting to show Ms Charumee not banking an amount of money and he indicated that the police had been involved in charging Ms Charumee. Mr McCarthy claimed that: "This was not an isolated incident but merely one of her operating systems that she had been using over a long period of time". Mr McCarthy closed his letter by cryptically alluding to "further evidence" that may be provided to the police "that should your client proceed further with claims for remedies, will be presented in evidence to be taken into account in relation to any claims for remedies".

[5] The parties subsequently attended mediation on 25 September 2020 but the matter remained unresolved.

The Authority's investigation

[6] The investigation took one day and I heard evidence from: Phatacharin Charumee, her partner Mark Taylor and Chloe Scott, an ex-employee of Thai Holdings and for Thai Holdings: Graham McCarthy and his partner Rattana Katvijaraya. I viewed a CCTV recording and listened to an audio recording of a disciplinary meeting that was also transcribed.

[7] I was ably assisted by Robin Bickley, an independent interpreter.

[8] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submissions and information received from both parties and refer to them where appropriate and relevant.

Issues

[9] The issues to be decided are:

- (a) Was Ms Charumee unjustifiably suspended and then dismissed following a sufficiently fair and properly conducted investigation?
- (b) If Thai Holdings’ actions in dismissing Ms Charumee do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:
 - i. Arrears of wages and holiday pay.
 - ii. Lost wages.
 - iii. Compensation under s 123(1)(c)(i) of the Act.
 - iv. A penalty for alleged breaches of the Wages Protection Act and Holidays Act.
- (c) If Ms Charumee is successful in all or any element of her personal grievance claims should the Authority reduce any remedies granted as a result of any contributory conduct?
- (d) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[10] Ms Charumee commenced working for Thai Holdings in Queenstown in early 2016 after moving from Thailand. She then she moved to Kaikoura in September 2016 to continue working for Thai Holdings as a chef/waitress at their Thai Siam restaurant but

initially with no employment agreement. Ms Charumee says she secured the employment and work visa assistance through a connection with Ms Katvijaraya, her cousin.

[11] From July 2018, Ms Charumee with her then husband, ran the Thai Siam in Kaikoura but then separated and her husband left Kaikoura. Ms Charumee continued as duty manager at Thai Siam until April 2019 when Thai Holdings engaged a new manager (Thitipak Siripoon). Ms Charumee was then provided with an employment agreement dated 10 May 2019 describing her position as a “waitress” but she says her ongoing tasks remained unchanged as:

- Cooking
- Taking orders
- Collecting customer payment – cash, eftpos, credit card
- Cashing up
- Banking
- Ordering supplies online
- Buying supplies – New World, Paper Plus, Asian shop in Christchurch
- Cleaning
- Open and close restaurant.

[12] Ms Charumee’s employment proceeded without incident until 13 October 2019 when Mr McCarthy who resides in Queenstown, said Ms Siripoon, contacted his partner Ms Katvijaraya to alert them to some “issues with cash handling” involving Ms Charumee. Ms Siripoon was not available to give evidence.

[13] Ms Katvijaraya said Ms Siripoon advised her that a co-worker had reported seeing Ms Charumee acting suspiciously, including removing a customer meal transaction docket from the printer. Ms Siripoon asked to view the restaurant’s CCTV recording that was remotely controlled by Mr McCarthy.

[14] Mr McCarthy says he provided the recording to Ms Siripoon as it showed Ms Charumee removing a deleted customer order from the printer and then screwing it up and binning it. The CCTV recording that Mr McCarthy viewed also showed Ms Charumee placing cash from the customer under her cell-phone rather than placing it in the till.

[15] Mr McCarthy says he then asked Ms Siripoon to approach Ms Charumee to seek an explanation and that he understood that Ms Charumee did not provide a response.

[16] Ms Charumee did not allude to an initial approach from Ms Siripoon but I was provided with a copy of a letter Ms Siripoon had sent to Mr McCarthy on 16 October 2019. The letter indicated after speaking to Mr McCarthy and checking the CCTV footage, she had had a meeting with Ms Charumee “about what she was doing but she did not answer me” on 13 October and then a further meeting occurred on 15 October. Ms Siripoon relayed that she asked why “she did not put the money from the customer into the till. She did not answer me and walked away”. Ms Siripoon then indicated: “On Wednesday 16th of October, I asked her again about the transaction and she did not answer but started to cry”. Ms Siripoon’s letter ends with: “Please advise what my next steps should be”.

[17] Mr McCarthy says he at this point, asked Ms Siripoon to contact the police and she confirmed on 17 October that she had done so and other staff were scheduled to be interviewed by the police on Monday 21 October.

[18] On 22 October the police arrived at the restaurant and Mr Charumee says they ushered her outside and said she had been accused of taking money from the restaurant and they took her to the local police station to be interviewed. Ms Charumee was later charged with a theft offence related to a missing \$30 under her control.

[19] During the process of being interviewed by the police, Ms Charumee says she had the assistance of an interpreter and produced a translated text exchange from the interpreter after she was interviewed, that in part indicated: “The police have spoken to your boss and they will be terminating your contract and your visa, so you will need to speak to your boss about this”. Ms Charumee’s advocate advanced this in submissions as evidence that the decision to dismiss her client had been pre-determined.

[20] Mr McCarthy says given that he had no experience of running a disciplinary process, he sought advice from Me de Wattigner “right from the start” and Mr de Wattingar assisted him to draft the 22 October: “Notice of Disciplinary Meeting” letter over Ms Siripoon’s signature. Ms Charumee recalls receiving the letter by email at 6 pm that evening (22 October). The letter in summary indicated that:

- Ms Charumee had been observed on 13 October, “on video and in person taking cash and deleting transactions and throwing the docket in the bin”.
- This “is a very serious allegation of theft that amounts to serious misconduct”.
- They understood the Police were involved, but that would be “a separate process from the Disciplinary investigation process we now request you attend”. A meeting with Ms Siripoon was scheduled for Friday 25 October to allow Ms Charumee to explain and respond to the concerns raised and “comment on any charges the Police have laid against you”.
- Ms Charumee was now suspended until the meeting and dismissal was a prospect should no satisfactory explanation be provided.

[21] I observe the letter did not alert Ms Charumee of her right to be represented and did not disclose the CCTV recording alluded to or suggest how it could be viewed prior to the disciplinary meeting.

[22] Ms Charumee then sought assistance from her partner Mark Taylor. Mr Taylor after initially not mentioning it in his evidence, disclosed that he called Mr McCarthy prior to the disciplinary meeting and suggested that he would remove Ms Charumee from the restaurant if the charges could be dropped as he was concerned about the impact on Ms Charumee’s work visa.

[23] Mr McCarthy’s evidence confirmed two calls took place (one prior to and one after the disciplinary meeting) and what was said but he indicated that Mr Taylor had also offered to “sort something out with any money that was missing”. Mr McCarthy says he declined the requests.

Friday 25 October meetings

[24] At around 2 pm in the restaurant at Kaikoura, the disciplinary meeting commenced. Present were: Ms Siripoon; Ms Charumee and Mr Taylor. The meeting was recorded by Mr Taylor and the recording and a transcript provided to the Authority. The meeting fell into two parts.

The first part

[25] The meeting was conducted in English at Mr Taylor’s insistence and it opened with Ms Siripoon trying to engage Ms Charumee in a “private” conversation without Mr Taylor being privy to such. This was resisted vigorously by Ms Taylor in a tense and prolonged

initial exchange. In addition, Mr Taylor raised a concern that customers and other staff were still present and could potentially overhear the meeting. Mr Taylor says Ms Siripoon then adjourned the meeting indicating that she needed to call Ms Katvijaraya.

The second part

[26] Mr Taylor says this occurred around 30 minutes later and by this point in time the restaurant was closed. Mr Taylor says Ms Siripoon commenced asking questions but he had to ask that the CCTV footage be disclosed. This led to another break as Ms Siripoon retrieved her lap-top. Mr Taylor says Ms Siripoon then displayed only one of the two CCTV videos (being an aerial view from above the till). The transcript shows that there was then a discussion as the parties viewed the video footage together. From this transcript Ms Charumee was asked why she had hidden the customer's money under her phone and not put it in the till. Ms Charumee responded indicating in summary that:

- She was still talking with the customer.
- Someone had called her.
- She could not remember why she put her cell-phone with the money – she did not mean to hide the cash.
- She had then got on with cleaning the sink and tables.

[27] Immediately after the above responses were given, Ms Siripoon switched the topic to ask why Ms Charumee had deleted the customer transaction docket. Mr Taylor firmly steered Ms Charumee to not answer this question on the basis that he asserted no documentary evidence had been put forward to establish the allegation. Ms Siripoon then indicated that she had no more questions to put to Ms Charumee.

[28] The meeting then descended into Mr Taylor somewhat aggressively, interrogating Ms Siripoon on what she had apprised the police of and Ms Siripoon refusing to answer. The meeting eventually ended with Ms Siripoon indicating she needed to talk to Mr McCarthy and Ms Katvijaraya.

Dismissal letter 26 October

[29] Mr McCarthy says that over the weekend, despite him not attending the disciplinary meeting and having to deal with a call from Mr Taylor, he mulled over Ms Charumee's fate.

He recalled Ms Siripoon calling him on the 25th October and that she was distressed perceiving that Mr Taylor had been disruptive and intimidating during the disciplinary meeting and she relayed the only explanation she got directly was that Ms Charumee had taken the cash after placing it under her cell-phone without an explanation as to why.

[30] I was also provided with brief notes that Ms Siripoon took that Mr McCarthy had at the time of his decision-making – the note for 25 October said:

She and her witness came for meeting and I asked the question why you did not put the money into the till and she answered she not doing anything even I showed her the CCTV video.

[31] Mr McCarthy says he went through the CCTV footage and concluded: “Her explanation did not match with the proper process for cash handling and entering and maintaining customer service payments.”

[32] On the Saturday 26 October, Mr McCarthy says he resolved he could no longer trust Ms Charumee in cash handling situations and made the decision to summarily dismiss her by way of a letter he drafted for Ms Siripoon’s signature. The letter indicated that despite being provided “the opportunity to co-operate with our investigation”, Ms Charumee had not provided acceptable answers or explanations to concerns raised “about cash handling and the till systems”. The finding of the ‘investigation’ was “serious misconduct due to your dishonest behaviour” and that this led to a decision to summarily end Ms Charumee’s employment.

[33] On 4 November 2019, Ms Siripoon provided Ms Charumee with a statement of her final pay (\$583.20 gross) but it was accompanied by a calculation of losses the business allegedly suffered detailed as “\$5,641.91c” and a statement that Ms Charumee’s final pay would be withheld pending restitution of such amount. The reason for the claimed “losses” was described briefly as “due to your deleting customer dockets and denying payment to the company which you kept for your own benefit”.

[34] I note on the latter matter, that none of these additional claimed amounts were put before Ms Charumee at the disciplinary meeting and were not sought as counter claims at the Authority or evidently disclosed to the police (no mention of additional missing money was contained in the disclosed police “Charging Document” that was confined to a cash sum

of \$30). I find there is insufficient evidence that I can safely rely upon to make any finding in this area.

[35] In written evidence, Ms Charumee said that on 13 October she was intending to get supplies for the restaurant from the local supermarket and put some cash aside but after a dispute with her partner she did not want to go and “gave the cash to the kitchen staff to take with them”.

[36] In giving evidence during the investigation meeting, Ms Charumee elaborated that she had for some time, with Mr McCarthy’s knowledge, adopted a system of removing money from the till and using it to buy supplies for the restaurant at the local supermarket. Ms Charumee claimed Ms Siripoon was aware of this arrangement and when she (Ms Charumee) was in charge she regularly emailed Mr McCarthy receipts from the supermarket. On the day of the alleged theft of \$30, Ms Charumee claimed during the investigation meeting, that she gave the money to Ms Siripoon to buy supplies at the local store.

[37] The problem with the above explanations, apart from them differing in who she gave the money to, was Ms Charumee and Mr Taylor inexplicably failed to apprise both Ms Siripoon and Mr McCarthy of the explanations now cited during the disciplinary process and in two phone calls by Mr Taylor to Mr McCarthy. Mr Taylor conceded he could not recall raising this key mitigating explanation with Mr McCarthy (or any mitigating explanation).

[38] However when questioned, Mr McCarthy conceded the restaurant was run on an informal basis, he rarely visited it, he had no written cash handling policies and when he was shown copies of texts from Ms Charumee to him with attached receipts from the local supermarket he claimed he overlooked them. The messages did not however, cover the period from when Ms Siripoon was employed and Mr McCarthy says she was brought on board to tidy up on such informal procedures.

[39] The police chose not to proceed with prosecuting Ms Charumee.

Was the dismissal justified?

[40] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in

all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[41] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

Resources

[42] My finding is that Thai Holdings had the resources to engage an experienced advocate throughout the process and did so. Lack of resources is not an issue but the investigation as such was insufficiently fair and thorough (discussed below).

Sufficiency of the investigation

[43] The first issue is - given that Thai Holdings categorised the initial allegation as one of theft, one would have expected a very careful and well documented investigation to proceed and whilst I do not expect it to be "akin to a judicial inquiry",¹ I do have to consider if it was sufficiently fair given the serious level of the allegation. I find that overall, this was not the case and that the standard of the investigation fell well short of

¹ *A Limited v H* [2016] NZCA 419; [2017] @ NZLR 295 at [25].

procedural fairness and the defects were not minor and my reasons for this finding are as follows.

Pre-determination

[44] Ms Gordon indicated that it was her view that the fact of making the complaint to the police on 17 October pre-determined the dismissal outcome. In of itself, a complaint to the police may not be evidence of pre-determination – it could simply be an employer having a suspicion and asking the police to investigate such. However, what occurred here was Thai Holdings decided not to await the outcome of the police investigation and I was struck by Mr McCarthy’s evidence that prior to asking Ms Siripoon to engage the police he had decided after Ms Siripoon reported she had informally confronted Ms Charumee, that “this was a case where a meal had been made, eaten, and paid for and then deleted”. Mr McCarthy failed to properly ascertain Ms Charumee’s explanation at a formal meeting before he referred the matter to the police – this was suggestive of pre-determination.

Issues in the investigation process

[45] Thai Holdings failed to engage a suitably competent investigator and left the task up to an evidently (from documentation I have viewed) inexperienced local manager.

[46] Despite referring to a CCTV recording in the initial disciplinary invite, none was disclosed prior to the meeting and only one was shown at the meeting on the employer’s device (when at least two videos at different angles existed). Ms Charumee was not offered the opportunity to take a break and view the video.

[47] Ms Charumee was not apprised of her right to representation or her right to silence given concurrent criminal charges were at issue, although I have to observe that Mr Taylor although not legally qualified or experienced as an advocate, appeared to be fully aware of this deficiency but he did not attempt to delay the meeting.

[48] It was suggested that co-workers had been interviewed (at least by the police) but nothing was documented or put to Ms Charumee for comment.

[49] The more serious allegation of ongoing cash handling issues amounting to an alleged shortfall of \$5,641.91c was not put to Ms Charumee prior to her dismissal.

Serious misconduct?

[50] In deciding to categorise the initial allegation as theft, it is apparent that no thought was given to the background and context of money being removed from the till and used for grocery purchases (a fact Mr McCarthy was aware of as being at least, a possibility).

[51] I find that Mr McCarthy did not approach the matter with an informed and open mind to considering mitigating factors as he crucially did not provide Ms Charumee with an opportunity to address him as the decision-maker or a chance to comment on an initial finding of serious misconduct. Mr McCarthy says he sought advice at every stage of the process and it is incomprehensible that the process was so deficient. The decision to allow Ms Siripoon to conduct the disciplinary process when it was patently obvious from the transcript of the meeting that she lacked the skills and experience to do this, was a fundamental flaw in Thai Holdings approach to this dismissal.

[52] I find as the Employment Court did in *Lim v Meadow Mushrooms Ltd* upholding an Authority finding, that Thai Holdings' very limited investigation was inadequate to the point that any reasonable employer in this context "could not have satisfied to the high degree of proof that was needed for a serious allegation of theft".²

[53] In examining other factors I do note on balance, that Ms Charumee had several opportunities to explain her conduct of the cash handling observed on the CCTV but failed to advance any coherent explanation at the time the dismissal occurred. Mr Taylor although also clearly inexperienced, had ample opportunities to advance mitigating circumstances both at the meeting and in calls to Mr McCarthy, but chose perhaps understandably, to focus his protective instinct which was 'outrage' on the inadequacies of process caused by Mr McCarthy not attending to his employer responsibilities.

[54] I would not go as far to say dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I do find though, that a fair and reasonable employer could have approached this more fairly and paused to consider wider

² *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192 at [12] - [13].

factors before making the decision, but the ‘assumption’ that serious misconduct was at issue for cash handling irregularities is reasonably evident.

[55] Overall, Ms Charumee was entitled to be treated fairly in terms of s 103A and good faith obligation set out in the Act. I find that the defects in process were not minor as envisaged in s 103A(5) ³ of the Act and they did result in Ms Charumee being treated unfairly. Mr McCarthy had access to an experienced advocate and he was heavily reliant upon such but I cannot absolve the company from a very poorly conducted process.

Finding on the summary dismissal

[56] I find in the overall circumstances that the summary dismissal of Ms Charumee may have been substantively justified on the grounds that she engaged in deficient cash handling procedures rather than theft of her employer’s property without advancing any mitigating circumstances. However, the significant procedural deficiencies I have identified render the dismissal unjustified.

[57] Whilst this concept may appear frankly odd to Thai Holdings Limited, the concept of a dismissal perhaps being substantially justified but procedurally unfair and therefore overall being unjustified is well established having been identified by the Court of Appeal thirty five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* a judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer’s right but “unjustifiable” by virtue of the way in which the matter was handled. ⁴

The disadvantage claim

[58] Ms Charumee was suspended without any opportunity to discuss the need for a suspension, but in the circumstances given that she had been charged by the police and her employer had attempted, albeit informally, to discuss legitimate concerns with her, the suspension that was of a very short duration, was appropriate in all the circumstances.

³ The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

⁴ *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* (1985) ERNZ Sel Cas 142; [1982] ACJ 663 (CA).

[59] I find however, that the significant procedural deficiencies identified, disadvantaged Ms Charumee in the sense that she was denied a proper opportunity to address the employer's decision maker during a poorly conducted disciplinary process. I also consider Thai Holdings, in conducting the said process, did not have due regard to Ms Charumee's vulnerability.

[60] I also find that the disciplinary process breached good faith requirements pursuant to s 4(1A)(c) of the Act in that Thai Holdings Ltd did not provide sufficient relevant information prior to the disciplinary meeting (including the complete CCTV footage) or a fair opportunity for that information to be appraised and commented upon during the disciplinary meeting.

[61] Ms Gordon identified the good faith breach in submissions but did not seek a penalty for such, so none is appropriate.

Conclusion

[62] Having made a finding of unjustified dismissal on procedural grounds, an unjustified disadvantage and breaches of good faith requirements, I consider that Ms Charumee is entitled to remedies as a result of my findings above and I discuss below.

Remedies

Lost wages

[63] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Charumee should I find that she has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[64] Here I find Ms Charumee's lost remuneration was attributed to the personal grievance. Ms Charumee gave evidence that she did not secure alternative employment until 13 October 2020 as a chef. In the interim, work visa issues prevented Ms Charumee from being employed.

[65] Given the above and reflecting the circumstances of the dismissal, I consider overall justice is served best by awarding Ms Charumee three months lost wages calculated at an hourly rate of \$18 for 40 hours work per week – amounting to \$9,360 (gross).

Final pay

[66] By way of a letter of 4 November 2019, Thai Holdings detailed Ms Charumee's final pay, including holiday pay, would be withheld and effectively offset against perceived losses. I find this withholding of amounts due to be illegal and respectively in breach of the Wages Protection Act 1985 and the Holidays Act 2003. Mr de Wattignar suggested that his client had insufficient detail to respond to the claim but from the MYOB records disclosed to the Authority, annual leave owing is shown as \$1,722.53c, alternative holidays not taken as \$1404 and a final pay of \$583.20. I find the amounts identified should be paid to Ms Charumee. I have considered the claims for additional penalties for the identified breaches but in the totality of the circumstances without approving Thai Holdings' actions, I exercise a discretion not to award penalties.

Compensation for hurt and Humiliation

[67] Ms Charumee gave compelling evidence of the distressing impact of the summary dismissal and the uncertainty it created at a difficult time to find immediate alternative employment and the upset it caused her observing the impact of the dismissal upon her and the shame it caused to her and her family in Thailand.

[68] I am convinced that at the time, Ms Charumee suffered humiliation and shame, loss of dignity and injury to feelings due to her former employer failing to allow her to address the dismissal decision-maker and the manner by how the dismissal was effected, including Mr McCarthy's failure to properly disclose all the evidence he was relying upon to reach a decision. Taking into account all the circumstances and awards made by the Authority and Court in similar situations and the manner by which Thai Holdings effected this dismissal, I consider Ms Charumee's evidence warrants a moderate level of compensation that I fix at \$10,000 under s 123(1)(c)(i) of the Act.

[69] **Contribution**

[70] Section 124 of the Act states that I must consider the extent to what, if any, Ms Charumee's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced, I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*.⁵

[71] I find that Ms Charumee engaged in blameworthy misconduct by at best, engaging in a seriously deficient cash handling process that left the business she worked for vulnerable and at worst, she failed to properly account for missing cash. At the time she was asked to explain such, Ms Charumee failed to show any understanding of her former employer's concerns during the investigation meeting.

[72] Overall, I find Ms Charumee did contribute to the situation giving rise to the personal grievance, but I have balanced this up with my finding that Thai Holdings' approach was procedurally deficient. Ms Charumee cannot be blamed for the deficiencies in process that robbed her of the time for reflection and seeking of proper advice which may have led to her to adopt a different or less belligerent approach to the disciplinary meeting by perhaps not allowing Mr Taylor free reign to protect her from providing any coherent explanation of her conduct. In view of the paucity of an explanation, the decision to dismiss was hasty but understandable from Thai Holdings' perspective.

[73] On balance, given the contribution to her own downfall, I find a 25% reduction in Ms Charamee's remedy of compensation for hurt and humiliation is warranted.

Summary

[74] **I have found that:**

- (a) Phatcharin Charumee was unjustifiably dismissed in a procedurally unfair manner.**
- (b) Thai Holdings Limited failed to adhere to good faith obligations whilst effecting the dismissal.**

⁵ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

(c) In the circumstances, Thai Holdings Limited must pay Phatcharin Charumee the sums below:

- (i) \$9,360 gross lost wages pursuant to s 123(1)(b) of the Act;**
- (ii) \$3,709.73 gross combined final pay/holiday pay; and**
- (iii) \$7,500 compensation pursuant to s 123(1)(c)(i) of the Act.**

Costs

[75] Costs are at the discretion of the Authority and here Ms Charumee was successful in her claim of unjustified dismissal and has obtained compensatory remedies in an investigation meeting that took one day and some legal submissions thereafter. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs. If no agreement is achieved, Ms Charumee has fourteen days following the date of this determination to make a written submission on costs and Thai Holdings Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority