

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN: Penita Silafai Davies, Applicant
AND ANZ Banking Group (NZ) Ltd, Respondent

REPRESENTATIVES: Mr Alex Hope for the applicant,
Ms Penelope Nevill for the respondent.

MEMBER OF AUTHORITY: James Wilson.

DATE OF INVESTIGATION MEETINGS: 13 December 2000 and 19 January 2001.

DATE OF DETERMINATION: 14 February 2001.

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

On 28 November 2000 the applicant, Ms Penita Davies, lodged an application with the Authority seeking an order for her interim reinstatement pursuant to section 127 of the Employment Relations Act 2000. In her application she stated that she believed that she had personal grievance against her employer, the ANZ Bank, on the grounds that she had been unjustifiably dismissed from her position of Head Teller at the Bank's Ward Street, Hamilton, branch.

On 11 December 2000 Ms Davies lodged an amended *statement of problem* seeking substantive reinstatement to her position, lost wages, compensation for humiliation etc. and costs.

The investigation process

As the applicant was seeking an order for her interim reinstatement a telephone conference was held with the respective representatives on Tuesday 1 December 2000. During this conference a timetable was agreed which it was hoped would allow me to expeditiously determine the substantive issues in this case i.e. whether or not the applicant had a personal grievance and if so what remedies should be awarded.

On 11 December 2000 the parties attempted mediation under the auspices of the Labour Department mediation service. Unfortunately this was not successful. Following this attempt at mediation the applicant lodged her amended statement of problem as noted above.

On 12 December 2000 the respondent provided a formal "statement in reply". On 13 December I convened a formal investigation meeting in Hamilton. As it was not possible to complete my

investigation at that meeting it became necessary for me to determine Ms Davies' application for interim reinstatement. On 20 December 2000 I issued a determination declining this application (ref. Determination AA 6/00).

On 19 January 2001 a further investigation meeting was held in Hamilton. At this meeting I was able to complete the process of hearing from and questioning the various witnesses. Due to the lack of time on that day it was agreed that the respective representatives would provide written summaries and submissions to me by 26 January 2000.

Background and chronology of Ms Davies' problem.

1. The applicant was employed by the ANZ Bank at its Ward Street, Hamilton, branch for approximately four years. At the time of her dismissal she held the position of Head Teller.
2. As a condition of her employment the applicant was provided with an \$800 "wardrobe account" which was to be used for the purpose of purchasing and/or replacing clothing items that formed part of the respondent's corporate uniform.
3. On or about 16 November 2000 the applicant was advised by one of her supervisors that she was required to attend a meeting on 20 November 2000. This meeting was to be with her manager, Mr Steven Jensen and Mr John Kuzmich, a security manager employed by the respondent. The purpose of the meeting was for her to answer allegations that she had misused funds from her wardrobe account.
4. At the meeting of 20 November 2000, at which Mr Hope represented her, the applicant admitted using monies from her wardrobe account for purposes other than those approved by the respondent.
5. On 23 November 2000 the applicant, apparently, offered her resignation to her manager Mr Steven Jensen. The respondent did not accept this resignation and this incident appears to have had no effect on the final outcome of the respondent's investigations.
6. On 23 November 2000 Mr Hope made a written submission on his client's behalf asking the respondent to consider a range of factors and that it exercise its discretion and not dismiss Ms Davies. Factors he requested the respondent take into account included:
 - Ms Davies' past good conduct and length of service.
 - The severe consequences of dismissal including that she has four children, is the sole income earner, would be unable to find new employment in the banking industry and has no skills or qualifications which would enable her to find employment in a different industry.
 - Ms Davies had admitted her conduct, had expressed remorse and regret, had repaid the monies owing and had taken steps to resolve her financial difficulties.
 - Ms Davies wished to assure the Bank that they could and should trust her in the future.
7. On 27 November 2000 Ms Davies, once again accompanied by Mr Hope, attended a further meeting with Mr Jensen and Mr Kuzmich. At this meeting she was given the opportunity to offer further explanation regarding the use of her wardrobe account. The meeting was then adjourned for some 25 minutes. After this adjournment she was summarily dismissed.

Legal considerations.

The issues to be taken into account when considering whether an employer's decision to dismiss was justified or unjustified are well established. In this regard three well-known judgments will serve to illustrate the established principles.

In *Drummond v. Coca-Cola Bottlers New Zealand Ltd* [1995] 2 ERNZ 229 at 234 the Employment Court stated:

The initial question for the [Tribunal] is solely this: on the basis of the inquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgement about the quality of the inquiry and quality of the decision based upon it.

On the question of the quality of the inquiry to be carried out, the Labour Court in NZ (with exceptions) *Food Processing etc. IUOW. v. Unilever New Zealand Ltd* [1990] 1 NZILR 35 said:

What the procedure should be in any particular case is a question of fact and degree depending on the circumstances of the case, the kind and length of the employment, its history and the nature of the allegation of misconduct relied on including the gravity of consequences which may flow from it, if established.

The minimum requirements can be said to be:

(1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;

(2) an opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and

(3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the idea are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

With regard to whether or not dismissal is justified in any particular circumstances the Court of Appeal in *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ 483 at p. 487 stated:

*For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgment in *BP Oil NZ Ltd v. Northern Distribution Workers Union* [1989] 3 NZRL 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a*

personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.

It is also well established that a *reasonable and fair employer* will take into account all of the surrounding circumstances when deciding whether or not to dismiss. One issue, and one for consideration in this case, is a whether or not to the employee understood that their actions could be considered by the employer to be *serious misconduct* and could therefore lead to their dismissal.

Consideration of specific issues.

It is clear from the cases I have outlined above that it is necessary, after weighing up issues of procedural and substantive fairness, to consider whether overall *the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances*. However during the course of my investigation in this case, a number of specific questions were raised as to the fairness of the respondent's investigation and its decision to dismiss Ms Davies. Set out below is a discussion of the merits of the parties' arguments in respect of these questions and my findings on the specific issues.

Question 1. Did the applicant know that her conduct would be considered by her employer to be **serious misconduct** and that this conduct could result in her dismissal?

The respondent argues that the applicant did, or should have, known that her misuse of her wardrobe account was serious misconduct and could lead to her dismissal. In support of this argument they rely upon a number of documents.

1. The company's personnel policy sets out under the heading "STAFF PRODUCT CONCESSIONS"

CONDUCT OF STAFF ACCOUNTS

Officers are responsible for their financial position and proper conduct of their accounts.

Account controllers supervise staff accounts in the same manner as customer accounts including by dishonour when necessary (standard fees are charged). Persistent abuse results in staff concessions being withdrawn; accounts may be closed.

Serious misconduct of accounts will be taken seriously and result in disciplinary action.

The policy defines the employee wardrobe account (otherwise known as a Corporate Collection Purchase Loan) as one of the staff product concessions.

2. At the time she opened her wardrobe account (March 1997) the applicant signed a formal declaration acknowledging that the (account) *is subject to the terms and conditions of the ANZ/PostBank Staff Lending Policy as amended from time to time.*

3. In June 1998 the respondent reviewed its policy and procedure regarding the operation of the staff wardrobe account. At that time they instituted a new form of acknowledgement and declaration. This specifically required staff opening such an account to acknowledge that misuse of the account would be considered serious misconduct and might lead to dismissal. The memorandum outlining this new procedure contained the following instructions:

Ongoing action required:

- *Line Managers are responsible for ensuring that staff drawing new wardrobe loans, comply with the following requirements and should **also stress them to staff with existing wardrobe loans**. [My emphasis]*

4. On 10 April 2000 the respondent issued a memorandum to all managers regarding its *concern at the increasing number of staff being dismissed for defalcation, breach of authority and/or other misconduct*. This memorandum required that managers remain alert to identifying those staff who may be experiencing financial difficulty and help them as appropriate. Under the heading action requested now managers were required to:

- *Please emphasise to your staff that should any of them be in this situation at present, you are willing and available to discuss their personal circumstances now.*
- *Would you please discuss this letter with staff **and the repercussions that could occur in the event of defalcation and/or serious misconduct**. [My emphasis]*
- *A copy of this letter should then be circulated to all employees that you lead, and a written acknowledgement obtained from them that they have read this letter and clearly understand its content. Care should be taken to follow up staff availing of leave. Please ensure you complete this process and hold such acknowledgements by 30 April 2000, and send a written confirmation to your district manager.*

The respondent's branch manager, Mr Steven Jensen, stated in his evidence that it is his practice to circulate copies of all memos and circulars he receives to all staff in the branch in folders that he has for this purpose. He also stated that important circulars and memos, such as the one dated 10 April 2000, would be brought to the attention of all branch staff at monthly staff meetings. In his written statement he continues:

I would tell staff to make sure that they have read the memo or circular. I would definitely have specifically discussed this memo (of 10 April 2000) with staff because it was an important one. I have also told my staff on a number of occasions that they need to keep their personal bank accounts in order, and if they have financial problems to come to me, or Graham Meecham or use the new EAP service, which gives budgeting advice.

Mr Jensen also produced a schedule which staff had initialled at regular intervals to indicate that they had read the various circulars and memorandum. While the applicant has initialled this schedule on most, but not all, occasions there was no direct evidence proffered by the respondent to demonstrate categorically that the applicant had seen, read and understood all of the relevant documents. The respondent relied on the probability that she had done so.

The applicant in her evidence stated that:

- While she was aware of the existence of the company's policies she was not familiar with their detailed contents and had not specifically read the sections relating to the staff wardrobe account and its misuse.
- She recalls, at the time she had opened her wardrobe account, her supervisor explaining to her the purpose of the account but does not recall him explaining the consequences of its misuse.
- She does not recall having seen the circular of June 1998 or any discussions surrounding it.
- While she may have seen the circular of April 2000 she did not recognise its import.

In her evidence to the Authority the applicant stated:

I didn't even think I would get fired for doing what I did. If I did know that I was likely to get fired, I wouldn't put my family at risk, I wouldn't have done it as I am the sole earner in our household.

Frankly, taken on the balance of probabilities, I find this statement hard to accept. Ms Davies had been employed by the Bank for several years. Over that period her employer had made a number of attempts to inform staff of its policy in respect of the misuse of the wardrobe account and the consequences of that misuse. The applicant was in severe financial difficulty and the consequences of her actions i.e. dismissal, may not have been uppermost in her mind when she misused her wardrobe account. However it is highly improbable that she was unaware of the Bank's policy or that breaching that policy would be treated as serious misconduct and could result in her dismissal.

Question 2. Was the respondent's decision to dismiss the applicant predetermined by its rigid adherence to its policy?

Mr Hope, on behalf of the applicant, has submitted that while the Regional Manager, Mr Graham Meecham had the theoretical discretion not to dismiss the applicant, this discretion was fettered by the respondent's policy i.e. misuse by staff of the wardrobe account was serious misconduct and would result in dismissal. Mr Meecham, on the other hand, states that the discretion is real but that in this case there were no mitigating circumstances to warrant the use of that discretion. The respondent submitted that there were occasions when managers use this discretion and gave as an example the case of another employee who, although they had misused their wardrobe account, was not dismissed. [In that case the employee, who had only recently been employed, was able to cast serious doubts on whether or not the operation of this account and the serious consequences of misuse had been explained.]

