

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 12
5639690

BETWEEN JULIE DELLAWAY-SMITH
Applicant

AND DAREN SAUNDERS
Respondent

Member of Authority: Robin Arthur

Representatives: Warwick Reid, Advocate for the Applicant
Kate Ashcroft, Counsel for the Respondent

Investigation Meeting: 25 September 2017 in Tauranga

Determination: 15 January 2018

DETERMINATION OF THE AUTHORITY

- A. Julie Dellaway-Smith was unjustifiably dismissed.**
- B. In settlement of her personal grievance for unjustified dismissal Daren Saunders must pay Ms Dellaway-Smith the following sums within 28 days of the date of this determination:**
- (i) \$22,880 in reimbursement of lost wages; and**
 - (ii) \$12,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved with a timetable set for memoranda if a determination of costs by the Authority is needed.**

Employment Relationship Problem

[1] Julie Dellaway-Smith was dismissed from her job as office manager for Cleantech NZ on 22 June 2016. She was dismissed for what were said to be two instances of serious misconduct. Firstly, Ms Dellaway-Smith was alleged to have made unauthorised reductions in the price of product to one customer. Secondly, she was said to have breached her duty of fidelity to Cleantech by telling the principals of

that customer business about the disciplinary investigation of her conduct and asking them to provide a letter supporting her.

[2] Cleantech sold products used in the commercial cleaning and hospitality sectors. At that time Wildzog Investments Limited owned the business. Daren Saunders was Wildzog's sole director and shareholder. In his work for Cleantech he used the title of managing director. An early determination the Authority found Ms Dellaway-Smith could pursue her personal grievance for unjustified dismissal against Mr Saunders in his personal capacity.¹ She was entitled to make that election, which she did, because the identity of Wildzog was not adequately disclosed to her as the employing entity at the outset of her employment in May 2014.

[3] Ms Dellaway-Smith's husband Glen Smith also worked for Cleantech NZ from September 2014. Before his wife's dismissal Mr Smith had raised a personal grievance alleging he was unjustifiably disadvantaged by changes to his terms of employment. And three weeks after his wife was dismissed, Mr Smith was dismissed on the grounds of redundancy. He also raised a grievance of unjustified dismissal. He had then sought to pursue those grievances personally against Mr Saunders rather than Wildzog. However the Authority's earlier determination found he could only continue those proceedings against Wildzog. A separate investigation meeting was held about his grievances and a determination about them issued at the same time as this one about Ms Dellaway-Smith's grievance.²

The Authority's investigation

[4] Ms Dellaway-Smith, Mr Saunders, Alex Wills, and Lawrence McDonald gave evidence during the Authority's investigation of her claim.

[5] Mr Wills and his wife, Katrina Wills were co-proprietors of a lunch bar, called "The Rumbly Tum", in the same street as Cleantech's offices. The Rumbly Tum was the business Ms Dellaway-Smith was alleged to have given unauthorised discounts on its purchases of Cleantech products.

[6] Mr McDonald also operated a nearby business. He had met Ms Dellaway-Smith when purchasing products at the Cleantech offices. His evidence was about

¹ *Dellaway-Smith & Smith v Wildzog Investments Limited & Saunders* [2017] NZERA Auckland 163.

² *Smith v Wildzog Investments Limited* [2018] NZERA Auckland 13.

having seen Ms Dellaway-Smith, after her dismissal from Cleantech, working at The Rumbly Tum and later at another neighbouring business in the street.

[7] The parties' representatives, in addition to asking questions of witnesses at the investigation meeting, provided closing submissions on the issues for determination. Closing submissions for Ms Dellaway-Smith were made orally at the close of the meeting and for Mr Saunders in writing on 12 October 2017. On 16 October Ms Dellaway-Smith's representative advised she did not wish to use an opportunity that had been timetabled to make further submissions in reply.

[8] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received. It has stated findings of fact and law, expressed conclusions on the issues requiring determination and specified orders made.

Issues

[9] The issues for determination were:

- (i) Whether the dismissal of Ms Dellaway-Smith, for serious misconduct, was what a fair and reasonable employer could have done in all the circumstances at the time, considering whether:
 - (a) Mr Saunders had fully and fairly investigated the concerns about his conduct, considering the requirements of s103A(3) and (4) of the Act?
 - (b) In light of what was investigated, a finding of serious misconduct and a decision to dismiss was within the range of responses open to the employer?
- (ii) If the employer's actions were not justified, what remedies should be awarded to Ms Dellaway-Smith, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iii) Whether there was any blameworthy conduct by Ms Dellaway-Smith that contributed to the situation giving rise to her grievance and required a reduction of any remedies awarded to her (under s124 of the Act)?
- (iv) Should either party contribute to the costs of representation of the other party?

The allegations and the employer's investigation

[10] Mr Saunders said he found out during May 2016 that Ms Dellaway-Smith “may have been applying unauthorised discounting for The Rumbly Tum”. He said he had checked records on its orders after noticing Mr Wills walking out of the Cleantech office with several packs of hand towels. This “seemed odd” because the packs were sold in carton lots. He asked Ms Dellaway-Smith why Mr Wills had individual packs. He said she had told him there were no stocks of the cartons of towels The Rumbly Tum usually purchased. But Mr Saunders said his check on the business computer system showed cartons of those type of towels were in stock. This led him to check the records for other orders by The Rumbly Tum. He said this review showed Ms Dellaway-Smith had given “unauthorised discounts on various products” but he could not identify a consistent level of discounting.

[11] In a letter dated 23 May, which Mr Saunders said was drafted with his solicitor's assistance, Ms Dellaway-Smith was advised of a disciplinary investigation regarding three allegations. The first concerned discounts to The Rumbly Tum. The second said she had failed to keep an electronic copy of the individual employment agreements for herself and her husband Mr Smith. The third said she had failed to communicate a proposal she and Mr Saunders had discussed about the terms that Mr Smith was to return to work as an account manager.

[12] Ms Dellaway-Smith, accompanied by a representative, attended a meeting with Mr Saunders and his solicitor on 26 May. Following that meeting she was sent a further letter on 30 May advising preliminary findings. Those findings included rejecting her explanation that Mr Saunders had authorised discounts and that inconsistencies in discounts given were mistakes rather than deliberate.

[13] Mr Saunders' 30 May letter also rejected a request from Ms Dellaway-Smith that he speak with Mr and Mrs Wills about the discounts they had received. The reasons given for that refusal were that Ms Dellaway-Smith was said to have “a personal social relationship” with them and it was not appropriate to question a customer about the allegations.

[14] The letter however also indicated the other two allegations would not be pursued. It said Mr Saunders could not prove Ms Dellaway-Smith had deleted employment agreements for herself and Mr Smith from Cleantech's computer system.

It also accepted Ms Dellaway-Smith's explanation that she had told Mr Smith about the proposal for his return to work, had then told Mr Saunders that Mr Smith was "not happy" and had then also told Mr Saunders to talk to Mr Smith directly as she did not want to be involved any further.

[15] On 1 June 2016 Ms Dellaway-Smith provided a written response to the 30 May letter. This included a copy of a letter from Mr and Mrs Wills. It said Mr Saunders had offered them a discount on products, that Ms Dellaway-Smith had not received any "kick backs" from them and that they would take their business elsewhere. This led to the further allegation of serious misconduct, made by letter on 3 June, that Ms Dellaway-Smith had breached her duty of fidelity to Cleantech by disclosing the details of the disciplinary investigation to Mr and Mrs Wills.

[16] A further disciplinary meeting was held on 15 June. This was followed by a letter to Ms Dellaway-Smith on 16 June. The letter rejected explanations she made and advised her that Mr Saunders had reached a preliminary decision to terminate her employment for serious misconduct. Ms Dellaway-Smith provided a written response on 17 June. Following some further correspondence between her representative and Mr Saunders, she was supplied some further background documents but did not take up an opportunity offered to attend a further meeting. Mr Saunders then sent Ms Dellaway-Smith a letter on 22 June advising she was dismissed for serious misconduct.

Did Mr Saunders fully and fairly investigate the allegations?

[17] Mr Saunders submitted his inquiry into and his decision on the concerns raised with Ms Dellaway-Smith met the statutory test of justification.³ The test considers whether his decision, and how he reached it, was what a fair and reasonable employer could have done in all the circumstances at the time. This includes the obligations set out in s 103A(3)-(5) of the Act to meet certain requirements of fairness and to only take account of any defects in that process that were more than minor and resulted in Ms Dellaway-Smith being treated unfairly:

(3) In applying the test in subsection (2), the Authority or the court must consider—

³ Employment Relations Act 2000, s 103A.

