



# Employment Court of New Zealand

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## Dumolo v Lakes District Health Board [2014] NZEmpC 40 (14 March 2014)

Last Updated: 21 March 2014

### IN THE EMPLOYMENT COURT AUCKLAND REGISTRY

#### [\[2014\] NZEmpC 40](#)

ARC 60/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN DAVID DUMOLO Plaintiff

AND LAKES DISTRICT HEALTH BOARD Defendant

Hearing: 24, 25 July and 26 September 2013 (Heard at Rotorua and Auckland)

Appearances: B Buckett, counsel for plaintiff

G Peplow and N Griffin, advocates for defendant

Judgment: 14 March 2014

### JUDGMENT OF JUDGE M E PERKINS

#### Introduction

[1] The plaintiff, David Dumolo, was employed as an Information Systems Support Level 2 Technician by the defendant, Lakes District Health Board (LDHB) at Rotorua Hospital and various ancillary sites from 21 September 2009.

[2] Mr Dumolo is also an exponent and instructor in the martial art of taekwondo. This has some relevance in the present case.

[3] On 14 May 2010 Mr Dumolo was dismissed from his employment without notice for serious misconduct. The dismissal was notified orally to Mr Dumolo at a meeting conducted by the Chief Information Officer of LDHB, Mr Alex Wheatley. It took effect from 12 noon on that day. Mr Wheatley confirmed the dismissal by

letter dated 17 May 2010. That letter is set out as follows:

DAVID DUMOLO v LAKES DISTRICT HEALTH BOARD NZEmpC AUCKLAND [\[2014\] NZEmpC 40](#) [14 March 2014]

#### TERMINATION OF EMPLOYMENT

I am writing to record the outcome of our meeting held Friday 14th May

2010, regarding the allegations concerning:

1. The back-up tape failure during the weekend 30 April to 2 May 2010;

and

2. Removal of organisational property without authorisation on 24 April

2010, i.e. unauthorised removal of Lakes District Health Board property/dishonesty.

The meeting was attended by yourself; your representative, Dr Lloyd Lang; Hannes Schoeman, Human Resource Manager; and myself. As discussed at the meeting, regarding the first allegation, it was decided to give you the benefit of the doubt that the write protect on the back-up tape may have moved halfway to the "off position" during the process of insertion of the tape and that this was not picked up by you.

Regarding the second allegation, you have on 5 May 2010 acknowledged that you have removed organisational property and that you are in possession of these. I cannot accept your explanations that you intended to use the DVD for training of Lakes DHB security staff in self defence and that you felt, therefore, that it was okay to remove organisational property for this purpose. The self defence training that you provide is for your own private business for which you are charging a fee. This is further aggravated by the fact that you confirmed using paid organisational work time to arrange your personal business.

These actions are regarded as in breach of the Lakes District Health Board Rules of Conduct. This is based on the information gathered during the investigation and your admission on 5 May 2010 of being in unauthorised removal of organisational property (blank recordable media)/dishonesty, and your explanation during the meeting of 14 May 2010.

I consider that your actions constitute serious misconduct. Taking into consideration your previous disciplinary record and warnings issued to you, your behaviour has eroded the basic trust and confidence necessary in the employment relationship. I therefore summarily dismissed you, terminating your employment with Lakes District Health Board immediately (as at Friday, 14 May 2010 at 12 noon). The authority to terminate your employment has been delegated to me by Nick Saville-Wood, General Manager, Corporate Services, Lakes District Health Board.

Your final pay and any outstanding leave owing will be paid to you as soon as possible. Please ensure that you immediately return all property belonging to Lakes District Health Board, including your ID Badge and pager.

Should you have any questions arising from this letter, please contact Human

Resources or myself.

...