To accept Mr Hope's logic in its entirety would create a dilemma for employers. In the interests of natural justice and as good employment practice, an employer should have clear policies which set out the employer's expectations of its employees, the consequences for employees should they not meet those expectations and the procedures the employer will follow under such circumstances. These policies will invariably include actions or omissions that the employer regards as **serious misconduct**. Such policy will also include a statement to the effect that serious misconduct may result in dismissal. A fair and reasonable employer will consider all the circumstances surrounding the incident of serious misconduct. This will include such issues as whether or not the employee was aware of the company policy, its treatment of other staff in similar circumstances, the employees length of service and work record, etc.. However where there are no mitigating circumstances, the employee was aware of the policy and consequences of breaching that policy, admits breaching the policy and the employer carries out a fair and unbiased investigation, is it reasonable to say that the policy has predetermined the decision to dismiss?

Obviously **serious misconduct** should not encompass actions or omissions that are trivial. As stated by the Court of Appeal in *Northern Distribution Union v. BP Oil NZ Ltd* (above)

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

At this point it is sufficient to state that the respondent's decision to dismiss Ms Davies was not sufficiently predetermined by its policy as to render it unfair.

Question 3. Did the fact that the applicant and her representative were not aware of the purpose of the second disciplinary meeting, before the meeting took place, make the process unfair?

Both the applicant and her representative state that they had not fully understood the purpose of the second disciplinary meeting i.e. the meeting of 23 November 2000. The applicant stated that she assumed that the purpose of this meeting was to convey to her her employer's decision regarding whether or not she was to be dismissed. Mr Hope argues that had he and his client understood that there would be an opportunity to further argue the applicant's case he may, and probably would, have raised further arguments and thus avoided her dismissal.

It is clear from the transcript of the meeting of 23 November 2000 that there was some confusion over the purpose of this meeting. During the meeting Mr Hope specifically stated that he did not realise that there was going to be a further interview. Mr Kuzmich had then explained that this was part of the respondent's process and it was important to give (the applicant) an additional opportunity to make any further comment or explanation. The meeting was then adjourned, albeit for only ten minutes, to allow Mr Hope and the applicant to confer.

Clearly it would have been preferable for the purpose of the meeting to have been clearly spelt out prior to its commencement. However I do not believe that this oversight was prejudicial to the applicant. Ms Davies had admitted her misuse of her wardrobe account at a previous meeting. Mr Hope had made written submissions on her behalf before the meeting of 23 November 2000. While the ten minutes' adjournment taken during the meeting seems short, there is no indication that a longer adjournment would not have been possible if requested.

Question 4. In accordance with the respondent's policy, the authority to dismiss was held by the regional manager Mr Graham Meecham. Mr Meecham did not personally interview the applicant but relied on reports from Mr John Kuzmich. Was this failure by Mr Meecham to hear directly from Ms Davies a breach of the requirements of natural justice, thereby making the procedure unfair and her dismissal unjustifiable?

The minimum requirements of a fair procedure are set out in the *Unilever* case quoted above. In *Quinn v. BNZ* [1991] 1 ERNZ 1060 the Labour Court said:

The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision maker. [My emphasis]

Ms Neville on behalf of the respondent argues that the respondent's actions were not procedurally flawed and did not result in any unfairness to the applicant. In particular she submits

- *The respondent's policy and management of investigations into misuse of accounts ensures consistency of approach, that the proper skills and experience and expertise are used when conducting investigations into potentially criminal conduct. This policy is also necessary because of the size of the respondent's organisation.*
- *Graham Meecham delegated his authority to carry out the investigation and the applicant's dismissal to John Kuzmich, as Manager Investigations, in accordance with the respondent's policy.*
- *Mr Kuzmich is an experienced investigator, and has worked for the respondent for a number of years. He prepared a complete and unbiased report on the results of the investigation, and discussed it with Graham Meecham.*

- *Mr Meecham was fully acquainted with the results of the investigation when he made his preliminary decision to dismiss the applicant.*
- *The applicant raised no further explanations or extenuating circumstances at the second interview which were of such a nature as to cause a reconsideration of the decision to dismiss.*

Ms Neville also drew my attention to several Employment Court judgments. These included *Compass Union of New Zealand inc. v. Foodstuffs (Auckland) Ltd* [1992] 3 ERNZ 16 at 33 where the Court said:

That is but one example of the necessity to judge each case not by a fixed and unalterable set of criteria for procedural fairness but rather to ascertain whether in all the circumstances there has been fair play in action. It is a question of fact and degree in each instance.

