IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 19
5549805

	BETWEEN	LEIGHTON DEWAR Applicant
	A N D	XTREME DINING LIMITED t/a THINK STEEL Respondent

Member of Authority:	Helen Doyle
Representatives:	Ashley-Jayne Lodge, Counsel for Applicant Tim McGinn, Counsel for Respondent
Investigation Meeting:	8 December 2015 at Christchurch
Submissions Received:	1 February 2016 for Applicant 16 February 2016 for Respondent
Date of Determination:	1 March 2016

DETERMINATION OF THE AUTHORITY

A Leighton Dewar was unjustifiably dismissed from his employment with Xtreme Dining Limited t/a Think Steel.

B Xtreme Dining Limited t/a Think Steel is to pay to Leighton Dewar the sums of:

- **$2,709.08 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.**
- **Taking contribution into account the sum of $10,000 without deduction being compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000.**

C Costs are reserved and failing agreement a timetable has been set.

Employment relationship problem

[1] Leighton Dewar was employed by Xtreme Dining Limited trading as Think Steel (Think Steel or the company) from 11 August 2014 as a fabrication and fitting assistant. He was party to a written individual employment agreement with Think Steel (the employment agreement).

[2] Mr Dewar was summarily dismissed from his employment with Think Steel on 3 February 2015 because the company concluded he was involved in one incident of stealing petrol and may have been involved in 27 other instances.

[3] Mr Dewar says that the dismissal was procedurally and substantively unfair and Think Steel breached its obligations of good faith. He seeks reimbursement of lost wages, compensation and costs.

[4] In final submissions Ms Lodge sought a penalty for a breach of good faith but it was not a claim in the statement of problem so I have not considered whether a penalty should be awarded.

[5] The managing director of Think Steel is Neil Gard. Mr Gard set up the company in 2003 with a view to developing a business flying clients into back country areas for unique dining experiences. The company did not show enough promise to develop that further.

[6] Mr Gard then got into building and renovation work before buying the business of Moore Steel about three years ago from which point the company has traded as Think Steel. The core business of Think Steel is the manufacture of fabricated structural steel ready made parts for commercial and domestic building and construction projects.

[7] Think Steel says that Mr Dewar was justifiably dismissed for theft and dishonesty and that it did not breach the duty of good faith.

The issues

[8] The Authority needs to determine the following issues in this matter:

(a) Was there a full and fair investigation into the actions of Mr Dewar at the end of which a fair and reasonable employer could conclude that there was serious misconduct on his part;

(b) Was the decision to dismiss Mr Dewar justifiable;

(c) If Mr Dewar was unjustifiably dismissed, then what remedies is he entitled to and are there issues of contribution and mitigation?

Was there a full and fair investigation into the actions of Mr Dewar at the end of which a fair and reasonable employer could conclude that there was serious misconduct on his part

The reasons for dismissal

[9] Mr Gard wrote to Mr Dewar by letter dated 3 February 2015 confirming his dismissal for theft and dishonesty. He stated in the letter that it was considered that Mr Dewar had been involved in at least one and potentially 27 instances of stealing petrol owned by Think Steel. Mr Gard in his evidence said that the focus was essentially on one instance which took place on 1 February 2015 at Z Belfast service station at Christchurch. I accept that was the only incident discussed at the meeting on 3 February 2015 with Mr Dewar.

[10] Theft can amount to serious misconduct because, if established, it is destructive of the trust and confidence required in the employment relationship. I shall go on to consider whether dismissal was justified in all the circumstances in this case.

Individual employment agreement

[11] The employment agreement provided in clause 4 that the employer and employee are to deal in good faith with each other. Clause 13.3 provides for termination for serious misconduct which is stated to include but is not limited to theft and dishonesty. There is no disciplinary process in the employment agreement.

Background to concerns about theft of petrol

[12] Mr Gard's wife Kathryn works part time for the company in an administrative role and identified in January 2015 that the company monthly fuel card account

seemed a bit high for December 2014. On reviewing the account some suspicious transactions were noted. Unleaded petrol purchases were associated to the card which was linked to the company blue Toyota diesel truck and did not appear legitimate. There were similar purchases associated with another company vehicle card. The fuel card associated with another vehicle had been missing from the Isuzu crane truck for a period in early January and used for petrol purchases from late December.

[13] The fuel card company was contacted and sent through a list of current transactions for January that showed the issue was continuing. A call was then received from the card company to advise that one of the company fuel cards from the Isuzu crane truck had been used to purchase petrol again on Sunday 1 February 2015. Mr Gard was able to contact the service station at which the card was used, Z Belfast in Christchurch.

[14] On 2 February Mr Gard spoke to the manager of Z Belfast and was allowed to view the CCTV footage. The manager advised Mr Gard that they were not permitted to copy the CCTV footage for him and he was told that he would have to write with a formal request in due course. The purchase in question was for unleaded petrol valued at $62.01 inclusive of GST at 5.53pm on 1 February 2015.[1]

[15] The Authority viewed the video footage at the investigation meeting together with counsel and the parties. Copies of video stills that Mr Gard considered relevant to his conclusion that Mr Dewar knew about, and was party to, the dishonest conduct of another employee I shall refer to as Chris[2] were provided as the part the documentation.