- (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 thinks 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.

[18] For the following reasons Mr Saunders' actions and conclusions failed to meet his obligations to conduct a full and fair investigation:

- (i) The integrity of his inquiry was tainted by the early allegations made against Ms Dellaway-Smith to do with Mr Smith's employment.
- (ii) He relied on an entirely subjective assessment of whether Ms Dellaway-Smith was authorised to provide discounts to The Rumbly Tum.
- (iii) His evidence of having acted reasonably in the inquiry did not compellingly establish some differences in the amount of discount Ms Dellaway-Smith applied on some products were instances of deliberate misconduct rather than mistakes in calculations.
- (iv) He appeared to have relied, in part, on an analysis he said he had prepared showing inconsistencies in prices charged to The Rumbly Tum compared with other customers but Mr Saunders' evidence did not establish he showed Ms Dellaway-Smith that analysis or gave her a reasonable opportunity to comment on it during his disciplinary inquiry.
- (v) He acted unfairly in refusing to make any inquiries of Mr and Mrs Wills and in then deciding Ms Dellaway-Smith committed serious misconduct by getting them to write a letter in support of her.

(i) Inquiry tainted by the allegations about Mr Smith

[19] Mr Saunders submitted he had no mixed motives in raising disciplinary concerns about Ms Dellaway-Smith that initially included the two allegations about her husband's employment. Having dropped those two allegations after the first disciplinary meeting, he submitted he could not be criticised for then continuing to inquire into his genuinely-held concerns about the discounts issue.

[20] However the statutory test considers "all the circumstances" at the time of the employer's actions. In this case Mr Saunders initiated disciplinary action against Ms Dellaway-Smith on the first working day after her husband's representative had raised Mr Smith's disadvantage grievance.

[21] Mr Saunders said his inquiry about the discounts issue arose on the day he saw Mr Wills leave the Cleantech office with some packs of hand towels. There was real doubt from his evidence when that might have been. His written witness statement referred to this occurring in "May 2016", although his closing submissions said this was "early May". Mr Saunders' oral evidence, in answer to a question, said he had given Ms Dellaway-Smith the letter about the disciplinary inquiry on the day he saw Mr Wills leave the offices with some packs of hand towels. The date of that letter was 23 May.

[22] As a matter of likelihood Mr Saunders' initiative to start a disciplinary inquiry about Ms Dellaway-Smith on 23 May was to some degree related to the news he received on 20 May about Mr Smith's disadvantage grievance. The inference of a connection was strengthened by the fact that two of his three initial allegations were about Mr Smith. Although he later abandoned the allegations related to Mr Smith, the genuineness of Mr Saunders' motivation in beginning his inquiry on the discount issue was tainted by that initial connection.

(ii) Subjective assessment of the evidence about authorisation of discounts

[23] Mr Wills said Mr Saunders introduced himself on a visit to The Rumbly Tum in May 2014. He said Mr Saunders offered them a discount. Mr Wills and Mrs Wills began visiting the Cleantech offices on a weekly basis and began purchasing products for The Rumbly Tum. Ms Dellaway-Smith had started work at Cleantech and Mr Wills already knew of her through a mutual friend. Mr Wills said he had also heard,

while visiting the Cleantech office, Mr Saunders tell Ms Dellaway-Smith “don’t forget to give them a discount” and Ms Dellaway-Smith had referred to “Darren’s discount” on purchases they made. Mr Wills said he recalled Cleantech invoices for products purchased for The Rumbly Tum showed a ten per cent discount.

[24] Ms Dellaway-Smith said Mr Saunders had initially told her to provide The Rumbly Tum with a “20 per cent on” discount, which meant charging Cleantech’s wholesale purchase price plus 20 per cent. She later used a column in the company’s accounting software that applied a ten per cent discount and showed it on the invoice sent to the customer. She said she had discussed that 10 per cent level of discount with Mr Saunders as it provided a better return for Cleantech than a cost plus pricing. She said the ten per cent discount for The Rumbly Tum was “firmly in place by September 2014”.