And *Air New Zealand v. Sutherland* [1993] 2 ERNZ 10 p.18 where Judge Colgan said:

These matters should not,... be subjected to minute or pedantic scrutiny but rather the Court should have regard to fairness from the perspective of both parties."

And *Piutau v. JRA Batteries Ltd and NZ Amalgamated Engineering ETC IUOW* [1991] 1 ERNZ 520 at p. 535-536 where again Judge Colgan said:

In the final analysis, we must be satisfied whether, viewed over all the procedure which lead and resulted in Mr Piutau's dismissal was fair and permitted him to meaningfully participate in the process... [the] procedural deficiencies did not so materially disadvantage Mr Piutau's case that they should have the effect of causing the decision to dismiss him to be unjustified.

In her submissions Ms Neville states that *Graham Meecham delegated his authority to carry out the investigation and the applicant's dismissal to John Kuzmich...* If this had been the case then the applicant would have had the opportunity *to be heard by the decision maker*. However in his evidence Mr Meecham makes it clear that the decision was his. He says for example:

...in accordance with bank policy, I had the discretion to take disciplinary action in respect of Ms Davies.

And

I make a decision on appropriate disciplinary action based on the information collected in the investigation by John and the recommendation he makes as to appropriate action.

And

It was completely my decision. The business in Waikato is my responsibility.

There can be no doubt that the decision to dismiss Ms Davies was the responsibility of Mr Meecham. There is also no doubt that he did not personally interview her. The question is whether not doing so was a fundamental flaw in the disciplinary process thereby rendering the applicant's dismissal unjustifiable.

Mr Meecham in his evidence states that in accordance with the Bank's policy and practice he had left the investigation of the applicant's actions to the specialist investigator, Mr Kuzmich. He had received a report from Mr Kuzmich (on 24 November 2000) to the effect that:

- Ms Davies had admitted that she had misused the wardrobe account on a number of occasions over a period of time.
- She had acknowledged that she had been told that the wardrobe account was only to be used for purchasing corporate wardrobe.
- This was serious misconduct, as set out in the collective employment agreement, and that in line with the Bank's actions in similar cases he recommended that the applicant should be dismissed.

Mr Meecham says that he then discussed this report with Mr Kuzmich and the Branch Manager, Mr Steven Jensen. It was agreed that unless Ms Davies was able to produce some new argument in mitigation or extenuating circumstances (at the meeting with her on 27 November 2000) she was to be dismissed and they i.e. Mr Kuzmich and Mr Jensen should proceed on that basis.

I have very carefully considered the respective arguments and weighed these in the light of various judgments, including those cited above. Ms Davies had admitted that she had misused her wardrobe account; to that extent the facts were clear. The sole purpose of Mr Meecham meeting Ms Davies would have been to provide her with an opportunity to convince him of any extenuating circumstances. I have no doubt that Mr Kuzmich listened carefully to both the applicant and her representative and would, if he had felt it appropriate, discussed the matter further with Mr Meecham. However he was not the *decision maker*. The principles of natural justice, as has been well established by the Courts, require that Ms Davies should have been given an opportunity to put her case to the *decision maker*, Mr Meecham. The fact that she was not is not a mere technicality but a fundamental flaw in the respondent's disciplinary process. It is sufficient to render the process unfair and the decision to dismiss the applicant unjustifiable. Ms Davies therefore has a personal grievance against the respondent in this regard.

Question 5. Was the applicant's conduct **serious misconduct**.