[16] The footage shows that Mr Dewar pulled in and parked his car to the side of the petrol station shop at 5.43pm on 1 February 2015.[3] Chris is seen getting out of the passenger seat and going to talk to a customer at the service station but the customer walks away. He approaches another customer. He then returns to Mr Dewar's car and the footage suggests that he talked to Mr Dewar and/or the other passenger in the car who was in the back seat. Chris then approaches another customer filling his car with petrol. He then goes to the store before returning to talk to the customer again. The customer and Chris then go to the store together. Mr Gard

[1] Page 26 of the bundle of documents.
[2] His employment was also terminated
[3] Mr Dewar accepted that he had driven his vehicle to Z Belfast at the material time when he was asked about the matter on 3 February 2015.

said that video still[4] shows Chris giving the thumbs up to Mr Dewar but as I observed when the footage was viewed at the start of the investigation meeting that thumbs up was not obvious from the footage or the still.

[17] Chris, it appears from the footage, paid for the customer's fuel with the customer present at the counter and then the customer is shown withdrawing cash from the ATM machine in the petrol station shop and giving it to Chris. Chris and the customer are shown to leave the store together before parting ways with Chris getting into Mr Dewar's car. The back seat passenger in Mr Dewar's car then gets out of the vehicle and gives the customer a *high five* which was concluded to be a thank you.

[18] Mr Gard said that the information from the CCTV footage and transaction information suggested to him that Chris had done some sort of deal where he had paid for an unknown person's fuel using Think Steel's fuel card for the Isuzu crane truck. In return, he had received some cash from that person, probably at a discount, for their participation.

The process

3 February 2015

[19] There was one meeting on 3 February 2015 at the conclusion of which Mr Dewar's employment was terminated. Mr Gard and product manager David Cross were involved in the meeting on 3 February 2015 on behalf of Think Steel. Mr Cross explained in his evidence that his role was that of an observer at the request of Mr Gard. Mr Gard confirmed in his evidence that he had briefed Mr Cross about the CCTV footage late on Monday, 2 February before the meeting.

[20] Mr Dewar was not advised to bring a representative with him to the meeting and he was not told what the meeting was to be about. Mr Dewar said that he thought he was to discuss a job for the day. Mr Dewar attended the meeting shortly after he arrived at work on 3 February 2015 at or about 7am. He followed Mr Gard into his office where Mr Cross was.

[21] There was some dispute as to what was said at the meeting with Mr Dewar. Nobody took any notes. The first written record after the meeting was the letter of termination which was dated 3 February 2015 from Mr Gard. Given the passage of

[4] Page 43 of the bundle

time since the meeting, the absence of written notes and the conflict in accounts of those present at the meeting I have placed reliance on the contents of that letter.

[22] There is a dispute as to the exact nature of the questions at the start of the meeting but the evidence does support that the meeting started with some general questions about fuel cards before Mr Gard explained that the questions were directed to an allegation of serious misconduct. These questions were asked before Mr Gard advised that the meeting was about serious misconduct allegations.

[23] Mr Gard said he showed Mr Dewar a fuel card and asked him if he knew what it was. He said that Mr Dewar told him he did not know what it was.

[24] Mr Dewar did not accept that he was shown a fuel card at the meeting and disputed that he was ever asked in the way Mr Gard said in evidence he was about the cards. He said he was well aware that the company had fuel cards and he had used them previously. Mr Dewar said that the initial question was directed towards his knowledge of fuel cards and that in response to a question about the fuel cards, Mr Dewar ran through his knowledge about which company vehicles were allocated fuel cards.

[25] Mr Gard placed weigh on Mr Dewar's demeanour at that time in reaching his conclusions about the misconduct. Mr Gard and Mr Cross described Mr Dewar at the meeting as dismissive, uninterested, bored and distracted. Mr Dewar described Mr Gard as hot-headed in his oral evidence during the meeting and said that he felt intimidated by him.

[26] I accept Ms Lodge's submission that Mr Dewar was in effect ambushed with the allegations of theft and dishonesty and these allegations were advised after the meeting had commenced and not at the outset. The fact that Mr Dewar's demeanour at the meeting negatively weighed in Mr Gard's mind during the meeting was unfair in the above circumstances particularly where he was not aware of the purpose of the meeting at the outset. Mr Dewar described himself as *in shock* during the meeting and said that he felt intimidated.

[27] Procedural fairness is rarely achieved when an employee is unprepared for a meeting and therefore taken by surprise. There are criticisms made by Think Steel that Mr Dewar's fuller explanation given in his evidence was not given at the time of the meeting. The strength and persuasiveness of such a criticism is reduced if the

process adopted by the employer was not fair and did not permit a reasonable opportunity for an employee to respond to concerns before dismissal.

[28] Mr McGinn submits that Mr Dewar adopted a strategy of denial at the meeting *that began at an absurd level of denying what a fuel card was or what it looked like*. I find it less likely that Mr Dewar would have said that he did not know what the fuel cards were when he had clearly used them. I note that in the letter of 3 February Mr Gard makes no reference to such a question or answer and I have placed some reliance on that because if it was as significant as Mr McGinn now submits I would expect it to have been recorded in the letter. The first question that Mr Gard refers to in the letter is one about the use of company fuel cards for the purchase of unleaded fuel for a non-work related vehicle. It is noted in the letter that Mr Dewar denied any knowledge about that.

[29] Following on from the more general questioning about fuel cards Mr Gard told Mr Dewar that the questions about fuel cards was related to an issue of serious misconduct and that the conduct could be serious enough for the employment agreement to be terminated. Mr Gard said that he read clause 13.3 which relates to serious misconduct aloud. Mr Dewar could not actually recall those passages being read out. For present purposes I accept clause 13.3 was either read out in full or the relevant allegations within the definitions of serious misconduct in the employment agreement of theft and dishonesty referred to.

[30] I find there were then some specific questions about the missing fuel card for the Isuzu truck and whether Mr Dewar had any knowledge of that. Mr Dewar denied knowledge. Mr Gard said that two of the company cards had been used over a period of three months to purchase unleaded petrol and potentially other products not for work related use or for work related vehicles. Mr Dewar denied any knowledge.

[31] Mr Gard then explained to Mr Dewar an incident on 1 February 2015 where there had been a transaction with the fuel card at Z Belfast and that CCTV footage had been reviewed and showed Mr Dewar's vehicle arriving at the forecourt with two passengers.

[32] Mr Dewar confirmed that it was his car and that he was driving.

[33] Mr Dewar said in his evidence at that point *it clicked what had happened*. In his evidence Mr Dewar said that he explained that he had gone out with Chris to the

Waimakariri River and that he was under the belief that the fuel card that Chris was using belonged to Declan who was Chris' girlfriend's sister's partner.

[34] Mr Gard agreed that Mr Dewar's explanation was that Chris told him that he had been given the fuel card from his brother-in-law although I note in the letter of 3 February 2015 the word brother is used and that he did not receive any cash from the transaction. He did not agree there was reference to the place where the vehicle had travelled from or to the name *Declan*. The explanation was expanded on in the statement of evidence by Mr Dewar.

[35] Mr Dewar said at this point of his explanation which he thought had taken about 30 seconds he was cut short. He said that Mr Gard gave him a *filthy look* and asked if he had *dumb c… written on his forehead*. Mr Gard denied that he used that particular phrase and said that he said *do you think I have stupid tattooed on my forehead?*

[36] Mr Dewar said that Mr Gard advised him that his employment was terminated. Mr Cross was asked to escort Mr Dewar upstairs. Mr Dewar said that after removing his overalls he followed Mr Cross to the main office where he was told not to enter the workshop floor and that his belongings would be collected for him. He said that he told his manager/team leader Lee Robins that he had been fired.

[37] Mr Dewar said that as he was waiting where he had been instructed to wait Mr Gard came in and pushed Mr Robins out and then forcibly pushed him out saying *get the fuck out*.

[38] Mr Gard said that he simply directed Mr Dewar out of the office by placing his hands on his shoulder and denies strongly any contact in the nature of an assault of Mr Dewar. Mr Cross in his evidence said that he saw Mr Gard ask Mr Dewar to leave the premises and that Mr Gard gently ushered him towards the door.

[39] Mr Robins said that he saw Mr Dewar in a distressed state and walked into the office as he wanted to know what had happened. He said Mr Gard told him to *get fucking out.* Mr Gard denied saying that. Mr Robins said that he then saw Mr Gard push Mr Dewar in *quite an aggressive manner*.

[40] Mr Dewar was then left waiting for 20 minutes for his personal items to be collected.

[41] Mr Dewar subsequently laid a complaint of assault about Mr Gard pushing him with the police but the police did not pursue it for resourcing reasons set out in a letter from a senior sergeant dated 11 March 2015 to Mr Dewar.

[42] Mr Dewar sent Mr Gard an email on the evening of 3 February expressing that he was upset about the day's events and upset to be accused of lying and stealing from Mr Gard and Think Steel. He asked for reasons for his dismissal and the letter of 3 February from Mr Gard confirming those in writing was provided to him.

[43] The test of justification in s103A of the Employment Relations Act 2000 (the Act) provides whether a dismissal was justifiable must be determined by the Authority on an objective basis as to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[44] Section 103A contemplates there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer – *Angus and McKean v Ports of Auckland Limited*[5].

[45] Think Steel must show that it carried out a fair and full investigation which disclosed conduct a fair and reasonable employer could regard as serious misconduct. It does not have to carry out a process in the nature of a trial and the process should not be pedantically scrutinised but rather the focus should be on overall and substantive fairness. Procedural and substantive fairness overlap in this matter.

[46] The Authority must have regard to the procedural fairness factors in s 103A (3) (a) to (d) of the Act. They are fundamental principles of natural justice. Regard must also be had to good faith obligations in considering the fairness and reasonableness of the process carried out.