[4] The sole ground therefore adopted by LDHB for dismissal was the removal of a DVD disc or discs by Mr Dumolo from LDHB's premises and dishonesty. However, it was in the context of other disciplinary action previously dealt with. Mr Dumolo had previously been subject to a disciplinary process relating to his failure to ensure backup of information at the hospital. There was another failure in the backup during the weekend of 30 April to 2 May 2010 at the hospital. This was to be the subject of a further disciplinary process. When the removal of the DVD disc was uncovered, both matters were put forward as being subject of the disciplinary action. Mr Dumolo denied responsibility for the second backup failure. He gave an explanation, which may have been consistent with an equipment defect. He was given the benefit of the doubt and that was not used as a ground for disciplinary action against him.

[5] Following his dismissal Mr Dumolo raised a personal grievance. The matter proceeded through mediation, was not resolved in that way, and was referred to the Employment Relations Authority (the Authority). The Authority, following an investigation on 24 June 2011 at Tauranga, issued a determination<sup>1</sup> dated 29 July

2011 holding Mr Dumolo's dismissal as justifiable. Mr Dumolo filed a challenge against the whole of the determination seeking a hearing de novo. LDHB, being dissatisfied with a preliminary finding as to costs in the determination, has cross-challenged against that part of the determination.

### **The pleadings**

[6] The challenge is first to the findings in the determination that a fair and proper process was adopted by LDHB. Secondly, Mr Dumolo challenges the determination that the LDHB was justified in deciding that serious misconduct had occurred and that the dismissal was appropriate.

[7] The relief sought is set out in the statement of claim as follows:

a) A finding of the Court that the plaintiff was unjustifiably dismissed (both procedurally and substantively).

<sup>1</sup> [2011] NZERA Auckland 343.

b) An order for lost wages, being the wages lost from the time of the dismissal until employment.

c) An order for compensation for stigma damages of \$25,000.

d) An order for compensation of \$25,000 for the pain and suffering, hurt and humiliation, anxiety and stress.

e) An order for costs, being costs incurred as a result of the personal grievance, including any legal fees.

f) An order for special damages, being the costs (to be quantified and includes legal) incurred by the plaintiff in dealing with

the defendant in relation to this matter.

g) Any other order this honourable Court sees fit to order.

[8] Following the completion of evidence and submissions it was clear that “compensation for stigma damages” were not being pursued as a separate head of compensation beyond the remedies provided under [s 123](#) of the [Employment Relations Act 2000](#) (the Act). No separate evidence of liability or quantification was provided or submission made as to jurisdiction to award such “damages”.

[9] In addition to the cross-challenge on the costs issue, LDHB denied Mr Dumolo’s entitlement to relief. LDHB pleaded that if the Court held that Mr Dumolo had been unjustifiably dismissed, Mr Dumolo had contributed so substantially to the situation giving rise to the personal grievance that any remedies should be reduced or negated.

[10] Mr Dumolo filed a statement of defence to the cross challenge on the basis that he alleged that LDHB was not entitled to any costs as a result of being represented by in-house legal advisors.

### **Factual outline**

[11] In his role as an Information Systems Support Technician, Mr Dumolo had wide access at all hours to the majority of LDHB’s worksites including the hospital areas. A high level of trust was placed in him as a result.

[12] Since the commencement of his employment in September 2009 Mr Dumolo had been the subject of discussion and one formal warning over performance issues. These primarily related to his relationship and behavioural interaction with other staff members. He was issued with the formal warning concerning failure to follow established protocols around a backup tape.

[13] As a result of Mr Dumolo’s qualifications in martial arts and the private business he ran in training martial arts, he persuaded the LDHB to let him run a course in self defence for other employees. He was paid for this and reimbursed for expenses and equipment used.

[14] It appears to have been his hope and intention to run further courses but this did not eventuate. Nevertheless, upon the evidence of Mr John Nieuwoudt, a support manager employed by LDHB, the prospect of further courses being given was held out to Mr Dumolo. Some of the staff who undertook the first course continued receiving training via his private business, paying him personally for the courses undertaken.

[15] In May 2010 the LDHB became aware of another backup failure and regarded Mr Dumolo as responsible. A disciplinary process was put in place and a meeting was arranged to discuss this with him. Prior to that meeting taking place, LDHB also became aware that Mr Dumolo, without authorisation, had removed LDHB property in the form of a blank writable DVD disc from his work premises. The meeting set for the backup failure discussion was adjourned and another meeting arranged so that both matters could then be discussed.

[16] Mr Dumolo was invited to attend the adjourned meeting by letter dated 6 May 2010. This letter set out the allegations against him and reads as follows:

...

#### **Invite to a meeting – Back-up Tape Failure and Incident of 24th April**

**2010**

I would like to invite you to a meeting to discuss two allegations, one being

a complaint regarding a back-up [having failed] and secondly notice received around removal of organisational property without approval.

##### **1. Alleged back-up tape failure:**

I have received notice from Paul Taylor in relation to a back-up tape failure that occurred during the weekend 30 April to 2 May 2010.

(Copies of the “*Extract from backup job for Rotoiti Friday 30 April*

*2010*” and the notice received from Paul Taylor are attached for your information).

This back-up failure alleges poor performance, negligence or incompetence in the performance of your duties. These allegations, if proven, are considered to be misconduct and a breach of the Lakes DHB Rules of Conduct.

##### **2. Alleged removal of organisational property without permission.**

I have received an Incident Report from Chris Dixon around an incident on the 24th April 2010 where you allegedly removed organisational property from the premises. (Copy attached for your information). This was followed up with you on 5th May 2010. (A copy of the notes from our discussion is attached for your information.)

This incident alleges fraudulent activity/dishonesty and if proven, is considered to be serious misconduct and a breach of the Lakes DHB rules of Conduct.

Accordingly in relation to these allegations, I would like to meet with you to discuss this matter and seek your explanations. Should your explanations be deemed satisfactory, then these matters will be closed. However, as a result of the investigation, including your explanations, you could be subjected to disciplinary action in accordance with Lakes District Health Board Disciplinary Policy. As one of the allegations is regarded as serious misconduct your continued employment at Lakes DHB may be in jeopardy.

This meeting has been scheduled for 12th May 2010 at 1 pm in the HR Offices on the Ground Floor of the Edward Guy Building. You are encouraged to bring a support person or your representative to this meeting. Hannes Schoeman, HR Manager, will also be attending this meeting.

Should you have any questions on this matter, please do not hesitate to contact me.

...

[17] The disciplinary meeting then took place on 14 May 2010. Mr Dumolo had a support person present. The two matters were discussed with Mr Dumolo and he was given the opportunity to respond to the allegations against him. The company

was represented by Mr Wheatley and also the General Manager for Human Resources, Mr Hannes Schoeman. Once Mr Dumolo had been given the opportunity to respond to the allegations, Mr Wheatley and Mr Schoeman took an adjournment to consider his explanations. In respect of the backup tape failure, LDHB accepted that there may have been technical problems leading to that issue and Mr Dumolo was given the benefit of the doubt and his explanation accepted. Insofar as the second incident relating to the taking of the DVD was concerned, the company decided that this was serious misconduct and that Mr Dumolo's explanation was not accepted. The minutes of the meeting record the following:

On the second incident on the 24th of April this is a very serious [offence] and regarded under the Lakes DHB code of conduct as serious misconduct as per your letter inviting you to this meeting.

In this incident I cannot accept your explanation that you were in town and picked up a DVD for Krav Maga. You regard the DVD as low value however Lakes DHB have over 1000 staff and if they all did this it would cost Lakes a lot of money.

You state that you are using this to help train Lakes DHB staff and therefore it is OK, however they are paying you so it should be part of your own business expenses.

Thirdly and of huge concern are the emails you have produced from John

Nieuwoudt where you are conducting your private business in work time.

If I add to this the dishonesty of taking the DVD, your previous record that includes first a verbal warning and then a few weeks ago a written warning, the [your] total lack of insight into the things you are doing while at work, then it raises an issue for Lakes regarding trust and confidence.

Therefore in accordance with the Lakes DHB code of Conduct, Serious Misconduct Section please be informed that I am ending your services with immediate effect.

You will be required to immediately hand back all Lakes property and clear out your office space and we will arrange with payroll your final salary to

122:00 noon today. Any accrued leave will be paid at the next pay run.