[25] Mr Saunders denied authorising discounts at either level. He said he had only told Mr Wills that he would “look after” him. Mr Saunders said that was something he told all customers but at no time had he specified a discount of any amount.

[26] Ms Dellaway-Smith submitted Mr Saunders had unfairly been in the roles of complainant, witness and decision-maker over the issue of whether a discount was authorised. While acknowledging the limited resources of Cleantech as a relatively small business, she submitted that an independent investigator should have been engaged to resolve the dispute in their respective accounts over the discount issue.

[27] In larger businesses where a manager or owner might otherwise be both witness and decision-maker on a disputed point in a disciplinary investigation, the law generally recognises that a reasonable employer, acting fairly, is best advised to have someone else make the necessary inquiries and assessments about that contest of evidence.⁴ Cleantech engaged a specialist employment law firm to assist throughout its disciplinary investigation of Ms Dellaway-Smith so the business clearly had some significant resources to apply to the process. However, accepting that engaging an independent investigator and decision-maker may have been beyond Cleantech’s reasonably available resources as a small business, Mr Saunders still could not fairly make a decision about the conflicting evidence on a solely subjective basis. In justifying actions such as whose evidence about the discounting issue should be

⁴ *Allen v C3 Limited* [2012] NZEmpC 124 at [25], [27] and [30].

preferred, he could not simply say he was there, he knew what was or was not said, and that was enough. In justifying his actions in the Authority investigation, he was required to show he had made that assessment in the same way as a fair and reasonable employer could have done. However he simply rejected the account of Mr Wills and Ms Dellaway-Smith on the basis that he did not say what they said he had said and he “would have remembered” if he told her to give the Rumbly Tum a discount.

[28] There was one objectively observable factor that made Ms Dellaway-Smith’s description of the agreed arrangement more likely than Mr Saunders’ denial of it. This comprised the fact that all the prices charged to The Rumbly Tum were available to Mr Saunders on the networked office computer system. He sometimes helped prepare monthly invoices for customers, as Ms Dellaway-Smith could not always complete the task alone. He also made random checks of the sales records.

[29] Mr Saunders accepted that Ms Dellaway-Smith knew of his regular involvement with those records and, if she had been making unauthorised discounts to The Rumbly Tum, there was a risk he could easily find out about them. As a matter of assessing their respective evidence for the Authority investigation, this made Ms Dellaway-Smith’s account, that she was authorised to give The Rumbly Tum discounts, more likely to be correct and Mr Saunders’ less so.

[30] Rather than making that objective assessment, Mr Saunders had subjectively decided a ‘he-said, she said’ contest in his own favour. It was not what a fair and reasonable employer could have done in all the circumstances at the time, without some further objective item of information or evidence to support such a conclusion. It was a defect in the process he followed which was more than minor and resulted in Ms Dellaway-Smith being treated unfairly.

(iii) Unsupported conclusion on deliberate misconduct in pricing

[31] After the first disciplinary meeting Mr Saunders compiled a spreadsheet listing all the invoices and transactions for The Rumbly Tum. Many showed a ten per cent discount but others showed reductions from the usual sales prices of some products that Mr Saunders could not understand. He sent the spreadsheet to Ms Dellaway-Smith along with a copy of an email she sent to The Rumbly Tum on 28 January

2015. The email attached a quote for various products and included a note saying that “once again I have cut everything back to give us a little profit and you a good price”.

[32] Mr Saunders did not accept the response Ms Dellaway-Smith gave to that information. She said she had made mistakes in calculating some product prices, partly due to her workload. She also said the phrase in the 28 January email was a sales tactic, used often, so the customer thought Cleantech was doing its best for them.

[33] Mr Saunders’ evidence was not of a sufficient or reliable basis for his conclusion that some inconsistent pricing by Ms Dellaway-Smith was deliberate. The point was important because deliberate, unauthorised reduction of prices could amount to serious misconduct. Careless mistakes, if not repeated once identified, might have amounted to misconduct only and warranted less serious or immediate disciplinary consequences.