[47] Mr Gard upon viewing the CCTV footage would understandably have been upset and angry about what he saw. I accept he would have wished to deal with the issue quickly and there was a strategy to keep Mr Dewar and Chris separate until there had been a meeting. The matter was serious and impacted on the business.

[48] Mr McGinn submits that after Mr Dewar admitted he was the driver the essential question about Mr Dewar's knowledge and intent was dealt with by

[5] [2011] ERNZ 466

inferences drawn from the CCTV footage and the *improbable story* by Mr Dewar after he was told about the CCTV footage. He submits that the effect is such that no further investigation was necessary – *Murphy and Routhan v van Beek*[6]

[49] In *Murphy* the employee admitted taking 14 pizzas without paying for them although said they were perishable stock. It was held by the Employment Court that was enough and there was no need for the employer to investigate further because it was *the admission that then cloaked the employer's decision with legitimacy.*

[50] Mr Dewar's knowledge that Chris was using a fuel card from Think Steel without authorisation was an essential element in this matter. Mr Dewar denied that knowledge in the meeting with Mr Gard. It was a distinguishable situation from that in *Murphy*. I do not find that Mr Gard could conclude that Mr Dewar admitted to knowledge of Chris using a Think Steel fuel card without authorisation.

[51] The process Think Steel chose to adopt did not eventuate in an admission from Mr Dewar about the essential element of knowledge that Chris used a fuel card belonging to Think Steel without authorisation. In the absence of an admission there was a real risk that the process may not satisfy the procedural fairness factors set out in s 103A (3) (a) to (d) of the Act.

[52] The same process Think Steel adopted with Chris yielded a different result when Chris, although initially denying the serious misconduct allegations of theft and dishonesty, subsequently admitted these to Mr Gard and as in *Murphy* that cloaked the *employer's decision with legitimacy*.

[53] Think Steel did not accept that its process with Mr Dewar was unfair and I shall go on to consider as I must the procedural fairness factors under s 103A (3) of the Act.

[54] Mr Gard said the CCTV footage made it very clear to him that Mr Dewar was a party to the conduct including footage of Chris returning to the car to update Mr Dewar and/or the other passenger on progress with customers.

[55] Mr Dewar was not shown the CCTV footage. I accept that Mr Gard was unable to do that on the day in question. Mr Gard said in his evidence that he summarised what he had seen from the footage. I questioned Mr Dewar about the

[6] [1998] 2 ERNZ 607

extent of disclosure that he could recall. Mr Dewar agreed that Mr Gard advised he believed Mr Dewar was the driver of the car and that he believed that Mr Dewar knew what was going on. Mr Dewar said that he could not recall Mr Gard mentioning that Chris was updating him on progress. I questioned Mr Gard on this matter as well and I am not satisfied that the footage of Chris returning to Mr Dewar's car during the process of getting a customer to agree to payment with the fuel card was specifically discussed at the meeting on 3 February 2015.

[56] Mr Gard in his written statement of evidence said that Mr Dewar would not identify the back seat passenger but he confirmed in his oral evidence that he had never asked Mr Dewar about that.

[57] I find it would have been very difficult for Mr Dewar to explain the particular aspects of the footage that led to Mr Gard's belief that Mr Dewar was a party to Chris's behaviour without seeing them. Given the significant weight placed on the CCTV footage by Mr Gard it was unfair that he could not see what information Mr Gard had viewed and that was not in accordance with the good faith obligations in s 4 of the Act for disclosure of information.

[58] At the meeting Mr Dewar explained that he thought the fuel card belonged to another person. He said that he was cut short on his explanation; Mr Gard gave him a *filthy look* and indicated clearly that he did not believe Mr Dewar. Mr Gard's evidence is that Mr Dewar was given every opportunity to give an explanation and he asked if he had anything further to add which he did not.

[59] I do not find objectively assessed that Mr Dewar had a reasonable opportunity when the meeting is considered overall to respond to the concerns before he was dismissed.

[60] A fair and reasonable employer could have been expected to investigate further by putting Mr Dewar's explanation to Chris for him to respond to before reaching a decision to dismiss. I accept that Mr Gard had a view that Mr Dewar acted *in concert* with Chris and in those circumstances there was a concern about corroboration but Mr Dewar and Chris had not spoken to each at work that morning and neither knew that there was to be a meeting to discuss the event of 1 February.

[61] Mr Gard in his evidence said that Chris made no mention at his disciplinary meeting that he had told Mr Dewar about having the use of someone else's fuel card

even though Chris was aware Mr Dewar had been dismissed. A fair and reasonable employer could not draw conclusions from that in circumstances where Mr Gard agreed that he had not asked Chris any questions about Mr Dewar and his explanation and there was no evidence that Chris had been forthcoming with any information about Mr Dewar.

[62] A fair and reasonable employer could have been expected to have asked Chris about Mr Dewar's explanation in giving genuine consideration to it before dismissal as part of a sufficient and fair investigation. Unfortunately that was not done.

[63] The ability to investigate Mr Dewar's explanation further was available almost immediately after the meeting Mr Gard held with him. The failure to take that step before dismissing Mr Dewar supports in my view that the investigation was not approached with an open mind and there was an element of pre-determination. The investigation of the allegations in light of the explanation was insufficient.