David responded to this by stating that the DVD is of a low value and that he did provide training to Lakes staff, although they had to pay to attend his classes.

Hannes further explained that his previous record at the organisation during a relatively short service period, contributes to the decision by the organisation. Dishonesty and the lack of trust and confidence leave the organisation to summarily dismiss David.

Dr Lang enquired around EAP for David and Hannes confirmed that the organisation will fund one EAP session for David. David has to take [the] opportunity up within the next few days by contacting EAP directly.

The meeting closed.

[18] On 17 May 2010, Mr Wheatley confirmed in writing the decision given orally to Mr Dumolo terminating his employment. That letter has already been set out at paragraph [3] of this judgment.

### **Disciplinary procedures and delegated authority**

[19] The LDHB has an elaborate disciplinary procedure to be followed in the event of disciplinary action being considered and taken. There was some dispute in the evidence as to whether, upon commencement of employment, Mr Dumolo received the LDHB's policy documents, containing the disciplinary procedures and rules of conduct. The offer of employment, job description and employment agreement, all counter-signed by Mr Dumolo, contain adequate reference to those procedures and rules. Mr Dumolo also acknowledged receipt of an "employment pack" containing such documents. Additionally, the employment agreement itself sets out the provisions applying as to termination of the employment. While there is some equivocation arising from a Human Resources checklist as to exactly what was given to Mr Dumolo upon employment, there was sufficient material, in the documents he signed, to put him on notice and require some proactive enquiry on his part if he had not received the policies on discipline.

[20] There was some evidence from Mr David Johnstone as to a loan book, which is used for staff who wish to temporarily remove LDHB property from the workplace. Mr Johnstone, who gave evidence for the defendant, was Customer Support Team Leader. Mr Johnstone was the person who supervised Mr Dumolo's induction at the commencement of employment. He maintained in his evidence that he explained to Mr Dumolo how the loan book operated. However, under cross-examination he weakened in this assertion and it may well be the case that he did not mention or explain the loan book to Mr Dumolo.

[21] Mr Wheatley carried out the final part of the enquiry into dismissal. Miss Buckett, counsel for Mr Dumolo, made much, during cross-examination and in her submissions, of the delegation requirements of LDHB. She submitted that in the evidence before the Court, Mr Wheatley did not have the requisite delegated authority to dismiss Mr Dumolo. I do not accept that submission. Both Mr Wheatley and Mr Schoeman were emphatic that Mr Wheatley held the appropriate delegation from the General Manager of Corporate Services. Mr Schoeman also stated that the delegation made orally was then confirmed in writing. It would have been preferable for LDHB to have provided any documentation confirming the delegation. However, the point was not pleaded by Mr Dumolo and appears to have been raised late in the piece by Miss Buckett. Mr Schoeman indicated that the delegation could be made orally. On the evidence I find on the balance of probabilities, that Mr Wheatley was authorised to carry out the final stages of the disciplinary process and dismiss Mr Dumolo.

[22] Under Appendix 1 of the LDHB's Management and Administration Manual, classifications are made of what constitutes misconduct and serious misconduct. The appendix also specifies the disciplinary action, which may follow for breach. Theft or conversion of LDHB's property is categorised as serious misconduct, as is unauthorised possession of LDHB property. Theft or conversion of LDHB property is categorised as an example (the list is not exclusive) of fraudulent or dishonest activity. The emphasis appears to be on the fact that misconduct or serious misconduct is activity significantly undermining or significantly impairing trust and confidence between employer and employee.

### **Principles applying**

[23] Mr Dumolo's dismissal occurred on 14 May 2010 prior to the amendment to s 103A of the Act. Accordingly, the test that LDHB must meet to justify Mr Dumolo's dismissal is whether its actions and how it acted were what a fair and reasonable employer *would* have done in all of the circumstances at the time that the dismissal occurred.

[24] The full Court in *Angus v Ports of Auckland Ltd*<sup>2</sup> considered at length the inquiry which the Court is required to make into the actions of the employer under s 103A of the Act. While that decision primarily considered the new test for justification introduced in 2011, the Court reiterated the approach it had set out in *Air New Zealand Ltd v V*.<sup>3</sup> It is often stated that it is not the role of the Court to substitute its view for that of the employer. Instead, the Court's role is to assess on an objective basis whether the actions of the employer fell within a range of the standards for justification established by the statutory provisions. The Court is required to assess, objectively and carefully, both the conduct of the employee and the employer and then the employer's response to that conduct. Often as part of the assessment a preliminary inquiry will need to be made as to whether the employer's

finding as to misconduct or serious misconduct can be established on the facts before embarking on a consideration as to whether the employer's disciplinary actions in response to those findings is what a fair and reasonable employer would do in all the circumstances.

[25] In the present case Mr Dumolo's actions in taking the DVD are not in dispute. Miss Buckett in her written submissions dealt with the issue of standard of proof and in particular the decision of *Honda New Zealand Ltd v New Zealand Boilermakers Union*.<sup>4</sup> The analysis, which she submitted I needed to make, might be applicable in a situation where the alleged act of misconduct or serious misconduct even occurred is in dispute. However, that is not the position here. Mr Dumolo does not dispute that he took a DVD disc in circumstances described by Mr Christopher Dixon, who gave evidence on behalf of LDHB. Mr Dumolo disputes whether that

was serious misconduct or the lesser standard of misconduct and if it was either, whether dismissal was the appropriate response to his actions.

[26] While the amendment to s 103A also introduced subs (3) setting out matters the Court must consider in applying the test of justification, those predominately

procedural steps would be matters to be taken into account in any event in applying

<sup>2</sup> [\[2011\] NZEmpC 160.](#)

<sup>3</sup> [\[2009\] ERNZ 185.](#)

<sup>4</sup> (1990) ERNZ Sel Cas 855.

the pre-amendment test. They are matters that would form part of a fair and reasonable process to be applied by an employer before taking disciplinary action.

## Conclusions

[27] The Authority Member, in her determination, set out a substantial list of factors, which led the employer in this case to the view that Mr Dumolo's conduct in taking the DVD primarily for his own purposes, amounted to serious misconduct for which dismissal was justifiable. She concluded that his actions amounted to serious misconduct because they fundamentally undermined the trust and confidence inherent in the employment relationship. Probably the conclusion should be the other way round, namely that trust and confidence was undermined because of actions the employer concluded amounted to serious misconduct.

[28] I note that in the letter of termination, Mr Wheatley indicated that Mr Dumolo's action in taking the DVD was further aggravated by the fact that Mr Dumolo had confirmed using paid organisational work time to arrange his personal business. That particular assertion may have been covered in the evidence adduced in the Authority's investigation. It did not assume any importance in the evidence before the Court and was not substantiated.

[29] The employer certainly made the point that while the value of the DVD was minimal, being a dollar or thereabouts, the matter was one of principle. Mr Dumolo of course, in his explanation, indicated his belief that an item of this value should be equated with stationery items such as pens and writing paper. He inferred that the employer was unreasonable in elevating the matter in the way it did. Mr Dumolo maintains that he only took one disc. There was some suggestion in Mr Dixon's evidence that Mr Dumolo had more than one disc on the day in question. Mr Dumolo's evidence, which was not disputed by the employer, was that he had received a large number of blank DVD discs to use during the course of his employment.

[30] Clearly, as Mr Wheatley stated in his evidence, while the item had an extremely low value, if the practice of taking such items became widespread it could develop into a significant cost to the LDHB.

[31] In this particular case the employer has clearly taken into account in dismissing Mr Dumolo, not only the fact that he stole a DVD but also his employment background. He had received a warning for a backup failure and other supervisors of him had received complaints about his behaviour from other staff members. Mr Wheatley significantly stated in his evidence that he might not have dismissed an employee with long and valued work history in a similar situation.

[32] The disciplinary process appears to have been conducted in an appropriate manner. The factor, which causes difficulty, is that while Mr Dumolo's conduct probably would be categorised as serious misconduct and unauthorised taking of an employer's property would invariably be categorised as such, in this case it is at the lower end of seriousness. The decision therefore to be made is not necessarily how the conduct is to be categorised but whether LDHB's response to it in all of the circumstances was not the action which a fair and reasonable employer would take.

[33] While the Authority Member, in her determination, has taken the view that the dismissal was justifiable and has set out a reasoned argument for reaching that conclusion, there is one part of the evidence, which causes concern at the dismissal being upheld. This relates to the evidence of Mr Nieuwoudt. Mr Dumolo conceded that the disc he took was used to download a film to be used for his martial arts students. Some of these were fellow employees with whom he had conducted a martial arts course at the request of the employer and for which the costs and his fee were paid by the employer. Mr Nieuwoudt had indicated to Mr Dumolo that he was hopeful that further courses paid for by the employer might be conducted by Mr Dumolo. The matter was apparently one of funding. It is true that Mr Dumolo knew that no such further courses were in immediate prospect but nevertheless Mr Nieuwoudt had held out that there might be a prospect of such courses in the future. While tenuous, there was nevertheless some link between the taking of the DVD and what might be considered a benefit for the employer. As I understand it Mr Dumolo's evidence is that if further courses were agreed to, the film that he

downloaded would be used during such courses. He did concede, however, that for the moment the DVD was to be used for his own private business.

[34] It might be said that this does not, in any event, excuse Mr Dumolo's conduct. On the other hand it is a factor, which a fair and reasonable employer would have taken into account in assessing all the circumstances and therefore affect its response such that disciplinary action short of dismissal would have been more appropriate.

[35] During the disciplinary process Mr Dumolo raised a connection between the taking of the disc and his hope of receiving approval for conducting further courses with the LDHB staff. He did not appear to have specifically raised his prior conversations with Mr Nieuwoudt at the meeting on 14 May 2010. However, the management at LDHB knew that Mr Nieuwoudt hoped funding would be allocated for further courses to be conducted by Mr Dumolo. During the course of the disciplinary process none of the managers, including Mr Wheatley, made enquiry of Mr Nieuwoudt. That should have been undertaken as part of a genuine consideration of Mr Dumolo's explanation. In addition it appears the allegation of Mr Dumolo conducting his own business in work time relates to the correspondence he was having with Mr Nieuwoudt as to future martial art courses.

[36] It is true that in the overall consideration of the matter Mr Wheatley, as he was entitled to do, had regard to Mr Dumolo's employment history. The employment in total was of relatively short duration. During that time Mr Dumolo had received a warning in respect of backup failure. He was also subject to a further accusation of similar failure, but provided an explanation, which the employer was prepared in the circumstances to accept. In addition to that there were difficulties with Mr Dumolo's relationships with other employees where those employees felt compelled to make complaints against him. However, the employer had decided clearly to endeavour to manage those matters rather than take any formal disciplinary action and a warning for the backup failure was for a matter totally unrelated to the reason for his dismissal. Having assessed the matter carefully, Mr Dumolo's action in taking the DVD is very much on the cusp of behaviour for which a dismissal may or may not be justifiable. On balance I consider that a fair and reasonable employer,

while wanting to set a clear standard, in all of the circumstances, would have taken disciplinary action short of dismissal. For this reason I find Mr Dumolo's dismissal unjustifiable, applying the test that prevailed at the time of that dismissal.

### **Mr Dumolo's contributing behaviour**

[37] Pursuant to s 124 of the Act, in deciding both the nature and extent of the remedies to be provided in respect of a personal grievance, I must consider the extent to which the actions of the employee contributed toward the situation that gave rise to the personal grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded.

[38] As I have indicated, Mr Dumolo's conduct in taking the DVD would be categorised as serious misconduct. However, in all of the circumstances I do not consider a dismissal was the appropriate response from the employer. Even so, the employer, in such circumstances, would be entitled to take a reasonably stern approach. Mr Dumolo has very much been the author of his own misfortune in this matter. It is clear that he took a casual attitude to removing property without authorisation. There may perhaps be circumstances where there is a line of demarcation with stationery items. Quite often businesses have their logo printed on pens and other stationery items for advertising purposes and there is an inference they expect them to be used outside the workplace. In such a case they might not take the approach which LDHB has in this case to such items. However, Mr Dumolo was given a number of DVDs which were clearly to be used in his role as an Information Systems Support Technician with his employer and he has committed a considerable error of judgement in deciding to take the DVD. This is so even if he believed he might use the downloaded film at a later date if funding was approved for him to carry out the self defence courses on behalf of the LDHB. In all the circumstances his contributory behaviour, particularly the somewhat offhand and casual attitude he displayed during the disciplinary process, substantially contributed towards the situation that gave rise to his dismissal.

### **Remedies**

[39] Mr Dumolo's claim to remedies needs to be considered in light of these findings. In accordance with Miss Buckett's final submissions, Mr Dumolo now seeks lost wages, compensation, and costs.

[40] So far as wages are concerned, Mr Dumolo claims gross \$52,545.00 as finally quantified in Miss Bucket's closing submissions. There was some equivocation in the evidence relating to his steps to mitigate his loss by way of alternative employment. However, in view of my findings as to his contributory conduct, I accept the submissions of Mr Peplow for LDHB that an appropriate award is the sum equal to three months' ordinary time remuneration pursuant to s 128(2) of the Act. That sum is to be calculated and paid to Mr Dumolo.

[41] In respect of the claim to compensation, this, in accordance with Miss Buckett's final submissions, was narrowed down to a claim for compensation pursuant to s 123(1)(c) of the Act. Stigma damages are not being claimed as a separate head but are claimed as part of Mr Dumolo's humiliation, loss of dignity and injury to feelings as a result of being primarily dismissed for theft and dishonesty. There was limited and uncorroborated evidence from Mr Dumolo of the psychological effects of the dismissal and the difficulty in obtaining alternative employment. The evidence provided does not support his claim for \$25,000 compensation. Normally for this type of circumstance, an award in the vicinity of

\$10,000 to \$12,000 might be expected. In reducing his claim to take account of his contributory conduct, I award him \$3,000 under this head.

### **The cross-challenge**

[42] Remaining to be decided in this case is the issue of LDHB's challenge in respect of the finding on costs before the Authority and also the issue of costs on this challenge.

[43] Insofar as the first point is concerned, the Authority's determination that

because LDHB was represented by an in-house advocate it has not incurred any

costs is not correct. Obviously each case will be decided on its particular circumstances, but cases such as *Henderson Borough Council v Auckland Regional Authority*,<sup>5</sup> *O'Malley v Vision Aluminium Ltd (No 3)*,<sup>6</sup> *Open Systems v Pontifex*,<sup>7</sup>

*Clarke v Attorney-General*<sup>8</sup> and *Dwyer v Air New Zealand Ltd*<sup>9</sup> are all authorities for

the principle that in appropriate cases, representation by in-house counsel, advocates or employees will not necessarily preclude an award of costs. Although that confirmation may be sufficient to meet the relief which LDHB seeks in its cross-challenge in this case, in view of my findings on Mr Dumolo's challenge it is not appropriate to disturb the actual decision of the Authority that costs should not be awarded to the defendant in respect of the investigation meeting.

### **Costs**

[44] Insofar as costs in respect of this challenge are concerned, costs would normally follow the event. As he has been successful in his challenge, Mr Dumolo will no doubt seek costs. I will allow him 14 days from the date of issue of this judgment to file a memorandum on costs. LDHB will then have 14 days in which to reply.

M E Perkins

Judge

Judgment signed at 1pm on 14 March 2014

<sup>5</sup> [\[1984\] 1 NZLR 16](#) at [23]-[24].

<sup>6</sup> [\[1992\] 2 ERNZ 1043](#).

<sup>7</sup> [\[1995\] NZEmpC 278](#); [\[1995\] 2 ERNZ 211](#) at [216].

<sup>8</sup> WC 29A/97, 24 October 1997.

<sup>9</sup> [\[1997\] ERNZ 156](#).