[34] In concluding that apparent inconsistencies in Ms Dellaway-Smith’s pricing for The Rumbly Tum’s purchases were deliberately made to their advantage and to her employer’s disadvantage, Mr Saunders had to demonstrate evidence in support of that conclusion in a way that an objective observer would accept had been reached reasonably, as an honest belief, and with an open mind.⁵ His evidence did not reach that standard. Again, a weakness in the likelihood of his conclusion was his open access to those records, which Ms Dellaway-Smith thought he regularly checked and he said he randomly audited.

(iv) Relying on information not shown to Ms Dellaway-Smith

[35] In Mr Saunders’ oral evidence it emerged that his conclusions relied in part of a comparison of prices Ms Dellaway-Smith had charged other customers and The Rumbly Tum. His check of those records showed what he said were “a certain number of mistakes”, including incorrect product sent and some discounts not applied to those other customers. He described the discounts for The Rumbly Tum as “all over the place”. However Mr Saunders’ evidence to the Authority did not clearly establish he provided that comparative information to Ms Dellaway-Smith or any real opportunity for her to comment on it. Its relevance was that such information may have supported her argument that some of the variation in questioned transactions for

⁵ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [108].

The Rumbly Tum was due to computational errors, as she made with other customers, rather than deliberate measures in its favour. The apparent omission in providing her that information, and the loss of the opportunity to comment on it, was not a minor defect in the process and resulted in her being treated unfairly.

(v) *Inadequate inquiry and unfair further disciplinary allegation*

[36] In the first disciplinary meeting Ms Dellaway-Smith asked Mr Saunders to talk with Mr and Mrs Wills about whether he had authorised discounts to their business. By letter of 30 May Mr Saunders declined to do so, giving three reasons. Each reason he gave was inadequate when measured by the standard of what a fair and reasonable employer could have done.

[37] Firstly, he said it was not “appropriate” to question a customer about Ms Dellaway-Smith’s conduct. A disciplinary inquiry will frequently require an employer to gather relevant information from a customer, client, service user or even a passer-by, even if that involves some embarrassment to the business. The test is whether such a person, when interviewed, will likely have information reasonably needed to fairly assess what has happened. The understanding of Mr Wills and Mrs Wills about the situation, even if mistaken, was relevant to what had happened.

[38] Secondly, he said any corroboration of Ms Dellaway-Smith’s version of events would not be reliable because she had “a personal social relationship with the Rumbly Tum’s proprietors, including having spent weekends away together”. Mr Saunders’ account of such a supposedly-close relationship relied on what he admitted second hand rumours and was not supported by any evidence available to him at the time or subsequently at the Authority investigation. An interview of Mr and Mrs Wills, who were working nearby and readily available, might have generated information Mr Saunders did not want to hear or may ultimately, after assessing it fairly, have been of little weight. It might even have provided him with some information that strengthened rather than weakened his concerns. However simply refusing to talk to them meant Mr Saunders had not taken all reasonable steps to conduct a full and fair investigation.

[39] Thirdly, Mr Saunders said he had not authorised a discount of any amount for The Rumbly Tum so considered Ms Dellaway-Smith’s explanation was not credible.

As already noted in this determination his subjective declaration was not supported by evidence sufficient to reach the standard of how a fair and reasonable employer could have decided that conflict in their respective account of events. Mr Saunders' only evidence in support of his version was his assertion that it was so.

[40] On receiving that rejection of her request Ms Dellaway-Smith asked Mr and Mrs Wills to write a letter outlining their understanding of the discounts. When she sent their letter to Mr Saunders he responded by adding a further disciplinary charge that Ms Dellaway-Smith had committed further serious misconduct by "solicitation of a letter" in support of her position. Mr Saunders later decided that telling Mr and Mrs Wills about the disciplinary investigation and asking them to provide a letter was a breach of the duty of fidelity, was "entirely inappropriate" and amounted to serious misconduct. It was not a conclusion that a fair and reasonable employer could have reached in all the circumstances. Even if an employer could reasonably instruct a worker not to disclose the fact that she or he was subject to a disciplinary investigation, Mr Saunders had not impressed such a confidentiality obligation on Ms Dellaway-Smith. Mr Saunders' actions, in then disciplining her for talking to and then getting a letter from people he should fairly have interviewed himself but had refused to do so, was unjustified for reasons explained by the Employment Court in *X v Auckland District Health Board* in this way:⁶

