Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 142
5434418

	BETWEEN	SAM COULTHARD Applicant
	A N D	TONY'S TYRE SERVICE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder and Jeff Goldstein, Counsel for Applicant Richard Harrison, Counsel for Respondent
Investigation Meeting:	20 and 21 August 2014 at Christchurch
Submissions Received:	21 August 2014 from both parties, with supplementary submissions on mitigation received from the respondent on 3 September 2014 and from the applicant on 8 September 2014.
Date of Determination:	10 September 2014

DETERMINATION OF THE AUTHORITY

A. Mr Coulthard was unjustifiably dismissed and is awarded remedies subject to a 25% reduction due to contribution.

B. Costs are reserved.

Prohibition from publication order

[1] The Authority heard evidence from both parties about an individual who took no part in the Authority's investigation meeting but who was suspected of having stolen a bar fridge from the respondent's Lincoln Road premises with the assistance of

Mr Coulthard. It would appear that no criminal charges have been laid against this individual and, accordingly, I prohibit from publication any information that would lead directly to this individual's identity being discovered. In this determination she will be referred to as Ms X.

Employment relationship problem

[2] Mr Coulthard claims that he was unjustifiably dismissed by the respondent on 26 August 2013 and that the respondent acted in breach of its duty of good faith towards him. The respondent denies that it unjustifiably dismissed Mr Coulthard and asserts that its actions were justified.

Brief account of events leading to the dismissal

[3] Mr Coulthard worked for the respondent as a Service Technician, specialising in carrying out wheel alignments. The evidence of the respondent is that Mr Coulthard had received a number of warnings for lateness and, on 31 July 2013, he was due to attend a meeting with the respondent at its Lincoln Road branch to face further disciplinary action in relation to lateness and unauthorised absence. The meeting was due to start at around 3pm and Mr Coulthard had asked a friend of his, Ms X, to attend as his support person. Ms X was not an employee of the respondent company but was well known to most of the staff because of her occasional visits to the premises to visit Mr Coulthard.

[4] It is Mr Coulthard's evidence that, sometime prior to the disciplinary meeting, he had been told that he was to clean the smoko room. He says that, whilst he was sweeping under the table in the smoko room, he knocked a bar fridge that was being stored there and that water came out of it. He says that a puddle formed on the floor of the smoko room, which he dried with paper towels. He says he then carried the bar fridge out of the smoko room through the workshop area and placed it just outside of the workshop in order to drain the water away from the bar fridge and to let it dry out. CCTV footage was shown to the Authority which confirmed that Mr Coulthard carried the bar fridge out into the workshop and placed it outside of its entrance at around 2.23pm. The footage shows Mr Coulthard tipping the fridge forward for a couple of seconds.

[5] Mr Coulthard's evidence is that he then went back into the smoko room and started cleaning the dishes. He then saw Ms X arrive and wait for him so that they could go into the disciplinary meeting, which actually started at about 3.10pm.

[6] Mr Coulthard says that he, Ms X and another staff member, Mr Daly, who had only recently started at the branch, were chatting close to the bar fridge prior to the start of the meeting, but that he had to go and carry out a wheel alignment job and left Ms X and Mr Daly talking. His evidence is that he did not see what happened to the bar fridge after that and that he forgot all about it until several days later when he received a letter on 8 August 2013 inviting him to a disciplinary meeting in relation to its theft.

[7] Mr Daly's evidence to the Authority is that he had never met Ms X before this occasion but that, as the three of them were standing by the fridge, Ms X asked him to help her move the fridge. He believed that someone had commented that the bar fridge was in the way but could not recall who that was. In any event, the CCTV footage shows Ms X and Mr Daly pick up the bar fridge and carry it past the main entrance of the workshop, out of sight of the camera. Mr Coulthard is clearly in sight during part of this manoeuvre and, at first sight, it seems unlikely that he did not see what Ms X and Mr Daly were doing. However, his explanation is that there was a roller door between him and Mr Daly and Ms X when they picked up the fridge. Photographic evidence from the respondent shows a pillar (which was around 30 to 50cm in width) which could have obscured Ms X and Mr Daly from Mr Coulthard as they were moving the fridge.