On the applicant's behalf Mr Hope argued that the staff wardrobe account was in effect an overdraft. This being the case the money was hers to use. He pointed out that the respondent's policy under the general heading *Staff Overdrafts -- Conditions* states:

Officers who exceed the approved overdraft limit will be charged the customer excess interest rate. Persistent excesses will result in staff concessions being withdrawn.

He argued that the applicant's use of her corporate wardrobe account was misuse of a staff overdraft given for a specific purpose. The overdraft policy provided for a penalty for misuse, where the corporate collection purchase loan policy did not. He drew the conclusion that the applicant's actions could not be construed as serious misconduct.

I do not accept Mr Hope's arguments in this regard. I have had the opportunity to study all of the respondent's policies and memoranda and to hear the evidence of the relevant managers. There can be no doubt that the respondent regarded the misuse of staff wardrobe accounts as serious misconduct. I have already found (refer question 1 above) that the applicant was aware of her employers policy in this regard. It is well established that what constitutes **serious misconduct** i.e. conduct that may result in dismissal, is for a *reasonable and fair employer* to determine. See *Northern Distribution Union v. BP Oil NZ Ltd* (above)

Question 6. Did the respondent genuinely lose trust in the applicant such as to justify dismissal?

Mr Hope argues that the respondent's claim that it has lost trust in the applicant to such an extent that dismissal is warranted is not credible. He points out that the respondent continued to employ the applicant even after she had admitted the actions for which she was ultimately dismissed. In his submission Mr Hope points to *Orm v. Eagle technology group Ltd*, unreported, Employment Court Wellington, WEC 40/95 where Chief Judge Goddard said:

Unfortunately, however, it is not enough for the defendant to assert the loss of trust and confidence for it to be a reality. What it needed to show was the existence of good and proper reasons for that state of affairs to have occurred. This is because - and perhaps the defendant has not entirely understood the legal position - it, as the employer, was under an obligation to maintain, in good heart, its employment relationship with the plaintiff. That is what trust and confidence means. Loyalty is another word for it, and it is a two-way street.

He argues that the respondent's failure to suspend the applicant while the investigation proceeded demonstrates that they had not lost faith and trust in her.

The respondent argues that it had never considered whether suspension was appropriate because:

- (a) The legal and procedural issues surrounding a decision to dismiss are not straightforward and
- (b) The time delay between the decision to dismiss the applicant and her final departure was only one day.

In her submissions Ms Neville contends that what is relevant is whether the respondent, as a financial organisation and the applicant's employer, had lost trust and confidence in the applicant. She submits that they had.

In his evidence Mr Meecham states:

Ms Davies committed serious misconduct, and I lost trust and confidence I needed to have in her to have her working in the Bank.

The issue of whether the respondent had lost trust and confidence in the applicant is important for two reasons. Not only does it impact on whether or not the applicant's dismissal was substantively justified but, if I should find that she has a personal grievance on procedural grounds, whether or not she should be reinstated. After careful consideration of the evidence and the submissions of the representatives I find that the respondent had good cause, and has, lost trust and confidence in the applicant. In this regard I accept that as a financial institution the respondent is entitled to expect an even greater degree of honesty from its employees than many other employers. Ms Davies, by her conduct, breached this trust.

Summary of findings on specific issues.

By way of summary of the issues discussed in the six questions set out above I find that:

- The applicant did know that her employer would consider her behaviour to be serious misconduct and this conduct could result in her dismissal.
- The respondent's decision to dismiss the applicant was not predetermined by its adherence to its policy.
- The fact that the applicant and her representative were not aware of the purpose of the second disciplinary meeting did not make the process unfair.

- It was open to the respondent, and they had reasonable grounds, to consider the applicant's conduct to be serious misconduct.
- The respondent had lost trust and confidence in applicant.

However:

- In not allowing the applicant to present her case to the *decision maker* the respondent breached the principles of natural justice. To this extent the process was unfair, the applicant's dismissal was unjustifiable and the **applicant has a personal grievance**.

Remedies.

1. Reinstatement.

Sections 123, 124 and 125 of the Employment Relations Act 2000 set out the remedies to be applied when the Authority determines that an employee has a personal grievance. The relevant parts of these sections are set out below.

123. Remedies.

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any one or more of the following remedies:

- reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:.....*
- etc.*

124. Remedy reduced if contributing behaviour by employee.

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court 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, reduced the remedies that would otherwise have been awarded accordingly.*

125. Reinstatement to be primary remedy.

(1) This section applies where –

- the remedies sought by or on behalf of employee in respect of a personal grievance include reinstatement (as described in section 123 (a)); and*
- it is determined that the employee did have a personal grievance.*

(2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, whenever practicable, for reinstatement as described in section 123 (a).

The applicant has sought reinstatement; and I have found that she has a personal grievance. In deciding whether or not to order her reinstatement I am required to consider two issues:

- (a) Whether to do so is *practicable* (section 125 (2)) and
- (b) whether she has *contributed towards the situation that gave rise to (her) personal grievance* to such an extent as to warrant the (*reduction*) of the remedies that would otherwise have been awarded i.e. she should not be reinstated.

In respect to the first of these considerations the Labour Court in *Association of Marine etc. Engineers v. Tasman Express Line Ltd* [1990] 3 NZILR 946 said:

In determining whether it is impracticable to reinstate a worker found to have been unjustifiably dismissed, grievance committees, mediators and this Court do not simply have regard to the reasons which lead to the dismissal. This is especially so in the case where a finding that a dismissal has been unjustified is based upon what might be categorised as procedural grounds. As counsel for the appellant properly acknowledged in the course of his submissions, the Court in a case such as this, is entitled to undertake a broad, but relevant inquiry including matters which, although they may not have formed reasons for the dismissal, are nevertheless germane to the prospects of a renewed employment relationship.

While that case was decided in terms of the Labour Relations Act 1987, the wording of the Employment Relations Act 2000 is for all intents and purposes identical to the 1987 legislation.

As set out earlier in this determination I have found that the respondent has lost trust and confidence in the applicant. For this reason alone it would seem impracticable to reinstate her.

In respect to the second issue i.e. the applicant's contribution to her dismissal, I have found that she knew that her conduct was considered by her employer to be serious misconduct and that it could lead to her dismissal and she has admitted that conduct. It follows that the applicant made a substantial contribution to her own dismissal.

Taking into account the applicant's contribution, together with the loss of trust and confidence in her by the respondent, I do not believe it would be appropriate or practicable to order her reinstatement. I therefore decline the applicant's request in this regard.

2. Other remedies.

In addition to reinstatement the applicant has sought reimbursement of lost wages for a period of three months (ref. s.128 of the Employment Relations Act 2000) and compensation for humiliation, loss of dignity, and injury to feelings. (ref. s.123 (c) (i)).

There is no doubt that as the sole breadwinner of a young family Ms Davies' dismissal has caused her a good deal of stress including humiliation, loss of dignity, and injury to feelings. However to a large extent this was a risk she chose to take when she decided, despite her employer's policy and the possible consequences, to misuse her wardrobe account.

If the applicant had not contributed to her own dismissal I would have awarded reimbursement of three months lost wages (estimated by the applicant to be \$7250) and compensation for humiliation etc. in the order of \$2500. However given the substantial contribution by the applicant to her own dismissal it is appropriate that these amounts be substantially reduced. I therefore determine that the respondent pay to the applicant:

- (a) Reimbursement of four weeks lost wages (in terms of s.128).
- (b) \$850 compensation for hurt and humiliation (in terms of s. 123 (c) (i).)

Costs.

At this point costs are reserved in the hope that parties can reach an agreement between themselves. If this is not possible the applicant should file and serve an application no later than 16 March 2001. The respondent may file a reply within 14 days.

James Wilson
Member of Employment Relations Authority