... the Board alleged a breach of confidentiality by the plaintiff. Although it was entitled to so allege, I am not satisfied that the allegation was soundly based and therefore the Board's conclusion justified. I find that the plaintiff was not told by ADHB representatives at the meeting on 8 February that he must maintain confidentiality about its allegations against him. Even if not, and quite apart from the propriety in principle of an employer seeking to gag an employee from communicating about a process affecting that employee, **the plaintiff was entitled to communicate with others as part of preparing his responses to very serious allegations.** Even if such an instruction had been given to him (as I am satisfied on balance it was not), it would not have amounted to a lawful and reasonable instruction from an employer to an employee. Finally, it is significant in my view that it was not the manner in which the plaintiff interacted with other employees that was criticised by the Board but, rather, the fact that the plaintiff spoke to others about the allegations against him. The Board's complaint of breach of confidentiality is without foundation, both on the evidence and as a matter of principle.

[41] Mr Saunders' closing submissions sought to distinguish the application of those principles on the supposed facts of what had happened in the present case. The letter of 30 May from Mr and Mrs Wills included a statement that Ms Dellaway-Smith had not received any "kickbacks" from them. Mr Saunders submitted this

⁶ [2007] ERNZ 66 at [115].

showed she had incorrectly described the disciplinary investigation as being about “giving discounts in return for ‘kick backs’”. During the disciplinary investigation Mr Saunders denied Ms Dellaway-Smith’s description of the allegations as being about ‘kick backs’ or ‘trade offs’ for her from Mr and Mrs Wills. He said no such allegation was made. Rather he said it concerned only unauthorised discounts. However Ms Dellaway-Smith said Mr Saunders had told her, at the outset of the disciplinary investigation, that he believed she was “trading coffee for discounts”. Her evidence on that point was consistent with the tenor of the written allegations and how Mr Saunders conducted his investigation, including by refusing to talk to Mr and Mrs Wills.

[42] Against that background his disciplinary conclusion about a breach of fidelity as a further instance of serious misconduct was also unjustified.

An unjustified dismissal

[43] Mr Saunders’ faulty investigation and unjustified additional disciplinary charge meant his decision to dismiss Ms Dellaway-Smith was not within the range of responses reasonably open to him at the time he made it. Her dismissal was therefore unjustified. She was entitled to an assessment of remedies for her grievance.

Remedies

Lost wages

[44] Ms Dellaway-Smith sought an order for reimbursement of lost wages for 12 months from her dismissal, less money she earned from a part-time job she started in February 2017. Her annual salary at Cleantech, based on an hourly rate of \$22, was \$45,760. The part-time job she started in February 2017 was for 12 hours a week paid at an hourly rate of \$25.

[45] In making a claim for lost wages an employee who is found to have been unjustifiably dismissed is obliged to show she or he had tried to offset the extent of that loss by taking reasonable steps to find another job or source of income. The employer may seek to persuade the Authority that the former employee had unreasonably failed to do enough to mitigate the asserted loss. In assessing that claim, and any dispute over whether those mitigation endeavours were sufficient, the Authority cannot be too stringent in its expectations of a dismissed employee who has

been the victim of a wrong.⁷ The nature of or alleged reason for the dismissal may be a factor in that assessment. For example the Court has noted that a dismissal for what was said to be dishonesty may inevitably make getting another job more difficult.⁸

[46] Ms Dellaway-Smith's evidence established she had made sufficiently diligent efforts during the months from June to October in applying for other jobs. She said she believed some applications were not considered further after she, if asked, told prospective employers her previous employment had ended by dismissal and the nature of the allegations that had led to it. Accepting that information was likely to have that effect, this hampered her job search efforts but did not amount to a failure to make reasonable endeavours to limit her loss.

[47] However her job search efforts appeared to have trailed off by November 2016. Ms Dellaway-Smith said this was when she was offered the part-time job that she then started in February 2017.

[48] Her evidence showed other factors also likely affected the time and energy she had for job search activities. In September 2016 Mr Wills contacted Ms Dellaway-Smith and asked her to help him at The Rumbly Tum. Mrs Wills had been admitted to hospital and was very unwell in the following weeks. Mr Wills knew that Ms Dellaway-Smith had, prior to working at Cleantech, been involved in running cafes. Ms Dellaway-Smith agreed to his request. She worked at The Rumbly Tum, without being paid for it, most mornings from then until Mr and Mrs Wills sold the business in February 2017. Mr Wills said the business could not afford to pay her. While Ms Dellaway-Smith was prepared to work on that basis because of the friendship she had developed with Mr and Mrs Wills, it was time voluntarily spent on other activities rather attending to efforts to mitigate her loss.

[49] Ms Dellaway-Smith also had some other family circumstances that distracted her from those mitigation efforts. These included daily visits to her son who had been seriously injured in a motor accident.

[50] Against that background, assessing both the period of loss and the mitigation efforts made, an award of lost wages for six months was appropriate, but no longer. There was some prospect that, but for her unjustified dismissal, the tensions in the

⁷ *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

⁸ *Xtreme Dining*, above n 7, at [105].

employment relationship between Mr Saunders and Ms Dellaway-Smith, might have resulted in her having left the job within that six month period. However this was more probably unlikely to have happened given limited alternative employment prospects. Accordingly no reduction of that assessed period was needed to allow for other contingencies of life.⁹

[51] By order made under s 123(1)(b) and s 128(3) of the Act Mr Saunders must pay Ms Dellaway-Smith the sum of \$22,880 in reimbursement of six months' wages lost as a result of her grievance. It applies to the period of six months from 22 June 2016. Ms Dellaway-Smith received an unemployment benefit for some of that period. It is up to her to account to Work and Income for any amounts that may need to be repaid to it once Mr Saunders had paid her the lost wages award.

Compensation for humiliation, loss of dignity and injury to feelings

[52] Ms Dellaway-Smith sought an order for compensation of \$20,000 for humiliation, loss of dignity and injury to her feelings as a remedy for her grievance.

[53] She gave evidence of feeling humiliated, depressed and helpless as a result of the accusations made about her conduct and her dismissal. She had received medication and counselling to assist with those feelings. She was embarrassed when she met former customers. She had experienced panic attacks and nausea which she attributed to the circumstances of her dismissal and how she felt about those events.

[54] While there was no reason to doubt Ms Dellaway-Smith's evidence of her ongoing sense of distress, other upsetting events that occurred during the period following her dismissal also added to the stresses and strains she experienced. Her son had suffered a serious accident later in 2016. She was involved in a family legal matter concerning her son and grandson that added to the worries she experienced. Her husband was also dismissed. However only the distress directly related to her own unjustified dismissal and its aftermath could be the subject of an order for compensation.

[55] Considering the range of awards in similar cases, and mindful of the need not to set such payments artificially low, \$12,000 was an appropriate but relatively

⁹ *Telecom New Zealand v Nutter* [2004] 1 ERNZ 315 at [73].

modest sum of compensation to address the injury to Ms Dellaway-Smith's feelings and loss of dignity as a result of her unjustified dismissal.¹⁰ By order under s 123(1)(c) of the Act Mr Saunders must pay Ms Dellaway-Smith that sum.

Any reduction of remedies for contribution?

[56] Under s 124 of the Act the Authority must consider whether any remedies awarded required reduction due to actions of the employee that contributed, in a blameworthy way, to the circumstances giving rise to her or his grievance.

[57] Mr Saunders' closing submissions suggested Ms Dellaway-Smith was to blame for the situation she found herself in because she had a "flippant attitude" during the disciplinary inquiry and gave inconsistent explanations. The suggestion of flippancy, that is not showing appropriate respect or seriousness, was too subjective to establish a requirement for a reduction of remedies. The notion that her explanations were inconsistent was similarly not established given the flaws identified in Mr Saunders' investigation.

[58] Ms Dellaway-Smith had, in her explanations, accepted she made errors in her work. Those were matters of performance which could have been investigated and warranted some disciplinary outcome. Mr Saunders had, when they were raised in the disciplinary investigation, not accepted her errors were the result of a heavy workload or inadequate training. The disputed cause of those errors was not sufficiently clear from the evidence to accept Ms Dellaway-Smith's admitted fault was so blameworthy as to require a reduction of remedies.

Costs

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and an Authority determination on costs is needed Ms Dellaway-Smith may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Mr Saunders would then have 14 days to lodge any reply

¹⁰ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Robin Arthur
Member of the Employment Relations Authority

¹¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].