[8] The respondent's evidence is that one of the workers, Mr Tavendale, spotted the bar fridge in the back of Ms X's car later on in the day, as it was leaving the premises. CCTV footage shows Ms X pull up in her car outside of the workshop area, and Mr Coulthard assist her in checking the air pressures in her tyres. As Mr Coulthard walked away, Ms X got into her car and drove out of sight towards the area where she had earlier carried the bar fridge with Mr Daly. A few minutes later, Ms X's car can be seen reversing back with what appears to be the bar fridge in the back seat of her car. The footage also shows Mr Tavendale looking at the car as it was reversing away and then making a gesture to his co-workers which could be interpreted to mean that there was a square object in the back of the car.

[9] It is worth saying at this point that, although Mr Coulthard and his counsel argued that what could be seen in the back of the car was a large white teddy bear which Ms X apparently had been carrying around in her car around that time, the respondent was able to zoom in on the relevant image during the Authority's investigation and show quite clearly that the object that could be viewed through the back of the car window was not a teddy bear (which, incidentally, was visible in earlier shots on the far side of the back passenger seat), but a white square object. The image was clear enough, indeed, to show an energy efficiency sticker on it, which had also earlier been visible when the bar fridge was being carried by Mr Coulthard from the smoko room.

[10] I am therefore satisfied that, on the balance of probabilities, it was the bar fridge that was in the back of Ms X's car as she reversed away, after having had her tyre pressures checked by Mr Coulthard.

[11] I would also say that I agree with Mr Coulthard's counsel that it is very unlikely that Mr Tavendale could actually see the bar fridge in the back of the car, because of the angle at which he was viewing the car. His gesture may therefore signify something other than that he had seen the fridge, or it is possible that he had known that the fridge would be in Ms X's car all along. It is impossible to know, and it is not necessary for present purposes to determine what was going through Mr Tavendale's mind when he made the gesture.

[12] It appears that Mr Tavendale then advised the respondent that the bar fridge was missing and that the Christchurch Team Leader for the company, Mr Baddiley, instigated an investigation to try to locate the bar fridge. This included viewing the CCTV footage for the day in question. While doing so, he identified Mr Coulthard as carrying the fridge out of the smoko room and, later, seeing the fridge in the back of Ms X's car. On the strength of this evidence, Mr Baddiley advised Mr Higgins, the National Sales Manager, of what he had found who, in turn, wrote a letter to Mr Coulthard which was erroneously dated 23 August 2013 but which was handed to Mr Coulthard on or around 8 August. The letter advised Mr Coulthard that he was invited to discuss some areas of concern with Mr Higgins on Monday, 12 August 2013, the areas of concern being expressed as follows:

> *That on 31 July 2013 you were observed on video footage removing a bar fridge from your workplace in Lincoln Road without any authorisation.*

> *We note that your support person* [Ms X] *was party to the removal of the fridge and we would suggest that it may be appropriate if she was not your support person for this meeting.*
> *You should also be aware that a Police report has been filed over this incident.*

[13] The letter went on to state that, if the above *incidences* resulted in an allegation of misconduct or serious misconduct being established, disciplinary action could result in the termination of Mr Coulthard's employment. He was also informed that he was entitled to have a support person or representative present at the meeting and that full consideration would be given to his explanation for the matters before any decision or outcome was reached.

[14] In his evidence to the Authority, Mr Coulthard said that, when he got this letter, he realised for the first time that the bar fridge had gone missing and reached the conclusion that Ms X may have stolen it. He said, however, that he did not ask Ms X anything about this at the time because he *"did not want to know"*. I understood from this that Mr Coulthard meant that he did not want to have it confirmed that his friend had stolen property from his workplace.

[15] Mr Coulthard attended the disciplinary meeting on 12 August 2013 choosing not to have a support person with him. The Authority saw some notes of the disciplinary meeting made by Mr Baddiley. Mr Coulthard confirmed to the Authority that the notes were, bar one sentence, accurate, although not necessarily comprehensive. The notes indicate that Mr Coulthard was shown the video footage (although he says he was not shown the second set of footage which showed the bar fridge in Ms X's car). The notes also indicate that Mr Coulthard said that he had moved the bar fridge in order to clean it out, that he had not given any authorisation to anyone to move the fridge and that he thought that someone had put the fridge back and it was not until he had received the letter of 8 August 2013 that he thought something was up. The notes also record that Mr Coulthard stated *"that's when I knew she had taken it"*.

[16] The notes also record that Mr Coulthard said that he had been asked to clean the smoko room by *"maybe Darrin or Jordan I'm not sure"*. He also stated that

Ms X *"is involved in fraud. Car fraud insurance fraud. She has some stolen items in her house"*[1].

[17] It is the respondent's evidence that, after the investigatory meeting with Mr Coulthard, both Mr Baddiley and Mr Higgins spoke to Darrin Lodge (the Branch Manager), Mr Laby, the Deputy Branch Manager and to Jordan (a tyre technician) to ask whether they had, indeed, instructed Mr Coulthard to clean the smoko room. Their evidence is that all of these individuals deny this.

[18] However, it is my finding of fact that, first, Mr Higgins did not ever speak to Mr Lodge and that Mr Lodge was only asked by Mr Baddiley, prior to the meeting with Mr Coulthard on 12 August, if he had asked Mr Coulthard to clean the smoko room.

[19] Secondly, and more significantly, I believe that no-one ever asked Jordan whether he had told Mr Coulthard to clean the smoko room. I reach this conclusion because of statements made in contemporaneous documents and in a brief of evidence which, together, strongly suggest that no one spoke to Jordan at all. Whether this failure to speak to Jordan to confirm Mr Coulthard's account of the events renders the decision to dismiss Mr Coulthard unjustified will be examined below.

[20] There is also a question mark about whether the questions asked of Mr Laby and Mr Lodge were whether Mr Coulthard had been asked to clean the fridge, as opposed to the smoko room. However, on balance, I believe that Mr Lodge, at least, was asked whether he had asked Mr Coulthard to clean the smoko room. Mr Laby and Jordan did not give evidence to the Authority.

[21] Mr Coulthard was invited to a further meeting on 26 August 2013 in which he was advised by Mr Higgins that he was going to be dismissed because *"no manager can recall asking you to clean the fridge"*[2]. Mr Coulthard protested at this, but it is clear from the notes taken of that meeting that Mr Higgins had already made his decision by that point and was not going to consider any further information from Mr Coulthard. It is Mr Coulthard's evidence that, between 12 and 26 August 2013, although he was not suspended and was working, he was not told any further

[1] It is this last sentence that Mr Coulthard takes issue with.
[2] This is recorded in a document headed *Outcome meeting with Sam regarding fridge*.

information in relation to the ongoing investigation. Mr Coulthard then received a letter dated 27 August 2013 which stated as follows:

> *Dear Sam*
>
> ***Subject: Termination of employment***
>
> *This letter is to confirm with you that your employment with Tony's Tyre Service has been terminated with effect from Monday 26 August 2013.*
>
> *A formal meeting was conducted on the 12 August 2013 at which the serious matters outlined in our notice of formal meeting dated 8 August 2013 were put to you. You were given the opportunity to explain your reasons for your actions. Your failure to provide a reasonable explanation for this given the circumstances was not acceptable.*
>
> *The fact is that the fridge belonging to the company has gone missing. You were captured on security video footage removing the fridge from the building. You claim you were asked to clean the fridge but cannot remember who requested this. Your manager and Brendon confirmed that they did not request you to do so at any point. The fridge disappeared soon after your removal of it to the rear of the store.*
>
> *As you are aware this is also a matter under investigation by the Police.*
>
> *Your actions and lack of explanation for your actions have undermined the trust and confidence that must exist in the employment relationship.*
>
> *Your current warnings and incidents have been taken into account in this decision to dismiss you.*
>
> *Any monies owing to you will be credited to your bank account at the next pay run.*
>
> *Yours faithfully*
> *Scott Higgins*
> *National Sales Manager*

The issues

[22] The Authority must determine whether or not the actions of the respondent, and how the respondent acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred[3].

[23] The Authority heard detailed evidence from several witnesses for both the respondent and the applicant. In addition, parts of the CCTV footage used by the

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[3] Section 103A(2) of the Employment Relations Act 2000 (the Act)

respondent to investigate the matter were scrutinised in great detail by counsel, some of these witnesses and by the Authority, in some cases on a frame-by-frame basis. As a result of this I am able to reach certain conclusions as to what is likely to have happened. However, in determining whether or not the dismissal was justified, the Authority must not substitute its view for that of the respondent, and it must examine whether the actions of the respondent were reasonable given the information available to it at the time.

[24] Section 4(1A) of the Act sets out the following requirements:

> *4(1A) The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[25] Section 103A(3)-(5) set out the key steps that the employer must follow when it is contemplating a dismissal. These steps are as follows:

> *(3) In applying the test in subsection (2), the Authority or the Court must consider –*
>
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
>
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
>
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
>
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the*

allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.