[64] I have then considered whether further investigation of Mr Dewar's explanation could have made a difference in the circumstances where Mr Gard says that Mr Dewar's knowledge of Chris's actions is so obvious from the CCTV footage.

[65] Mr Dewar provided a text message from Chris sent to him on 5 March 2015 as part of the Authority process in which he said that he had emailed, called and text Mr Gard to tell him that Mr Dewar had no involvement in his actions. Mr Dewar provided a copy of this text and attached it to his statement of evidence in reply in response to Mr Gard's statement of evidence that Chris had not said to him that Mr Dewar had no knowledge of his actions. Mr Gard in his oral evidence did not accept that Chris had communicated with him as he said in his text he had. I will not set out the two relevant text messages between Mr Dewar and Chris as they are full of profanities. They do support there was no longer a friendship between Mr Dewar and Chris.

[66] In light of Mr Gard's evidence that Chris did not communicate to him along the lines he says he did in his text message, there is a possibility that Chris does not tell the truth even to Mr Dewar. Further questioning of Mr Dewar by Mr Gard as part of a full and fair investigation beyond his limited explanation about the events of 1 February 2015 and then questioning Chris about the explanation could have made a

difference. It was investigation that a fair and reasonable employer could have been expected to carry out before dismissal given Mr Dewar's explanation.

[67] Ms Lodge provided copies of all text messages between Mr Dewar and Chris from 31 December 2014 to 9 March 2015 as requested by Mr McGinn before the investigation meeting. Mr McGinn expressed on behalf of Think Steel during the investigation meeting and confirmed by email after that there were some grave doubts about the truth of Mr Dewar's evidence on oath that he had not deleted any test message from Chris during this period.

[68] The Authority took the step under after the investigation meeting of writing to Spark, the cell phone service provider for Mr Dewar under s 160 (1) (a) of the Act for call and text data on Mr Dewar's cell phone between 31 January and 5 February 2015. The data supplied by Spark was consistent with Mr Dewar's evidence that he had not deleted any text messages from Chris for that period.

[69] In the letter of 3 February there is reference to 27 further transactions on the fuel card statements which are in question although the statements were not provided to Mr Dewar. The letter of 3 February 2015 provided that further information could be obtained from each of the petrol forecourts where most have closed circuit TV cameras.

[70] I accept that Mr Gard focussed on 1 February 2015 but the other 27 occasions must have been information that he had considered because they are specifically referred to in the letter of termination and there is reference that all information and proceedings will be passed on to the Police for investigation. Mr Gard said that he did not pursue a complaint because he was told by the Police that the chances of investigation were low unless the amounts in question were significant.

[71] I accept Ms Lodge's submission that Mr Dewar should have been provided with the fuel card statements with the dates of those 27 transactions as it was relevant information. Mr Dewar said that he was not in Christchurch on the dates of some of the transactions which would have answered those. Good faith obligations require access to information relevant to the continuation of an employee's employment and an opportunity to comment on the information.

[72] In his oral evidence Mr Gard confirmed on investigating those 27 other transactions that there was no camera footage involving Mr Dewar but Chris was seen on camera on another occasion using the fuel card in a similar dishonest manner.

[73] I conclude that Think Steel's investigation into the conduct of Mr Dewar was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. Mr Dewar was not told what the meeting was to discuss in advance or at its outset that it was about allegations of serious misconduct. He did not admit that he knew Chris had Think Steel's fuel card without authorisation. He explained that he thought the card belonged to someone else. His explanation was almost immediately discounted without it being put to Chris by way of further investigation in circumstances where the allegations were particularly serious.

Serious misconduct

[74] I now turn to whether at the end of the investigation a fair and reasonable employer could have concluded serious misconduct in the nature of theft of petrol and dishonesty on the part of Mr Dewar.

[75] Theft and dishonesty are serious allegations. Where a serious charge is the basis of justification then the evidence in support of it must be as convincing as the charge is grave – *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd*.[7]

[76] Mr Gard said that when he viewed the CCTV footage it appeared clear to him that Mr Dewar knew exactly what was happening. His reasons that he gave in evidence for concluding that Mr Dewar had engaged in theft and was dishonest were firstly that Chris and Mr Dewar were *thick as thieves*. The balance of the reasons were based on the CCTV footage and the position of Mr Dewar's car where he was not going into the shop and not at a petrol pump, his observation of Chris and Chris returning to the car and seeming to talk to the occupants including Mr Dewar in the nature of an update.

[77] Mr Dewar admitted that it was his car on the day in question at the petrol station and that he was the driver. He denied knowledge that Chris had the Think Steel fuel card. Mr Gard said that he did not believe Mr Dewar at the meeting on

[7] [1989] 3 NZILR 82

3 February for *one second* and that his demeanour (at the 3 February meeting) reinforced the *game was up* and he needed some strategy to come up with.

[78] I accept that the CCTV footage would have given rise to a strong suspicion that Mr Dewar knew what Chris was doing. The reason for having a meeting with an employee as part of a fair process is to ascertain whether there is some explanation for conduct which may not be obvious.

[79] Mr Dewar's explanation was that he had been told by Chris that the fuel card belonged to someone else. Mr Gard recorded this as Chris's brother in the letter of termination which Mr Dewar says is incorrect but the nature of the explanation was clear enough that the fuel card belonged to someone else.

[80] Mr Gard agreed that although Chris returned to Mr Dewar's vehicle as shown on the CCTV footage he did not know what was said. He had to, in those circumstances, put his suspicions or views about the interactions to Mr Dewar to establish what was going on and what was being said. I am not satisfied that Mr Dewar was asked about that matter specifically or that he had a proper opportunity to respond to it in circumstances where he had not even seen the footage. Chris could and should also have been asked about that matter.

[81] It is clear from the footage that at no time did Chris display the fuel card in a way that it would have been apparent to Mr Dewar as one belonging to Think Steel.

[82] Adverse conclusions I find were reached unfairly on the basis of information which Mr Dewar did not see and did not have an opportunity to explain to Mr Gard.

[83] In light of the explanation that was given by Mr Dewar the CCTV footage cannot be solely relied on in the absence of a fair and sufficient investigation to conclude serious misconduct.

[84] I conclude that the investigation by Think Steel into the conduct of Mr Dewar and whether he had been involved in the theft of petrol and dishonesty was not what a fair and reasonable employer could have done in all the circumstances at the time.

[85] Mr Dewar was not told why he was to meet with Mr Gard, he was not advised to bring a support person although Mr Gard was accompanied by Mr Cross. Information relevant to the continuation of employment was not shown to Mr Dewar

for his comment before dismissal and Mr Dewar was not afforded a real opportunity therefore to respond to the concerns. His explanation that he did give was not genuinely considered and obvious further investigations in light of it which would have been quite straightforward to undertake were not.

[86] The investigation was not undertaken with an open mind and there were elements of pre-determination. The procedure adopted was fundamentally unfair and not simply in a minor way. It resulted in unfairness to Mr Dewar. Good faith obligations were not adhered to. I do not find that a fair and reasonable employer could have decided at the time the dismissal occurred in all the circumstances that there had been serious misconduct on the part of Mr Dewar.

Another ground for dismissal

[87] It was put in evidence and submissions that another ground for dismissal which Mr Gard described in his written statement of evidence as Mr Dewar's *best case scenario* was that even if he believed the explanation, which he said he did not, Mr Dewar knew Chris was *ripping off someone else's fuel card* and that he thought it was *Okay if he didn't accept any cash from it*.

[88] No allegations were put to Mr Dewar before the meeting on 3 February. Any sensible analysis of what was said at the meeting supports that there was no clear allegation on this basis for Mr Dewar to answer. This allegation was not put to Mr Dewar before he dismissed and only arose as an alternative allegation at a later time. It can only be a matter to be assessed under s 124 of the Act in relation to contribution.

Was the decision to dismiss Mr Dewar justifiable?

[89] I have not found that there was a full and fair investigation following which a fair and reasonable employer could have concluded there was serious misconduct on the part of Mr Dewar. Given that finding, I do not find that a fair and reasonable employer could have dismissed Mr Dewar in all the circumstances at the time of the dismissal. I accept Ms Lodge's submission that if there was a full investigation of Mr Dewar's explanation and a conclusion that Mr Dewar did not know Chris was stealing petrol from Think Steel then other options could have been discussed.

[90] Mr Dewar has a personal grievance that he was unjustifiably dismissed from his employment with Think Steel and is entitled to consideration of remedies.

Remedies

Lost wages

[91] Mr Dewar said that following his dismissal he tried to find another job and made enquiries of friends and businesses but was told that he needed more experience. He said that it was clear to him that he needed a pre-trade qualification and enrolled at CPIT for a course starting on 18 February 2015 that ran through until 1 July 2015. Mr Dewar obtained a part-time job on 20 June 2015 and then full time employment when the course finished.

[92] Ms Lodge has calculated Mr Dewar's average earnings per month based on his income tax record from October 2014 to January 2015 as $3835.35 per month or $958.81 per week. I accept that calculation is not inconsistent with the payslips provided as part of the bundle.

[93] Ms Lodge has proposed two methods of calculating loss under s 123 (1) (b) and 128 of the Act. The first is the lesser of actual loss to the date of the investigation meeting or three months ordinary time and the second is total loss based upon an expectation of continued employment with Think Steel.

[94] In relation to the first proposed method which I find the more appropriate method Ms Lodge has assessed that up to September 2015 Mr Dewar received $18,450.86 in income but would have received $26,847.45 from Think Steel. The difference between the two is the actual loss of $8,396.59 which is, because of the study, a lesser sum than three months ordinary time which would be $11,506.05. The sum claimed is $8,396.59 gross.

[95] Mr McGinn submits that there is no evidence of mitigation before a decision to study was made at a time when the rebuild was at its peak and Mr Dewar had relevant work experience.

[96] He submits that the chain of causation between the loss of the job and lost wages was broken by the decision not to actively apply for other jobs but to retrain.

[97] Ms Lodge does not accept that Mr Dewar should be penalised for enrolling and completing a course. She submits that he had been promised an apprenticeship at Think Steel and with no performance issues there was no basis on which to believe that this opportunity would not have been offered if he had not been dismissed.

[98] An apprenticeship is a long term commitment by both employer and employee and a different relationship to that which Mr Dewar had at the time of his dismissal. I cannot be confident that if Mr Dewar had not been dismissed his hope of being offered an apprenticeship by Think Steel would have eventuated. I note that there was also a reasonably buoyant job market in the construction industry in Christchurch.

[99] I am not prepared to include into the assessment of lost wages the period of study between 18 February and 1 July 2015. Whilst it was no doubt a sensible decision which made it much easier for Mr Dewar to obtain work at the end of the course I do not find it appropriate that Think Steel should be liable for the decision to undertake study in the circumstances.

[100] Mr Dewar is entitled to reimbursement of lost wages of 11 days between 3 February and 18 February 2015 and I find he should be entitled to be reimbursed for the shortfall between what he would have received for the months of July and August 2015 had he remained employed by Think Steel. I have calculated the shortfall for the month of July as $597.35 and for the month of August as $2.35. Mr Dewar received earnings for September well in excess of what he would have received at Think Steel.

[101] Subject to any findings as to contribution Mr Dewar is entitled to reimbursement to lost wages in the sum of $2709.08 gross.

Compensation

[102] Mr McGinn submits that there was sparse and contradictory evidence about the claim for compensation for non-economic loss. I do not agree with that submission. Mr Dewar gave evidence that the dismissal turned his life upside down after the dismissal. He said he had a good job with Think Steel and he did not know what he was going to do and was in shock. He said that it then struck him what he had been accused of and he had what he described as an emotional break down. He said that he felt stressed about the reference to police involvement threatened in the

letter. He felt upset about the lack of fairness of the process and that his self-confidence had been damaged severely.

[103] That evidence was corroborated by a previous employee of Think Steel and Mr Dewar's supervisor/team leader Mr Robins. Mr Robins said that he had observed Mr Dewar very distressed immediately after his employment was terminated and he gave evidence that he saw Mr Gard push Mr Dewar in quite an aggressive manner from the premises. Mr Robins said he observed a major change in Mr Dewar's behaviour after dismissal in that he had no motivation and was depressed. When Mr Dewar advised him that he had nowhere to live as he had no income he invited him to stay with him and his wife and they helped him with food and daily living expenses until he found a job.

[104] Mr McGinn urges me to approach Mr Robins evidence with caution and submits that he *has his own axe to grind* against Think Steel. He described Mr Robins as *grossly exaggerating claims against a witness*.

[105] When Mr Robins gave his evidence I did not find that he was prone to exaggeration or embellishment. He corroborated what Mr Dewar said about this matter.

[106] I find that Mr Dewar was humiliated, and suffered loss of dignity and injury to his feelings when he was dismissed. The process adopted by Think Steel was clearly unfair and impacted I find on his self-confidence and feelings of injustice. Mr Gard vigorously denies that he pushed Mr Dewar out of the premises after he was dismissed and maintains that he simply guided him out. I found Mr Dewar's evidence that it was more than a guide out of the premises credible. Mr Dewar was understated in his evidence but very clear that he had been pushed aggressively. I find it likely that in circumstances where Mr Gard was angry about what he had seen there was some more force in the action that simply a guiding motion. Additionally there was the somewhat inexplicable delay Mr Dewar faced in having his personal belongings retrieved of about 20 minutes whilst he waited outside not allowed to enter which I find would have been distressing.

[107] Subject to any findings about contribution Mr Dewar is entitled to an award of compensation of $12,000.00.

Contribution

[108] The Authority must under s 124 of the Act, having found a personal grievance, consider the extent to which the actions of Mr Dewar contributed towards the situation that gave rise to the personal grievance in deciding the nature and extent of the remedies and, if so, reduce the remedies.

[109] It is not until this point that the Authority needs to reach a conclusion about whether Mr Dewar did what it was alleged he had done and whether he was involved in the theft of petrol on one and potentially 27 other occasions from Think Steel or was as Mr McGinn submits party to other dishonest activity that would have justified dismissal if a fair process had been followed.

[110] The situation that gave rise to the personal grievance was Mr Dewar driving Chris to Z Belfast and waiting for him whilst he approached customers to see if they would agree to him paying for their petrol using a Think Steel fuel card and then paying him cash.

[111] Mr Dewar explained that Chris wanted to buy some beer following an afternoon spent at a river. He said that Chris told him that he had a fuel card belonging to Declan who he shared a home with. Declan worked at a large construction/roading company and Mr Dewar said that Declan had given him the card and if he was ever *skint* he could use it for petrol or as an emergency fund. Mr Dewar knew Declan was a foreman and was not surprised he had a fuel card.

[112] Mr Dewar did think that what was happening was a bit dodgy but he said that he rationalised it along the basis that a fuel card was a bit like a credit card with a cash advance and that Chris had permission to use the card. He said that Chris came to the window after a failed attempt and he explained that to get cash he had to pay for someone else's petrol and had to offer a discount. The backseat passenger encouraged Chris to try again as he wanted more beer.

[113] Mr Dewar said that once Chris had received cash there was no further discussion about the fuel card and he left the petrol station dropping Chris and the back seat passenger off to Chris's car and Mr Dewar went to see his girlfriend.

[114] I am not satisfied on the balance of probabilities that Mr Dewar knew that Chris was in unauthorised possession of a Think Steel fuel card and was stealing

petrol from the company. I find it more likely Chris did not disclose that he had a Think Steel fuel card to Mr Dewar and Mr Dewar did not therefore have that knowledge. I have relied in reaching that conclusion on the text message from Chris that Mr Dewar had no involvement in his actions and the fact that Chris was clearly untruthful when it suited him. I have also placed some reliance on text messages which were also referred to as part of the evidence that supported Mr Dewar and Mr Robins believed that Chris had stolen items from them. I have also placed reliance on the fact that only Chris was implicated in any other instance of stealing petrol when Mr Gard looked into the other 27 transactions.

[115] I find that there is a strong likelihood that Chris did not want Mr Dewar with whom he had a friendship outside of work to know that he was dishonest and was in unauthorised possession of a fuel card from Think Steel so he made up a story about the fuel card belonging to another person. Chris was quite a few years older than Mr Dewar.

[116] Had Chris been asked about Mr Dewar's explanation by Mr Gard there was a strong likelihood he would have accepted that he made up a story about the fuel card belonging to someone else to Mr Dewar. I am not satisfied that Mr Dewar knew that Chris was stealing petrol from Think Steel and I find on the balance of probabilities that he was honest with Mr Gard that he thought the fuel card belonged to someone else. Unfortunately Chris was not questioned on that explanation before Mr Dewar was dismissed for serious misconduct, theft and dishonesty.

[117] Mr McGinn says that in any event Mr Dewar was party to some criminal activity whether it involved Think Steel or not and dismissal was inevitable.

[118] An employee's actions must be culpable or blameworthy or wrongful and must have contributed to the allegation of serious misconduct – *Harris v The Warehouse Limited*.[8]

[119] Mr Dewar drove Chris to the petrol station where Chris proceeded to engage in dishonest activity. I accept that Mr Dewar believed that Chris had permission to use the fuel card and that Mr Dewar formed an incorrect view about how cash would be obtained from a fuel card. Mr Dewar said that he did not know Chris was facilitating an offence.

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[8] [2014] ERNZ 480 at [178]

[120] Whilst Mr Dewar may have rationalised in his mind what was happening he knew it did not look right or normal because quite simply it wasn't. Mr Dewar waited without intervention for Chris while Chris approached a number of customers before he found one who would agree to his arrangements to get cash.

[121] If Chris had not used Think Steel's fuel card then Mr Gard would never have seen or known about the behaviour but I am assessing the situation that gave rise to the personal grievance in circumstances where the footage was seen.

[122] Trust and confidence is an essential element in an employment relationship. Even if there had been a fair process that concluded Mr Dewar had not stolen from Think Steel as a matter of common sense what Mr Gard saw on the footage would have been impacted on the trust and confidence he could have had in the future in Mr Dewar where his company had been a victim of Chris's dishonesty.

[123] Mr Dewar was essentially passive in the face of conduct by Chris on the forecourt he accepted looked *dodgy*. He did not for example encourage Chris to desist from approaching customers. That contributed to the view formed by Mr Gard that all those in the car were involved in the conduct and I find a degree of blameworthiness that contributed to the situation as a result.

[124] In *Harris*[9] it was stated that the Authority has a broad discretion to consider whether there will be a reduction of remedies even if there was some blameworthy or culpable actions on the part of the employee.

[125] I have already taken into account in awarding lost wages that an offer of an apprenticeship was unlikely and I make no further reduction to the proposed award for lost wages.

[126] I shall consider contribution solely with respect to compensation. I do not find that dismissal was inevitable if Think Steel concluded that Mr Dewar had not been involved in Chris's dishonest actions of theft because a variety of options could have been considered. Think Steel, after a process I have found was unfair, simply concluded Mr Dewar was involved in stealing its petrol. It was not clear what would have happened if further investigations had been undertaken.

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[9] At [180]

[127] I do though reduce the award of compensation from $12,000 to $10,000. I do not reduce it further. The process in this case was so deficient as to have in all likelihood lead to incorrect conclusions about the conduct and it caused considerable harm to Mr Dewar.

Orders Made

[128]

a. I order Xtreme Dining Limited t/a Think Steel to pay to Leighton Dewar the sum of $2,709.08 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

b. Taking contribution into account I order Xtreme Dining Limited t/a Think Steel to pay to Leighton Dewar compensation in the sum of $10,000 being compensation under s 123 (1) (b) (i) of the Employment Relations Act 2000.

Costs

[129] I encourage the parties to reach an agreement as to costs. If agreement cannot be reached then Ms Lodge has until 15 March 2016 to lodge and serve submissions as to costs and Mr McGinn has until 30 March 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority