

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 444
3096052

BETWEEN ANGELA CONNER
Applicant

AND CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: David G Beck

Representatives: Chrissy Gordon, advocate for the Applicant
Christopher Jury, counsel for the Respondent,

Investigation Meeting: 9 October 2020 in Christchurch

Submissions Received: 9, 12 and 20 October 2020

Date of Determination: 9 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Angela Conner was employed by the Canterbury District Health Board (“CDHB”) as a café assistant at Burwood Hospital until she was summarily dismissed on 4 October 2019 for removing cash from what the CDHB categorised as a “charity jar”.

[2] Angela raised a personal grievance by her advocate’s emailed letter of 22 October 2019 alleging an unjustified dismissal and seeking reinstatement. The CDHB responded by email of 5 November 2019 denying the grievance’s validity. The parties subsequently attended mediation on 21 January 2020 but the matter remained unresolved.

[3] In a statement of problem filed at the Authority on 12 March 2020, Angela claimed the dismissal was unjustified on both procedural and substantive grounds but no longer sought reinstatement as a remedy.

[4] CDHB filed a statement in reply, asserting that Angela's dismissal was carried out in a procedurally fair manner and an investigation confirmed her conduct to be sufficiently serious to warrant summary dismissal.

The Authority's investigation

[5] The investigation took one day and I heard evidence from Angela Conner; Chisato Wilson, a co-worker; Ian Hodgetts, an E tū organiser; Neville Patrick, Service Manager (and decision-maker); and Simon Cheeseman, Food and Service Manager. Statements from Jason Sole (Angela's partner) and Christine Robertson (a friend of Angela's) were admitted unchallenged.

[6] 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

[7] The issues to be decided are:

- (a) Was Angela unjustifiably dismissed following a sufficiently fair and properly conducted investigation?
- (b) If CDHB's actions in dismissing Angela do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering Angela's claims for:
 - i. Lost wages; and
 - ii. Compensation under s 123(1)(c)(i) of the Act.
- (c) If Angela is successful in all or any element of her personal grievance 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?

[8] Angela commenced working for CDHB in early 2012 at the Burwood Hospital café initially part time to accommodate childcare of her three daughters but latterly full time (36 hours per week) as her daughters reached school age. Her work involved food preparation, working on the till and then becoming the main coffee barista. Angela was a union member (E tū) covered by a collective employment agreement.

[9] Angela's employment proceeded without incident until 28 August 2019 when working alongside a co-worker (Lucy), she was approached for money by Lucy to purchase throat lozenges. As she had no cash on her, Angela accompanied by Lucy, left their work stations and proceeded to the in-house pharmacy. At the pharmacy, Angela chose the lozenges but could not use her Apple Pay facility due to online connectivity issues. Having no other means to pay, Angela decided to return to her work station and remove a twenty dollar note from a jar on her counter that was utilised for donations to feed Harry, a stray cat that staff had adopted (hence the open glass container was known as 'Harry's jar').

[10] Angela then opened her till and took out two ten dollar notes and replaced them with the twenty dollar note, put ten dollars back in Harry's jar and proceeded back to the pharmacy and paid for the lozenges and gave them to Lucy.

[11] At this point some confusion existed over who would take responsibility to replace the ten dollars. The upshot was it was not placed back in the jar..

[12] On 3 September Simon, Angela's direct manager advised his manager Neville, that it had been brought to his attention by a supervisor (Pauline) that money was going missing from Harry's jar. Simon says he then went through over one hundred and twenty hours of video footage taken from a strategic position above the café till and saw two individuals (Angela and Ms X, another employee I will refer to later) removing money from Harry's jar. Angela on one occasion on 28 August and Ms X on more than one occasion.

[13] On 4 September, Neville and Simon reviewed selected video footage and Neville instructed Simon to undertake a "low-level and confidential" investigation starting with talking to Pauline the supervisor.

[14] The following background was gleaned from typed notes Simon made that were only disclosed to Angela and her advocate in June 2020 as directed by the Authority.

[15] Simon conceded in evidence that he took no contemporaneous notes of the following conversations that he deemed part of his initial 'investigation'. He recalled typing the notes up a week or so after the interviews. I also note, that there was no formal statements taken at any point during the investigation and Lucy and Pauline gave no evidence during the Authority investigation. I therefore approach the detail of this evidence with some caution.

[16] Later on 4 September, with Pauline as a witness, Simon says he 'informally' approached Lucy asking her if she knew anything about money going missing from Harry's jar on 17 and 28 August. Lucy responded in the negative.

[17] The following day, Simon with Pauline in tow, again 'informally' approached Lucy revealing that he had seen a video showing two people take money from Harry's jar. Lucy said she recalled Angela had bought her something at the pharmacy but could not recall what day it was, that the payment system was down and when Angela suggested she get the money from Harry's jar, Lucy told her "don't do that, don't worry about it".

[18] On 6 September Neville "advised Simon that we would have to begin an investigation into the matter".

[19] Then on 11 September, Simon recalled being approached by Pauline saying Lucy "wasn't taking his investigation very well and she felt terrible about it". Simon says he then resolved to reassure Lucy and met with her later on the same day with Pauline in an office setting to explain "it was just an investigation and that no outcome had been reached". Simon says Lucy then, when being pressed on whether she had anything to add, "explained the scenario again in more detail" ('detail' that Simon failed to record) and then outlining what was said after Angela could not utilise her Apple Pay facility and Angela suggesting getting money from Harry's jar, Lucy recalled she said "don't worry it, I'll get it later".

[20] Simon then appeared to place a significant emphasis on what he believed was Lucy changing her earlier statement. After subsequently checking with Pauline, he rang Neville later on the same day and related to him that Lucy had been inconsistent in her explanation. Despite receiving this information and also considering it significant, Neville did not then interview Lucy or Pauline.

13 September letter setting out allegations

[21] With HR and legal advice, Neville says he then drafted a letter of 13 September over his signature, inviting Angela to an “investigation meeting”. The letter sets out an allegation to Angela indicating that from security footage it appeared that “you removed some money from the jar on the counter at the Burwood café”. Describing it as “the information I have already”, Neville detailed that on the day in question money went missing from the “charitable donation jar” and that security footage appears to show Angela removing the money. No mention was made of Lucy being interviewed and the supposed contradiction in her explanation and the video was not disclosed nor was any viewing arranged at this point in time.

[22] The letter continued under a heading “Your obligations” and made oblique and general references to CDHB policies including the CDHB Code of Conduct and Disciplinary Policy. It then said he was concerned that “your behaviour may place you in breach of a number of these obligations” including:

- (i) Maintain expected standards of performance. Employees should avoid behaviour which might impair their work performance.
- (ii) Respect the right of their colleagues and the public. In performing their duties, employees are expected to avoid behaviour which may cause distress to other employees.
- (iii) Unauthorised possession of CDHB property (cash).

[23] The letter further:

- (i) Alluded vaguely to an investigation process.
- (ii) Warned that a potential worst case outcome was “the end of our employment relationship”.
- (iii) Invited Angela to a meeting on 18 September.
- (iv) Advised that Simon and Andrew Munro, Senior People and Capability Advisor, would be attending.
- (v) Angela was more than welcome to bring a “representative or support person, and I hope that you do”.
- (vi) Impliedly identified Neville as the decision maker with a statement acknowledging it would be an unsettling process “so, I really want to support you through this and hear what you have to say before I decide what to do”.

(vii) Warned Angela to keep the matter “to yourself” and only contact support Neville had identified and in that way:

.... we can make sure an independent investigation is carried out which ensures fairness to everyone involved. Unfortunately if you do end up communicating this to others then I may have no option but to investigate that as a separate issue. You must understand and respect the need to keep this matter confidential.

[24] On 13 September, Simon advised Angela that Neville wished to meet her without describing the purpose of such. At this meeting Neville presented the 13 September letter.

[25] Angela recalls trying to explain the situation and being curtailed from doing so – Neville recalls Angela trying to explain and saying he should just “go and get Lucy who knew the full story” and Neville indicated that “all the evidence would be collected over the coming days, including video footage that would be available to the investigation”.

[26] Neville said that a great deal of emphasis at this point was placed on Angela’s welfare and a need to get her support for the next meeting, and there was an emphasis on confidentiality.

[27] Whilst no notes were taken by Neville at the 13 September meeting, Neville recalled in his written evidence (compiled 9 months later) that “she did not raise that other staff used the charity jar for their own purposes”.

[28] Neville and Simon could not explain why the video was not disclosed earlier and why they concealed the fact that Simon had already interviewed Lucy and their view of Lucy’s ‘evidence’. They also conceded no further investigation took place between 13 and 18 September or subsequently despite Chisato, another barista, being seen on the video. When pressed on this omission, Neville suggested that he had decided the only evidence on which he wished to focus was the video recording and Angela’s explanation.

18 September Meeting

[29] The meeting of 18 September was attended by Angela, Ian from E tū, Terry Foley a workplace support advisor, Neville, Simon and Andrew Munro (who did not give evidence at the Authority’s investigation meeting). The Authority was provided with Andrew’s contemporaneous notes taken at the meeting and a report that Ian typed up afterwards. I also

relied on written statements and oral evidence from Angela, Ian, Simon and Neville. What emerged in sequence was:

- (i) Neville opened the meeting by reading through his 13 September letter.
- (ii) Angela said she did not believe Harry's jar was a "charity" jar.
- (iii) Angela explained that Lucy was unwell, that they both went to the pharmacy, she could not use Apple Pay, she had no money or EFTPOS card with her, the pharmacy was busy so she decided to take money from Harry's jar – she knew this was the wrong thing to do, she thought Lucy would fix it up later and put the money back, Lucy thought Angela was going to put it back – they both agreed that they would put the money back later.
- (iv) After giving an explanation the video was played.
- (v) After watching the video, Angela indicated a belief that her purchasing the lozenges showed she had no intent to steal the money (although Mr Munro's notes appear to wrongly record this response, indicating Angela said "Certainly wouldn't have purchased strepsils if didn't have intent"), that Lucy paid the money back, it had slipped her mind and that the reason she did not write an IOU was because Lucy knew about the money's removal.
- (vi) Ian provided an overview pointing out Angela's length of unblemished service, that she had, in his view, borrowed the money for a co-worker in need and both knew about it and that a lapse of memory had occurred in not replacing it. He accepted on Angela's behalf that what she did was 'wrong' but contended no dishonest intent was apparent and that it was, on the contrary, an honest mistake with no intent.

[30] Of note is no questions seemed to have been put to Angela (or they were not recorded by Andrew) apart from Neville asking why she did not use her EFTPOS card.

[31] I find that establishing 'intent' was not adequately explored. The CDHB counsel suggested that there was no dispute of the facts that Angela's actions were dishonest as she deliberately took the money from the jar. I find this is a simplification that confuses deliberation with intent. The latter concept has to involve a conscious act of having a prior intention to deprive someone of their property – aside from the disputed issue of whether the money in the jar was CDHB property no such intention had been formed on the facts.

[32] I find that this was an openly observed 'conditional taking' of money from a jar that was conceptually under the direct control of the workers and not the CDHB (having previously been their tip jar) – Angela did not intend to permanently deprive the jar of funds for Harry's welfare. A good discussion of the how to assess intent to deprive an employer of their property is to be found in *McPherson v Chloride Batteries Ltd* where a Springbok tour

era demonstrator removed some gas masks from his employer and the High Court reasoned he had no intent to deprive his employer of the property permanently.¹

[33] Even applying a civil standard of whether it ‘more likely than not’ that Angela was acting dishonestly in the circumstances, leads away from the CDHB’s conclusion.

[34] At the time, no agreed notes of the meeting were exchanged or provided to Angela.

[35] In giving evidence Angela conceded that she may have given the impression at this meeting that it was her intention to pay the money back rather than Lucy as she did not want to place the blame on her.

Neville Patrick’s assessment of the situation

[36] Neville in evidence says after the meeting he:

.... assessed Angela’s evidence and accepted what Angela told me ... Having accepted everything that Angela told me at face value I considered that there was no need to undertake further investigation. There was nothing to indicate to me at the time that there was other appropriate staff members to interview or take statements from (beyond the Pharmacist, Lucy and Angela) and nothing that Angela or her representative had told me further indicated that further enquiries about the usage of the jar would be useful.

[37] When pressed, Neville conceded that he did not then interview Lucy or the Pharmacist or carry out any further investigation because he was convinced that all there was to see was on the video.

[38] When asked how he determined Angela was intentionally dishonest, Neville pointed to his view that in watching the video, Angela appeared to conceal the twenty dollar note in her hand when taking it out of jar and walking away (but he conceded he did not ask Angela to explain this) and she did not leave an IOU in the jar. Neville also claimed he sought internal HR and legal advice on establishing intent and that he formed a view that neither Angela nor Lucy intended to pay the money back. Simon, who indicated that he took part in the discussion, said he googled what ‘intent’ means. Neville then resolved to meet Angela on the 30 September.

[39] In the interim, Angela continued working, including undertaking cash-handling through the café till. When pressed on a decision making delay between 13 and 30

¹ *McPherson v Chloride Batteries Ltd* [1983] ACJ at [294].

September, Neville indicated that he was very busy during that period. Evidence also emerged that Pauline, Angela's direct supervisor, did not agree with Neville's approach and she related to Simon that she considered Angela's conduct to be an honest mistake not warranting dismissal. Neville acknowledged that Pauline spoke very strongly in favour of retaining Angela in employment.

[40] It emerged in questioning during the investigation, that a parallel disciplinary process was being run involving Ms X, a co-worker of Angel's in the café who had been observed surreptitiously removing significant amounts of money from Harry's jar on more than one occasion and ironically for Angela, she assisted in that investigation. Neville conceded that this would have led to Ms X's dismissal and a possible criminal complaint but a negotiated resignation was agreed with E tū (Ian confirmed this). When being pressed on whether they saw any material differences in this situation and Angela's in terms of forming 'intent' both Neville and Simon said no but could not articulate a coherent reason for this assessment.

Interim decision and 30 September meeting

[41] Neville says that prior to the next scheduled meeting and with the assistance of HR and CDHB's legal team, he drafted a 27 September letter to Angela headed "**Investigation Outcome – Interim Decision**" but did not provide this prior to meeting her.

[42] The letter initially recounts what was on the video and that Angela had acknowledged her actions as viewed, that Angela had indicated that she had not returned the cash prior to receiving the 13 September letter and her explanation was that she had forgotten to do so.

[43] The letter then summarised Angela's responses given at the 18 September meeting.

[44] I observe that in contrast to the notes of the meeting, the summary does not fully and accurately record Angela's responses: specifically the summary suggests Angela had stated Lucy told her not to do it but "you decided to take the cash anyway". I found no reference to this in the notes and I am led to suspect as some emphasis had been placed on it earlier by Simon, that this was a reference to the undisclosed interviews with Lucy.

[45] In addition, the summary suggests Angela had been apologetic "but you did not think you were doing anything wrong" – whereas, Andrew's notes record Angela conceding she "knew it was wrong".

[46] Neville in his 27 September letter, outlined "[F]indings" that Angela had removed the cash, failed to notify staff of her actions, failed to leave an IOU note and crucially found:

You acted in a dishonest manner with an attempt to deceive and as a result committed theft.

You failed to explore other options, such as using your EFTPOS card or getting your colleague to use their EFTPOS card.

[45] Neville then went on to state:

.... my preliminary decision is to terminate your employment with immediate effect. In reaching this decision, I have taken into account the points that you made.

I have also considered the representations you made in response to our investigation. I have contrasted this with the serious nature of the breach, the nature of your role, including access to cash and goods, and the extent to which trust and confidence has been compromised. The latter includes whether the CDHB can continue to have faith in your ability to exercise judgment in your position as a Café Assistant.

I believe that this has been undermined to such an extent that there appears to be no other option but to end your employment relationship with CDHB. In reaching this conclusion, I have considered options that may be available to me. This includes increased supervision, placement in other areas of the Wellfoods operations, and greater oversight of your role. Unfortunately, these measures have been unable to alleviate my concerns.

I'm prepared to consider any submissions that you or your representatives wish to put forward about this preliminary decision, such as any mitigating factors or circumstances you feel should be taken into account.

[47] The letter, that conflates factual findings with a preliminary decision to dismiss, invited feedback in writing and offered to meet.

[48] The 27 September letter was then presented at a meeting of 30 September that was led by Neville and attended by Ian, Terry, Simon, Andrew and Angela.

[49] From Andrew's typed notes that were again not shared at the time, I ascertain that:

- i. Neville read through his 27 September letter.
- ii. Angela then: "seemed very upset".
- iii. The meeting adjourned for 17 minutes to allow Angela and Ian to digest the letter's content.
- iv. Upon returning, Ian made a series of observations and asked questions including:
 - Seeking an assurance that if new information came to hand it would be considered (no answer to this was recorded).
 - That Lucy had not used the term "not to do it" but had said "don't worry about it" (impliedly in reference to buying the lozenges or not).
 - The money had been borrowed not stolen.
 - The supervisor (Pauline) was absent on the day in question so could not be consulted.
 - Angela and Lucy had not discussed paying the money back.
 - Angela had no intention to steal the money.
 - Lucy had paid the money back.
 - Trust and confidence had been affirmed as ongoing by allowing Angela to continue working and handle money (and after this meeting she continued working by agreement).

- He described Angela's family circumstances and importance of earning in her role to the family budget.

[50] I note that the meeting minutes do not record any questions being put to Angela. The meeting concluded with a deadline for a further written submission of 3 October and a final 4 October meeting was scheduled for Neville to confirm his decision.

4 October final meeting

[51] Ian provided Neville with a concise written submission of 1 October that basically expanded on what he had said at the 30 September meeting, it contended that:

- i. Intent to steal the money had not been established and no attempt at deception including hiding from the camera had taken place.
- ii. Neville had failed in his interim decision to properly record that Angela had said her and Lucy had discussed returning the money and that Angela considered Lucy to be informally 'in charge' when Pauline was absent due to her length of service.
- iii. Rather than engaging in theft Angela had failed to follow "sound procedure and best practice" and that was no ground to establish serious misconduct warranting a finding that trust and confidence had been irrevocably broken.
- iv. Neville should take account of Angela's unblemished employment record and that her domestic circumstances relied upon continued income to support her three children.

[52] In addition, Ian had in the interim prompted Angela to request Lucy and the Pharmacy manager provide Neville with statements, which they did on 2 October. Lucy's statement verified Angela's account of buying lozenges for her and their interchange including that she had not advised her against borrowing the money and that it was Lucy's intention to repay Harry's jar. The pharmacy manager confirmed Angela and Lucy bought the lozenges and that Apple Pay was not functioning.

[53] When questioned Neville confirmed that he did not follow up the two additional statements or put any questions to either author of such.

[54] Prior to meeting on 4 October, Neville again with HR and legal advice drafted a letter setting out his: **Investigation Outcome – Final Decision**. The basis for the decision to summarily dismiss Angela effective on 4 October was described as "misappropriating cash from the donations jar, acting in a deceptive manner and with intent".

[55] This letter made reference to the 1 October letter from E tū and the statements from Lucy and the pharmacist but not the 4 October meeting. This, I find, confirms that the decision to affirm the summary dismissal was made before the final meeting and Angela and Ian recalled being told of the decision and given the letter at the conclusion of the 4 October meeting.

[56] Neville did not refer to the final 4 October meeting in his written evidence but he provided a brief handwritten note that showed he attended it with Andrew in support of him, and in questioning acknowledged he drafted the dismissal letter before the final meeting and the meeting notes show that he provided the letter to Angela at this meeting.

Was the dismissal justified?

[57] 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.

[58] 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

[59] My initial finding is that the CDHB manager, Neville, who handled the investigation and made the decision to dismiss, had no problem with resources. Colloquially he had his ‘hand held’ at every stage by HR and had ready access to ‘in-house’ specialist legal advice (and appears to have used it). Neville was accompanied by a senior HR practitioner (Andrew) throughout the whole process apart from the final meeting. From this perspective, I have to hold the CDHB to a reasonably high but not pedantic standard when assessing procedural fairness; unsurprisingly as the largest employer in the South Island they are also no stranger to Authority and Employment Court proceedings.

[60] Despite Neville claiming that there were no internal written guidelines to assist managers in a disciplinary situation and counsel for the CDHB initially resisting the production of such, after the investigation meeting I was provided with an internal document headed “Investigation and Disciplinary Process”.

[61] CDHB Counsel suggested that the guidelines were used by HR staff and were not mandatory to follow. In this context, I am prepared to accept that Neville did not mislead the ERA but Andrew assisting him had access to the above document.

[62] I observe that the short and easily understood guidelines are flexible but I could detect no provision that indicated that they were not to be followed. Having said that, they are clearly ‘guidelines’. In analysing what did occur I will refer to them as “the guidelines” and assess the CDHB’s actions against such but stress this is only one factor in my overall consideration of applying the s 103A test and considering adherence to good faith provisions.

Sufficiency of investigation

[63] The first issue is given that the CDHB categorised the initial allegation as one of theft of CDHB property, 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”² I do have to consider if it was sufficient given the serious level of the allegation.

² *A Limited v H* [2016] NZCA 419; [2017] @ NZLR 295 at [25].

[64] I find that overall this was not the case and that the standard of the investigation fell woefully short of procedural fairness and the defects were not minor. My reasons for this finding are discussed below.

[65] One initial issue that the guidelines suggest is important where potential serious misconduct is involved, is to separate the investigator from the decision-maker – this did not occur.

[66] From the beginning, it was inconceivable that Neville did not simply approach Angela in a timely fashion and seek an explanation for her actions on the video recording (an option the guidelines suggest). Instead, even though he claimed to be the ‘independent investigator’, Neville deputed Simon to informally interview key employees. None of which was adequately documented nor was Angela’s co-worker Lucy, who was potentially implicated, given the opportunity to be represented when interviewed by Simon.

[67] Essentially, the result of this was that Angela was not advised of the serious allegation until after the evidence against her had been gathered. The guidelines provide advice contrary to what occurred as they suggest if witnesses are interviewed before meeting with the person at the centre of the investigation there should be provision of “all relevant information prior to meeting with them”.

[68] To compound matters, Neville relied upon Simon’s report of a contradiction in Lucy’s initial ‘statements’ without Neville interviewing her at the time. This, I find, led to an ongoing problem throughout the investigation as indirectly obtained information created a negative perception of Angela’s actions that was not at any point ‘squarely’ put to her. To avoid this situation the guidelines are clear on the need to properly record witness interviews (“you’ll need to decide whether it’s appropriate to record witness interviews and have them transcribed or whether written statements are adequate”).

Serious misconduct?

[69] Then, in deciding to categorise the initial allegation as theft and detailing it as unauthorised possession of CDHB property, it is apparent that no thought was given to the

background and context of Harry's jar. The history was it had previously been a 'tip jar' for café staff and management had suggested its alternative use (feeding Harry and any of his vet bills) that was collectively agreed to. It was arguably not CDHB property and had no formal guidelines around its use.

[70] I do accept that it was a public donation jar with an informal charitable purpose (as distinct from a recognised charitable organisation donation jar) and that the removal of money for other purposes was inappropriate. I consider this factor should have been more carefully assessed in determining the nature and seriousness of the allegation and whether Angela's conduct reached the appropriate threshold of being capable of categorisation as 'serious misconduct'. Having said that, in some circumstances if an employer establishes 'dishonesty' it can be capable of leading to a serious misconduct finding justifying dismissal. A potential parallel may be cases involving theft of social club funds.³

[71] In providing Angela with the crucial first letter setting out the allegation, Neville glaringly omitted to mention that Lucy had been interviewed twice and that he harboured a concern about her supposedly giving two versions of what had occurred. This was a significant breach of good faith disclosure requirements, as was the omission to not promptly arrange for Angela to view the video recording before the first investigation meeting.⁴ I also consider these failings in the context of s 103A(3)(b) and (c) of the Act that asks whether the employer properly raised concerns before deciding upon any dismissal decision and in doing so gave the employee a "reasonable opportunity" to respond.

[72] In hearing Angela's responses at the first meeting, Neville assured her of an 'ongoing investigation'. This was appropriate, as others were involved in the immediate aftermath of Angela taking the money from Harry's jar – none of this was followed up. I also find that all meetings were inexplicably poorly documented and a 'best practice' of sharing agreed meeting notes was not adhered to.

[73] So, by the time Neville had provided an interim decision, instead of merely outlining the results of his preliminary investigation and considering whether the serious misconduct threshold was met, it was reasonably apparent that he had made up his mind that Angela had

³ *Northern Distribution Union v BP Oil Ltd* [1991] 2 ERNZ 530 and *Goodall v L'Oreal New Zealand Ltd* [2002] 2 ERNZ 224 but caution should be exercised in contrasting these cases as both involved part of the relevant social club funds being provided by the employer.

⁴ Section 4(1A)(c) Employment Relations Act 2000.

intentionally removed the money from the jar and thus committed theft. I find that Neville made this decision on both a wrong approach to the facts and insufficient information. This also hampered any ability to approach the decision with an ‘open’ mind.

[74] In questioning, all Neville could point to in establishing what he thought was intent, was his claim that Angela concealed the dollar bill in her hand upon removing it. No obvious contextual issues were considered, such as: if Angela intended concealment, if she knew the surveillance camera was present and whether she had already told Lucy of her intent to remove the money and perhaps the pharmacy person overheard this as well – none of these matters were followed up.

[75] Further and crucially, Neville apparently failed to consider the purpose to which the money was used in the context of intent – clearly Angela did not use the money for personal gain.

[76] I find that the CDHB did not approach the final 4 October meeting with an open mind to considering mitigating factors, as evidenced by the fact that the dismissal letter had already been prepared and was delivered at the meeting and Neville’s failure to convince that he had fairly considered alternatives.

[77] I find, as the Employment Court did in *Lim v Meadow Mushrooms Ltd* upholding an Authority finding, that the CDHB’s 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”.⁵

[78] If a proper consideration had been made of all the evidence and contextual factors, a reasonable employer could not have come to a conclusion that a threshold of serious misconduct had been established. In essence, the investigator misdirected himself.

The summary and substantive nature of the dismissal

⁵ *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192 at [12] - [13].

[79] This was a summary or instant dismissal that required that the CDHB first find that Angela had initially engaged in serious misconduct. Guidance on how “[B]ehaviour that deeply impairs or is destructive of confidence and trust” is to be assessed was summarised recently by Judge Holden in the Employment Court decision *Emmanuel v Waikato District Health Board*⁶.

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

[60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and

⁶ *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[80] The above guidance on approaching a summary dismissal without notice, involves applying the same justification test in s 103A but the seriousness of the conduct has to be so destructive of the employers trust in the employee or substantial in its level of seriousness, that no notice is warranted before dismissing – thus the sanction of summary dismissal is reserved for the most serious cases of misconduct.

[81] I have made comment on the fact that CDHB could not demonstrate to the Authority that they had properly first turned their mind to the threshold issue of whether Angela had engaged in serious misconduct. What appears to have driven the decision to dismiss is a perception that Angela behaved in a dishonest manner amounting to an intentional act of theft – the facts just do not support this finding.

[82] I also saw some merit in the submission made that the CDHB's continued employment of Angela in a position handling cash whilst a supposed investigation was being conducted belied the notion that trust and confidence in her had been irrevocably destroyed.

[83] Setting aside my finding that the CDHB wrongfully concluded serious misconduct was at issue, I do not consider that after hearing mitigating factors that they gave sufficient attention to alternatives short of dismissal.

Assessment

[84] Whilst I cannot re-run or “stand in the shoes” of the employer conducting a disciplinary inquiry, I can assess whether the decision to categorise the conduct as sufficient to warrant summary dismissal was objectively a course open to a fair and reasonable employer at the outset. In this regard, I consider this could not be the case as described above. In addition to procedural deficiencies that would render the dismissal otherwise unjustified, I have found insufficient evidence to establish intent to deprive the CDHB of property as alleged.

[85] Angela's explanation for why she removed the money from Harry's jar was reasonably plausible and supported by evidence that in part, the CDHB chose to either ignore or inexplicably discount.

[86] I have been guided by the candid and helpful evidence of both parties and cases alluded to in both parties' legal submissions and found them useful but in the final analysis, this was a straightforward factual inquiry involving a particular context.

Finding

[87] I determine that Angela's decision to take money from Harry's jar was an unwise decision but I am not convinced there was an intention to permanently deprive Harry's jar of the cash (unlike the parallel case of Ms X) and given the purpose that the money was put to, it should have been apparent to the CDHB if they had properly conducted an investigation with an open mind, that the immediate failure to pay the money back was a mix up between Angela and Lucy with no dishonesty being evident.

[88] What did contribute to the facts not being properly elicited was the poorly conducted initial undocumented informal investigation, the lack of timeliness of such and failure to follow up witnesses during the formal investigation stage and partly, Angela not being concise enough in her initial response that was understandably driven by a misguided loyalty to her co-worker.

[89] I find in the overall circumstances, that the summary dismissal of Angela was not substantively justified on the grounds that the CDHB did not first conduct a full and fair investigation to determine whether the conduct in question was capable of being regarded as serious misconduct and Angela's conduct did not objectively reach the threshold of being considered theft and thus serious misconduct. This distinguishes Angela's circumstances from cases the CDHB counsel cited.

Conclusion

[90] Having made a finding of unjustified dismissal on procedural and substantive grounds and breaches of good faith, Angela has been successful in her personal grievance and is entitled to remedies. She sought to 'clear her name' and reputation and has successfully done so.

Remedies

Lost wages

[91] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Angela 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.

[92] Here I find Angela's lost remuneration was attributed to the personal grievance. Angela provided an IRD statement of no earnings since she was dismissed and she withdrew from the job market after applying for one job. Angela indicated that she had been doing voluntary work at her daughter's school in the interim and she will return to paid job hunting once she concludes these current proceedings.

[93] I find that that this is a situation where the necessity to consider what attempts an employee made to mitigate their loss should be carefully analysed in context. That being, Angela was initially focused upon reinstatement and clearing her name before she abandoned the hope of such, the unfortunate delay caused by Covid 19 to have this investigation meeting convened promptly, the CDHB's failure to compromise earlier in the face of what has turned out to be a distinctly unsustainable dismissal, the negative impact of being dismissed for theft on her job prospects and the impact on her self-esteem (discussed below).

[94] In these circumstances, I make the observation that had Angela continued to seek reinstatement it would have been considered favourably.

[95] Angela's advocate seeks lost wages from the date of dismissal to the date of hearing (effectively twelve months).

[96] The CDHB point to lost wages only being appropriate up until the point Angela abandoned her reinstatement claim and they fix that point at 21 January 2020 (the date the parties attended mediation) or earlier on the basis of a failure to mitigate her loss.

[97] Angela's advocate has suggested 11 March 2020 (the date the matter was filed in the Authority) I have carefully considered this suggestion but am not conceptually persuaded by either suggested date.

[98] In an unjustified dismissal where the ongoing stigma of being labelled a thief is a factor, compelling reasons for extending the discretionary period of lost wages beyond three months are present.

Finding

[99] Given the above and reflecting on the unfortunate circumstances of the unjustified summary dismissal and resulting impact on a relatively long serving employee, I consider that justice is equitably served by awarding Angela lost wages for a period beyond three months and I fix that period at six months. This amounts to a sum of \$17,625.60 calculated on an hourly rate of \$20.40 for a thirty six hour week.

Compensation for Hurt and Humiliation

[100] Angela gave compelling evidence and a submission in support, detailing the significant impact of the summary dismissal on her and her family and the indignity it caused. She described how difficult it was to tell her family and partner and described how hard it was living with the stigma of being labelled a thief. This included the disproportionate impact on her trying to find a similar role that would inevitably, given her experience, always involve cash-handling and her inability to explain away the reason she left the CDHB after 9 years-service knowing that to mislead over this may be crucial.

[101] This caused Angela, after one job application in which she revealed she was engaged in a personal grievance to 'clear her name', to withdraw from the job market feeling it was a hopeless endeavour. Objectively, she is in a very vulnerable job market situation - in any job application employers naturally view 'theft' as an integrity or honesty issue and will reference check your immediate past employer.

[102] Angela struck me as a capable and proud person and one thing that caused ongoing embarrassment and guilt was her inability to support her daughters and need to rely on her new partner, who is not their father, for financial support including him having to work additional hours.

[103] Angela's partner Justin and friend Christine, described the negative impact upon her self-confidence and esteem and general mental well-being. A significant hurtful factor was that the dismissal disengaged her from the workplace where she so enjoyed having a connection and sense of purpose related to working for health care provider, especially the rehabilitation focus of Burwood and its unique approach to holistic patient care.

[104] I am convinced that Angela suffered significant hurt, ongoing humiliation, loss of dignity and injury to feelings and has found it very hard to link the extent of her actions in

assisting a co-worker to being dismissed for theft; given her otherwise highly committed contribution to her former employer.

[105] Angela's advocate sought compensation in the vicinity of up to \$50,000 and set out a comparison of recent legal authorities she considered supported this level of compensation and set out an apt quotation from Angela's evidence:

This has taken a massive toll on my family, especially my partner having to work 60 plus hours per week. There is not one day that goes by where I don't think about this. I have anxiety, I feel like a failure of a mother not being able to give my children the life they used to have. I am ashamed, embarrassed and tearful all the time.

Finding

[106] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider Angela's evidence warrants reasonably significant compensation and I fix that at \$30,000 under s 123(1)(c)(i) of the Act.⁷

[107] I stress that in fixing this amount I have to consider Angela's contribution – however well motivated her action could be viewed, it was an error of poor judgment. I now have to consider what contribution that poor judgment made to the situation that gave rise to Angela's personal grievance.

Contribution

[108] Section 124 of the Act states that I must consider the extent to which, if any, Angela'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 and contrasted the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁸.

[109] I find that Angela did however unwittingly, engage in some blameworthy behaviour. She decided to use money that was placed partly in her trust or at least supervision, for a specific and worthy cause, for a different purpose.

⁷ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

⁸ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[110] I have to balance this consideration up with my finding that the CDHB's approach was significantly procedurally deficient and I have found that due to this, the manager concerned did not approach the dismissal with an open mind, although I do stress that Neville Patrick appeared to genuinely believe that he was acting correctly and he was supported by a senior HR practitioner who did not give evidence and who ostensibly failed to give appropriate guidance.

[111] Angela cannot be blamed for these deficiencies that robbed her of ongoing employment in a job that she enjoyed, derived a great deal of satisfaction from and was evidently appreciated in.

[112] I am also guided by the review of authorities in *Maddigan*⁹ as to the range and level of blameworthy contributory conduct.

[113] I find the conduct of Angela to be at the lower range of contribution. Evidence from CDHB witnesses confirmed that Angela had, up until the issue with Harry's jar, been a well-regarded and reliable employee and her conduct did not wilfully mislead her employer. To categorise her actions as theft was a wholly disproportionate and wrong approach.

Finding

[114] On balance, given Angela's contribution in the events that led up to her dismissal, I find this warrants a 10% reduction of her remedy for lost wages and compensation.

Summary

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

- (a) Angela Conner was unjustifiably summarily dismissed.**
- (b) The Canterbury District Health Board failed to adhere to good faith obligations in effecting the dismissal.**
- (c) In the circumstances the Canterbury District Health Board must pay Angela Conner the sums below:**
 - (i) \$15,863.60 gross lost wages pursuant to s 123(1)(b) of the Act; and**

⁹ At [75]-[76].

(ii) \$27,000 compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[96] Costs are at the discretion of the Authority and here Angela Conner was successful in her claim of unjustified dismissal and has obtained significant compensatory remedies in an investigation meeting that took just less than 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, Angela Conner has fourteen days following the date of this determination to make a written submission on costs and Canterbury District Health Board 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