(5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section 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.

[26] It is the respondent's case that, at the time of the dismissal, it had established the following facts:

(a) Mr Coulthard had placed the bar fridge outside of the workshop area, next to the tyre compound entrance;

(b) After Ms X's arrival, she and Mr Coulthard were standing next to the fridge and were then joined by another employee, Mr Daly;

(c) Mr Daly assisted Ms X move the fridge to another location outside of the store, in the presence of Mr Coulthard; and

(d) Ms X returned later in her car when Mr Coulthard checked the pressure on her tyres before the car was moved to where the fridge was taken and then backed out with the fridge in the back.

[27] The respondent submits that all of these events are clearly established on the footage and that the respondent relied primarily on the footage in reaching its decision. However, there are a number of areas of dispute, which are as follows:

(a) The reason for Mr Coulthard placing the fridge outside of the store;

(b) Whether Mr Coulthard witnessed Mr Daly and Ms X move the fridge to another location;

(c) Whether the fridge was in the back of Ms X's car after Mr Coulthard had checked her tyre pressures.

The reason for Mr Coulthard placing the fridge outside of the store

[28] With respect to the first area of disagreement, whether Mr Coulthard had moved the fridge outside of the smoko room because he had been cleaning the smoko room and had wanted to drain water out of the bar fridge, and dry it, the respondent says that it relied on its own knowledge of the bar fridge to conclude that this was incorrect. The respondent says that, because the bar fridge had not been used for several weeks, it could not have had water in it. It also says that it made inquiries and found that no one in management had instructed Mr Coulthard to clean the smoko room.

[29] First, having had the benefit of having interviewed Mr Coulthard during the Authority's investigation, and having scrutinised the footage, I believe that it is more likely than not that Mr Coulthard did carry the fridge outside because he was cleaning the smoko room and because it had water in it which he wished to drain away and have the fridge dry.

[30] However, was it reasonable for the respondent to have concluded that this was not true? I accept that the respondent was entitled to rely on its own knowledge of the bar fridge not having been used for some time to doubt the veracity of what Mr Coulthard told it. However, the footage which was viewed by the respondent prior to dismissal clearly shows Mr Coulthard placing the fridge onto the ground and then tipping it forward. According to the notes of the disciplinary investigation meeting, Mr Coulthard was not asked any questions about why he did this. The respondent cannot pick and choose which parts of the footage it wishes to rely upon. Given that the respondent relies primarily on the footage to reach its conclusions, it was not the action of a fair and reasonable employer to have ignored that part of the footage which, on its face, corroborates Mr Coulthard's evidence.

[31] Furthermore, the notes of the disciplinary investigation states that Mr Coulthard stated that *"maybe Darrin* [Lodge] *or Jordan"* asked him to clean the smoko room. Darrin Lodge managed the Lincoln Road store and Jordan was a tyre technician, at the same level as Mr Coulthard. As I have indicated above, I do not accept the evidence of the respondent that it asked Jordan whether or not he had asked Mr Coulthard to clean the smoko room.

[32] The respondent says that, effectively, even if Jordan was not asked, Jordan had no authority to ask another technician to clean the smoko room and so it was not unreasonable to have only asked managerial staff whether an instruction had been given. However, I do not accept that, as it is clearly possible for one technician to ask another technician to do something, even if the first technician did not have the authority to do so. Jordan may have lied about management desiring the smoko room being cleaned up, or may have misunderstood what management had said. Simply not asking Jordan was a serious failure to properly investigate the matter and, in my view, this failure was not the action that a fair and reasonable employer could have done in all the circumstances.

Did Mr Coulthard witness Mr Daly and Ms X move the fridge to another location?

[33] It is my finding that it was reasonable for the respondent to conclude that Mr Coulthard was aware of Mr Daly and Ms X moving the fridge to another location. Whilst I do not discount the possibility, having viewed that part of the footage, that he simply did not notice them do this, it is not an unreasonable conclusion to reach that Mr Coulthard knew they did it, given what can be seen on the footage.

[34] However, care must be taken when an employer seeks to rely upon CCTV footage because, often, images can be open to interpretation. This may be for many reasons, and in this particular case, uncertainty arises due to the distance from the camera of the activity under scrutiny. Because of this uncertainty, it would be reasonable to expect the employer to have taken further steps to investigate what appears on the footage and the most obvious step to have taken was to question Mr Coulthard on what was happening.

[35] However, it appears to be uncontested that only five minutes of the 19 minute investigation meeting with Mr Coulthard on 12 August 2013 involved viewing the footage. For this reason, and given that there is no mention in the notes of the meeting that that part of the footage was discussed, I believe that it is more likely than not that that part of the footage was either fast-forwarded or not discussed with Mr Coulthard,. Given that it is submitted on behalf of the respondent that Mr Coulthard being present during the movement of the fridge by Mr Daly and Ms X formed part of the respondent's rationale for concluding that he was implicated in the theft of the fridge, I conclude that the respondent did not do enough to check this

aspect, and that no fair and reasonable employer could have failed to have discussed that aspect with the employee.

Was the fridge in the back of Ms X's car after Mr Coulthard had checked her tyre pressures?

[36] As I have already indicated above, I believe that it was entirely reasonable for the respondent to have concluded that Ms X had placed the fridge in her car after she had had her tyre pressures checked by Mr Coulthard, whilst the car was outside of the sight of the cameras. Mr Coulthard's counsel made valiant attempts to cast doubt on the evidence shown on the footage to suggest that it could not be the case that the object seen in the car as it reversed away was a bar fridge, but I would venture to say that I am satisfied to a standard of proof higher than that is needed in the Authority that it was the same bar fridge as Mr Coulthard had been carrying in earlier footage.

[37] The footage of the car reversing with the bar fridge in it was not shown to Mr Coulthard. This is not contested by the respondent. Furthermore, Mr Coulthard also stated that he was told by Mr Higgins that the respondent had a copy of footage showing Ms X putting the fridge in her car but that they could not show it to him for technical reasons. He felt this amounted to entrapment. This is vehemently denied by the respondent. Whether or not Mr Higgins made that statement, I believe that Mr Coulthard believed he had heard it.

[38] In any event, failing to show Mr Coulthard the part of the footage which showed the fridge in the back of Ms X's car amounts to a serious flaw in the proceedings, given that it was part of the crucial evidence that was relied on by the respondent to dismiss Mr Coulthard. Without the footage of the fridge in the car, their case would have been much weaker. Whilst showing that footage to Mr Coulthard may not have made any difference to the conclusion that Ms X had taken the fridge, I cannot ignore the failure to do so under s103A(5) of the Act because, while the failure did not necessarily result in the employee being treated unfairly, the failure was not minor. Given that the test is conjunctive, not disjunctive, the defect in the process must be both minor and not resulting in the employee being treated unfairly.

Other alleged flaws in the process

[39] Counsel for Mr Coulthard assert that the respondent did not view footage for the period when he and Ms X were in the disciplinary meeting regarding his lateness,

and that this contributes towards unfairness. However, I regard this submission as being effectively a counsel of perfection, given that the respondent was entitled to conclude that Ms X loaded the fridge into her car and drove away with it after that meeting. This meant there was no need to view any further footage in my view.

[40] Mr Coulthard also argues that the respondent had predetermined his guilt prior to the investigation meeting on 12 August. This is based partially upon police records which show that the respondent lodged its complaint with the police against Mr Coulthard on 1 August 2013. However, I believe that the respondent was entitled to bring their suspicions to the attention of the police without delay, and on the face of the footage, and his friendship with Ms X, Mr Coulthard was implicated. I do not believe that this means that their decision to dismiss Mr Coulthard was predetermined and merely reporting a suspicion to the police does not mean one is convinced that the suspicion is true. The fact that Mr Coulthard was able to continue to work, without being suspended, from 1 August does not suggest predetermination at that stage.

[41] However, after 12 August 2013 I accept that the respondent appears to have made its mind up before completing all its enquiries. This is demonstrated by the comment in the notes of 12 August in which Mr Baddiley typed *we believe that Sam has orchestrated the removal of this fridge from the company premises and it was arranged for* [Ms X] *to come and pick this up to remove off site.* This appears to be before it had checked with Mr Lodge whether he had instructed Mr Coulthard to clean out the smoko room, because no mention is made in that document of that outcome. To reach such a conclusion prior to completing all its necessary enquiries clearly demonstrates predetermination. No fair and reasonable employer could have reached that conclusion in all the circumstances at that stage of its enquiries.

Conclusion

[42] Taking into account all the findings set out above, I am satisfied that no fair and reasonable employer could have taken the actions that the respondent took in all the circumstances that prevailed when the dismissal occurred. The respondent appears to have acted without conducting a sufficient investigation and what investigation it did carry out, it appears to have done with a closed mind. Therefore, the dismissal was unjustified.

Remedies

[43] Having established that Mr Coulthard was unjustifiably dismissed, it is necessary to consider what remedies he is due. Mr. Coulthard does not seek reinstatement.

[44] Section 123(1) of the Act provides as follows:

> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *…:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

[45] Section 128 of the Act provides as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[46] Mr Coulthard secured full time employment on 4 May 2014, and so seeks reimbursement of wages for a period of 36 weeks. This amounts to a net loss of wages in the gross (pre-tax) sum of $25,898.94, taking into account income he earned as a casual driver during this period.

[47] The Authority saw copies of 22 letters that Mr Coulthard says he sent seeking employment between 15 September 2013 and 20 April 2014. The jobs applied for covered a wide range, from relatively unskilled jobs, such as driver, to what appears

to be more technical roles, such as fibre optic technician. Although the respondent doubts the veracity of these applications, as they are all in the same terms and format, I believe it is unlikely that Mr Coulthard would seek to deceive the Authority by pretending to have applied for such a wide range of positions. I therefore accept that he took sufficient steps to mitigate his loss.

[48] Mr Harrison points out that it is not clear what income Mr Coulthard earned during the period in question from the activities of his business, NVIT Limited, which provides computer maintenance services. Mr Coulthard provided copies of GST returns for this company covering various periods between August 2012 and July 2014 which disclosed more expenditure disbursed than income made post termination, resulting in refunds of GST.

[49] Mr Harrison on behalf of the respondent submits that the GST returns are incomplete and that searches of Facebook show considerable activity in September and October 2013, following the dismissal. I do not agree, however, that the disclosure that Mr Harrison annexed to his additional submissions demonstrate *considerable* activity and it certainly does not evidence substantial sales. Mr Harrison also says that Mr Coulthard appears to have applied for only seven jobs between his dismissal and Christmas 2013, and that this implies he was putting his time and energy into his business. This is not necessarily the case, as Mr Coulthard did not say that the 22 letters he produced amounted to the totality of jobs he had applied for. Also, his evidence is that he sought financial help from his family and friends.

[50] All in all, I do not believe there is sufficient evidence to enable me to conclude that Mr Coulthard devoted his time post termination to developing NVIT Ltd instead of seeking paid employment, nor that he earned any income of note during that period.

[51] However, having considered all the evidence and the submissions, I believe that it is appropriate not to exercise the discretion given under s.128(3) of the Act to award a sum greater than that contemplated under s.128(2). This because Mr Coulthard is a multi-skilled, personable and articulate young man living in Christchurch (where employment opportunities for such people are not lacking) and who should have found it relatively easy to find a job within 13 weeks of his dismissal. Mr Coulthard says in his brief of evidence that he eventually found a job in May 2014 *through desperation and a friend's recommendation*. This implies that he was

not trying particularly hard up to that point, or was being rather fussy. Whilst that was Mr Coulthard's prerogative, it would not be just to require the respondent to pay for Mr Coulthard taking a longer time than was strictly necessary to find employment.

[52] Accordingly, during the period of the first 13 weeks after his dismissal Mr Coulthard would have earned the gross sum of $10,237.50. This is less than the sum that Mr Coulthard lost as a result of his personal grievance (which is estimated by Ms Ryder to be $16,873) and so, pursuant to s.128(2), Mr Coulthard is entitled to reimbursement of the gross sum of $10,237.50, subject to the application of s.124.

[53] Turning to what Mr Coulthard is entitled to in terms of humiliation, loss of dignity and injury to feelings, his evidence is that he was very hurt when his explanation meant nothing, and that he felt emotionally disturbed and depressed and that his honesty and integrity had been compromised. He had to seek financial help from his family and friends, which was demoralising.

[54] Although Mr Coulthard said that he felt depressed, there was no medical evidence proffered, and so I do not believe that this depression was of a clinical nature. I do not believe that an award of $10,000 is warranted, having regard to the evidence and the level of awards that are made in the Authority for similar degrees of humiliation, loss of dignity and injury to feelings. I therefore award the sum of $7,000.

[55] Under s.124 of the Act, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[56] Mr Harrison submits that reduction to any awards made should be by 100% because it is almost inevitable that the employer would have dismissed Mr Coulthard on the evidence. He cites *Schueber v General Distributors Limited* (AA 209/06) ERA Auckland 21 June 2006 to support this proposition. However, that case was about an applicant who took a camera from a store room and gave it to another employee who removed it from the premises. However, in this case, Mr Coulthard did not give the fridge to Ms X.

[57] In fact, having considered all the evidence, I believe on balance that Mr Coulthard did not wittingly facilitate the stealing of the fridge by Ms X. I believe that Ms X took advantage of an opportunity created by Mr Coulthard, and that he was unaware of Ms X's motives. The fact that Mr Tavendale gave evidence that Mr Coulthard had told him that he had the fridge at his house does not convince me of Mr Coulthard's guilt as I did not find some aspects of Mr Tavendale's evidence very convincing, including that aspect.

[58] However, there are some parts of Mr Coulthard's conduct that need to be scrutinised to ascertain whether they contributed, in a blameworthy way, towards the situation that gave rise to the personal grievance. The first is Mr Coulthard taking the fridge out into the yard in the first place, when he could have emptied the water into the sink. Whilst it is easy in hindsight to say that Mr Coulthard could have done that instead, objectively speaking there was nothing objectionable in him taking the fridge outside to empty it, and to dry it out. Therefore I do not believe that this was a blameworthy act.

[59] Next, was Mr Coulthard allowing Mr Daly and Ms X to move the fridge. He says he did not know they had done this. On balance, I find this unlikely. I believe that Mr Coulthard did know, to some degree, that the two were moving the fridge. However, I also believe that he probably did not consider it important at that time. Objectively speaking, allowing his friend and colleague to move the fridge because it was ostensibly or actually in the way was not a blameworthy act.

[60] However, I do believe that Mr Coulthard's failure to take steps to ascertain where the fridge had gone after Ms X and Mr Daly had shifted it was a blameworthy act, given that he had taken it from its usual spot in the first place. He says that he forgot about it. Even if this is true, he should not have done so, and must take some responsibility for it eventually going missing, to the extent that he failed to safeguard it.

[61] In addition, Mr Coulthard's admission that he effectively shut his mind to the possibility that his friend Ms X had stolen the fridge was blameworthy. Whilst this may be understandable from the point of view of their friendship, as an employee he owed duties to his employer, which included assisting it to safeguard its property and to recover it if it had gone missing due to his negligence. If he had taken better care

of the fridge, he would have discovered it had gone missing much sooner, so that it could have been recovered, or it would never have gone missing at all.

[62] In light of this, I believe that some of Mr Coulthard's actions did contribute in a blameworthy way towards the situation that gave rise to the personal grievance. This contribution merits a reduction in remedies. I believe that a reduction of 25% is warranted. This reduces the lost wages awarded to the gross sum of $7,678.13 and the award under s.123(1)(c)(i) to $5,250.

[63] Mr Coulthard seeks the payment of holiday pay on the award of lost wages, at the rate of 8%, in accordance with s.25 of the Holidays Act 2003. Judge Couch made clear in *Gunning v Bankrupt Vehicle Sales and Finance Limited* [2013] NZEmpC 212 that holiday pay is recoverable on the award of lost wages under s.123(1)(c)(ii) of the Act. This produces the gross sum of $614.25.

[64] Mr Coulthard also seeks interest on the award of lost wages. Clause 11 of schedule 2 of the Act provides as follows:

> ***11 Power to award interest***
> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.*
> *(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.*
> *(3) Subclause (1) does not authorise the giving of interest upon interest.*

[65] I believe that it is appropriate to award interest on the award of wages and lost holiday pay. Interest shall accrue on these sums at the rate of 5%, to run from 11 October 2013[4], until payment of the sums is made.

Orders

[66] I order that the respondent pay to Mr Coulthard the following sums:

(a) The gross sum of $7,678.13;

[4] Approximately half way through the 13 week period of loss

(b) The further gross sum of $614.25;

(c) Interest on these sums at the rate of 5% from 11 October 2013 until payment of the sums;

(d) Compensation in the sum of $5,250.

Costs

[67] Costs are reserved. The parties are to seek to agree how costs should be dealt with between them. However, in the absence of such agreement within 28 days of the date of this determination, any costs sought by Mr Coulthard should be set out in a memorandum from counsel to be served on the respondent and lodged with the Authority within a further 14 days. The respondent would then have a further 14 days within which to serve and lodge any memorandum of counsel in reply.

David Appleton
Member of the Employment Relations Authority