Employment Court of New Zealand

Ellish v Network Service Providers Limited [2021] NZEmpC 175 (13 October 2021)

Last Updated: 21 October 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 175
EMPC 211/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARL ELLISH Plaintiff
AND	NETWORK SERVICE PROVIDERS LIMITED Defendant

Hearing:	14 July 2021
Appearances:	S Greening, counsel for the plaintiff W Fussey, counsel for the defendant
Judgment:	13 October 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Ellish was employed as a commercial manager with Network Service Providers Ltd in late 2018. His employment came to an end less than a year later. He says that he was unjustifiably dismissed and unsuccessfully pursued a grievance in the Employment Relations Authority.1 The Authority found that the parties had mutually consented to the termination of Mr Ellish's employment. Mr Ellish has challenged the Authority's determination on a de novo basis.

1 *Ellish v Network Service Providers Ltd* [2020] NZERA 255 (Member Robinson).

Background

[2] The company specialises in IT solutions for businesses and at the relevant time employed around 21 employees, including a number of commercial managers. Mr Larsen is the owner and managing director of the company. He interviewed Mr Ellish for a commercial manager role. He was impressed with Mr Ellish's credentials, including his extensive sales experience. All of this was important to Mr Larsen because, as the position description for the role reflects, a commercial manager is focussed on securing sales for the company, including by "prospecting, opportunity identification and management", "promoting, presenting, negotiating, contracting and securing new business", "contributing to the achievement of Gross Profits and bottom- line profitability" and "Customer Account & Relationship Management in relation to securing new business."

[3] As I have said, Mr Ellish started with the company towards the end of 2018. He was employed on a base salary of $110,000, plus commission, a car allowance of

$500 per month, a company petrol card, and access to health and insurance rates. He was entitled to four weeks' annual leave per annum. Gross revenue targets for the position (referred to as minimum annual revenue targets for net new business) were set out in schedule 1 to the agreement. The figures (to be agreed) for year one were

$1m to $1.5m.

[4] The agreement provided for termination of employment, providing that:

This agreement may be terminated by either party giving the other 4 (four) weeks written notice. This minimum period of notice may be varied by agreement between the employee and the employer... This notice period shall be exclusive of any period of annual leave required to be given or able to be taken under this employment Agreement.

[5] It is fair to say that things did not go well from an early stage. It soon became apparent that Mr Ellish was struggling to make any sales. While it was expected that there would be a settling in period, Mr Larsen became increasingly concerned. In mid- 2019 three meetings occurred within quick succession, followed by Mr Ellish's departure from the company. Some of what occurred during the course of these meetings is in dispute.

[6] The first meeting took place on 10 June 2019, after Mr Larsen had returned to the office from surgery. He says that he met with each of the commercial managers individually to discuss how they had been progressing in his absence. In evidence-in- chief he characterised the meeting with Mr Ellish as an informal catch-up to find out how Mr Ellish was going and what further support the company could provide him with.

[7] The 10 June meeting occurred just prior to a pre-arranged period of extended annual leave for Mr Ellish. Because of the limited time Mr Ellish had been with the company a portion of this leave had to be anticipated. The company accepts[2] that at the meeting Mr Larsen told Mr Ellish that he was not meeting his sales targets and that Mr Ellish told Mr Larsen that he was finding this highly stressful. It is also common ground that the possibility of performance management was discussed. Mr Larsen gave evidence (which I accept)[3] that he mooted the idea. He says that Mr Ellish responded by indicating that increased supervision would be even more stressful for him. This then led to what Mr Larsen described as an "open" discussion about the possibility of Mr Ellish choosing to leave the company.

[8] Mr Ellish's perspective as to the "openness" of the conversation differs. He says that Mr Larsen made it clear that his time with the company was over and that he need not return after his annual leave. Mr Ellish's evidence was that he responded by telling Mr Larsen that he had a major sale in the pipeline and needed time to bring it to a close; but that Mr Larsen was unreceptive, advising that there was nothing Mr Ellish could do to salvage the situation; and that, while a performance process could be undertaken, the result (namely termination) would be the same. I return to what went on at the meeting below.

[9] A further meeting took place the next day (11 June 2019). Mr Ellish confirmed that he would be leaving the company. Mr Ellish wanted the termination date to post- date his return from annual leave, and Mr Larsen was prepared to accommodate that request. Mr Larsen drafted a letter and gave it to Mr Ellish to consider overnight.

2 Refer statement of defence at [7].

3. Mr Ellish said in cross-examination that he raised it; in re-examination he said that he really could not remember who raised it but thought that it was him.

[10] They met again the following morning (12 June 2019). Mr Ellish indicated that he would sign the letter that Mr Larsen had drafted and did so; Mr Larsen countersigned the letter. Mr Ellish did not raise any issues with the letter before signing it, nor did he say that he needed time to take advice or consider matters further. The letter stated:

Further to our meeting on 10th June 2019 and our subsequent meeting on the 11th June 2019 whereby we mutually agreed to terminate your employment with Network Service Providers Limited (NSP) on 31st July 2019.

NSP will continue to pay your weekly salary until the 31 July 2019, including your planned annual leave from the 17 June 2019 through to the 5 July 2019 even though you have insufficient accumulated annual leave for this period. We agreed that we would review what was potentially owing to NSP from the advanced annual leave when your final pay was calculated on the 31 July 2019 to determine what you had accrued to offset the cost of the advanced leave difference. In addition NSP would take into consideration any potential Gross profit generated from any sales achieved from the 11 of June 2019 to the 31 July 2019 to offset the shortfall.

We also agreed that you would continue to perform your normal duties, including generating and closing sales from the 11 June 2019 through to the 31 July 2019. It is expected that you would also attend all required client, sales and company meetings as requested by NSP.

[Mr Ellish] we would like to thank you for your endeavours during your time with NSP and wish you well wherever your journey

takes you.

[11] Mr Ellish left on annual leave as planned, returning to the office on 8 July 2019. On his return he tried to access a number of company files. He says that this was to access a sales presentation file. Mr Larsen was alerted to the issue via an automatically generated security report. He called Mr Ellish into a meeting and asked him why he had been trying to access files that he did not have access to. Rather than providing a substantive response to Mr Larsen's question, Mr Ellish asked Mr Larsen whether he was accusing him of trading company secrets. Mr Larsen replied that he was not. Mr Larsen took no further action in relation to this matter.

[12] Issues then arose about the calculation of Mr Ellish's final pay. While Mr Ellish had expected to be paid out a sum of money, Mr Larsen advised him that he owed the company money for holidays taken in advance but not earned. This related to the leave that Mr Ellish had just recently taken. Mr Ellish was very upset and left

the office, called an employment advocate and was advised not return to work. He later provided a medical certificate stating that he was unfit to work for the period 25 to 31 July 2019.

[13] On 24 July 2019 Mr Larsen sent an email to staff advising them that:

This is to advise that [Mr Ellish] has decided to explore other career options and will be leaving us on Wednesday 31 July.

I would like to thank [Mr Ellish] for his contribution during the time he has been with us and wish him well in his new adventure.

[14] On 30 July 2019 Mr Ellish notified a personal grievance claiming unjustified dismissal. It was said that Mr Ellish had been unjustifiably dismissed from his position as a result of being falsely accused of failing to load data at a meeting on or about 9 June 2019; being told not to return from leave on or about 10 June; feeling under pressure from these two events (and signing a mutual agreement to leave the company a short time later); being falsely accused of improperly accessing work files on his return from leave; and being advised that the amount he owed the company would be subtracted from his final pay. I pause to note that the claim of unjustified dismissal before the Court focussed squarely on the events on 10 June and comments Mr Larsen was said to have made, rather than the other issues referred to in the contemporaneous documentation.

[15] The company paid Mr Ellish his final pay without deduction in light of the disagreement. However, the underlying issues remained unresolved from Mr Ellish's perspective.

The termination spectrum - how did the employment relationship end?

[16] There are a number of ways in which employment relationships can come to an end, ranging from a decision that is fully the employee's, to one that is fully the employer's. There are also cases where termination is foisted on the parties by external events or circumstance. The justification or otherwise for a termination is a separate issue. At one end of the spectrum are cases which may be categorised as

(employer) dismissal; at the other end of the spectrum (employee) resignation. There is a shady area around the middle of the spectrum. The point of equilibrium (what has been referred to as mutual consent to terminate) sits at the epicentre. It goes without saying that terminations which occur in the shady area carry a degree of risk for both parties. This case reflects the point.

[17] The company says that both parties consented to the relationship coming to an end. Mr Ellish disputes this. It was submitted that Mr Larsen dismissed Mr Ellish at the 10 June meeting and that the dismissal was unjustified. Mr Larsen, it is said, was the "prime mover" for termination; it followed that there was no mutual consent and if there was no mutual consent Mr Ellish had been unjustifiably dismissed. Mr Fussey, counsel for the company, submitted that the "prime mover" test, previously applied by the Court in *Marshall v TNL Freight Link*,[4] was overruled by the Court of Appeal in *EN Ramsbottom v Chambers*.[5] He submits that following *Ramsbottom* a two stage inquiry is required – the Court must be satisfied that the termination was the unilateral act of the employer and that it was at their initiative.

[18] I do not accept that the Court of Appeal has overruled the prime mover test or that the two-pronged test identified on behalf of the company emerges from a close reading of *Ramsbottom*. But nor do I think that the prime mover test is particularly helpful in answering the key question in a case such as this. However, because it was a focus of submissions for both parties, I deal with the prime mover issue at this point.

The prime mover approach

[19] The “prime mover” approach adopted by the Court in *Marshall* was expressed in the following way:6

Another form of the same problem occurs where the termination of employment, although instigated by the employer, is the subject of negotiation and agreement with the employee as to the terms of termination, on the basis

4. *Marshall v TNL Freight Link A Subsidiary Company of TNL Group Ltd* [1997] NZEmpC 334; [1998] 1 ERNZ 395 (EmpC).

5 *E N Ramsbottom Ltd v Chambers* [2000] NZCA 183; [2000] 2 ERNZ 97 (CA).

6. *Marshall*, above n 4, at 405, adopting the observations of the learned authors Davies and Freedland; Paul Davies and Mark Freedland *Labour Law: Text and Materials* (2nd ed, Weidenfeld and Nicolson, London, 1984) at 453 (emphasis added).

of which the employer argues that there has been no dismissal but instead termination by agreement. The [National Industrial Relations Court] and its successors seemed on the whole to reject this kind of argument. *They rightly perceived that the crucial question was whether the employer was the prime mover in the process of termination, and that it should not matter that the employer had secured the agreement of the employee as to the terms on which the termination of his employment would occur*....

[20] The reasons why *Marshall* was held to fall on the dismissal side of the termination spectrum emerge from the following passages of the judgment:7

The defendant says that even at worst the situation was not as peremptory as the plaintiff has stated it to be for, on his own admission, he had a week or so after 21 June in which to take professional advice before he signed the contract to be an independent contractor which it is agreed he did on the date stated in the contract, 1 July 1994. It is objected that this interval was not a real opportunity for the plaintiff had already bound himself by a handshake on 21 June. There are three stages that can be detected, the handshake on 21 June, the agreement to terminate the employment on 27 June, and the signature of the partnership contract on 1 July. It is probably true enough that there was a done deal as early as 21 June and that the time between that date and the greater formality of written documents being signed should not count against the plaintiff. *On the basis, then, that the contract was made on 21 June, was it made then by the plaintiff freely and voluntarily? If it was, he must, of course, be held to it there being no other reason advanced for proceeding otherwise*.

... It is a most material fact that the defendant through Mr Rait knew that the plaintiff was reluctant to give up his employment or to enter into a contract as an independent contractor. Yet he gave him little time to consider and took no steps to satisfy himself that the plaintiff was an informed, willing signatory. He could have gone a long way towards attaining that state of mind by encouraging the plaintiff and his partner to take independent legal advice.

It is necessary to bear in mind that the termination of his employment was not the plaintiffs idea . It often happens that employees will agree to the ending of their employment on certain terms or on such terms as they are able to extract in preference to the odium and tangible disadvantages of being dismissed. Writing in 1976 in Freedland, The Contract of Employment, Oxford, Clarendon Press, 1976 at pp 189-193, Freedland distinguished between termination that is genuinely bilateral, agreed termination that is initiated by the employer, and agreed termination that is initiated by the employee. Obviously, the last category - resignation - has nothing to do with the present case and it is a choice between the first two.

[21] Ramsbottom post-dated *Marshall.* The Court of Appeal did not refer to

Marshall and nor did the case relate to an analogous set of circumstances. Rather, it

7 At 404–405 (emphasis added).

involved an employee who thought he heard the employer dismiss him and left to find work elsewhere. As it happened the employer had not dismissed him, and the employee was found to have resigned. The situation has little to do with a potential “mutual termination” situation.8 While the Court of Appeal lists various definitions of termination emerging from the cases, including “a unilateral act by the employer which terminates the employment contract” and “termination of employment at the initiative of the employer”, the Court did not indicate which formulation, if either, was to be regarded as preferable.9 And, while the list of definitions do not all neatly align, all illustrate why, in *Ramsbottom*, there was clearly no dismissal. It follows that *Ramsbottom* did not overrule *Marshall*.

[22] A similar approach to *Marshall* was adopted by the Employment Court in *Sisson t/a Edgeware Law v Lewis*, which post-dates *Ramsbottom*, although the phrase “prime mover” does not appear.10 There the employer indicated to the employee that she may be made redundant. After two meetings, the parties agreed to termination on 10 days’ redundancy pay. The Court held that Ms Lewis had been dismissed, rejecting a claim by the company that the employment had come to an end by mutual consent. In this regard Chief Judge Goddard observed that:

> [66] ... The package suggested by the plaintiff, that the employment would end on 26 July 2002, and that the defendant would be paid the equivalent of a months pay as compensation for redundanc y was not resisted by the defendant no

doubt because of the further arrangement to do with the computer and the transfer of clients. *The absence of any protest no doubt induced the plaintiff to think either that the employment was being terminated by mutual consent or at least that the terms on which it was being terminated were the subject of consent. That, however, was an unrealistic approach to the matter*.
[67] The plaintiff should have more realistically treated the termination of the defendants empl oyment as being in all respects at the plaintiffs initiative with consultative input from the defendant which, however, the plaintiff as employer was not bound to accept or act upon if to do so was inimical to operational imperatives... *It follows from what I have said that I reject Mr Goldsteins submission that the employment came to an end by mutual consent. On the contrary, I hold that it was terminated by the plaintiff on 16 July 2002 by her giving the defendant 10 days actual notice and promising to pay a months pay in lieu of notice* .

8. Indeed *Ramsbottom* is often cited as an example of abandonment and what steps the employer needs to take to make sure an employee actually resigned. See, for example, *Surplus Brokers Ltd v Armstrong* [2020] NZEmpC 131 at [17].
9. *Ramsbottom*, above n 5, at [19]–[20]. See also *Ngawharau v Porirua Whanau Centre Trust* [2015] NZEmpC 89, [2015] ERNZ 748 at [67].

10 *Sisson t/a Edgeware Law v Lewis* [2004] NZEmpC 22; [2004] 1 ERNZ 200 (EmpC) (emphasis added).

[23] It seems to me that while identification of the "prime mover", in terms of who started a particular discussion/came up with the termination idea, is likely to be helpful in assessing where on the spectrum a particular termination sits, it may not be dispositive. That is because it matters less who started a conversation and more what was taken from it, where it led and why.

The mutual consent to terminate concept

[24] I do not consider that the concept of mutual consent to terminate is particularly apt in cases such as this. While an employee can terminate an employment relationship at will and without cause,11 an employer cannot. The employer remains subject to the usual legal requirements relating to termination. In this sense there is nothing for the employer to consent to, other than the terms on which (rather than the fact that) the employment relationship will end.

[25] The position can be contrasted to termination at the expiration of a fixed term agreement, where consent to terminate (in certain specified circumstances) has been reached prior to the employment relationship being entered into. I prefer to see the issue in these terms (mutual agreement as to the *terms* of departure), rather than within the rubric of mutual consent to *terminate*.

What occurred in this case?

[26] What does all of this mean for this case? As I have said, the focus centred on the 10 June meeting and what occurred during the course of it. No notes were taken at the meeting; there were no other witnesses to what went on; and the meeting occurred over two years ago.

[27] The background context to the meeting is relevant. I accept that Mr Ellish was stressed about his performance and the lack of sales he was able to generate, and I accept that Mr Larsen was aware of that. However, it cannot be overlooked that Mr Ellish was a very experienced employee, with around 25 years' experience in the sales

11 Subject to any contractual notice periods.

industry. He was concerned about his nil sales record and he knew that Mr Larsen was concerned about it too. He was well aware that performance management was likely on the horizon and it can have come as no surprise when the conversation turned to the possibility at the meeting on 10 June – indeed Mr Ellish's evidence was that he thought he was the person who raised it at the meeting rather than Mr Larsen.

[28] The nil sales situation, which Mr Larsen was genuinely (and justifiably) concerned about, had been on foot for several months. Mr Ellish was about to go on an extended period of leave with his family. While I accept that the meeting was intended as an informal catch-up, it is apparent that the discussion took a more serious turn. Mr Larsen described the conversation in the following way in cross- examination: "really just a general discussion whether, you know, we had a future together basically."

[29] Mr Ellish's expressed belief at the meeting (naive or otherwise) that he thought he may be able to turn things around, but needed time to do it, may be taken to suggest that, as at 10 June, he wanted the relationship to continue. I accept that Mr Larsen's response to the 'give-me-more-time' suggestion was not encouraging. Mr Ellish gave evidence that Mr Larsen told him that it was the end of the road and that he need not come back to the company after his holiday; that what Mr Larsen had to say was like "instant termination – it was like what the heck?"; and that he had been struck by the finality of Mr Larsen's words. Mr Larsen denied having said such things.

[30] Mr Ellish's evidence as to the nature of the 10 June conversation sits uncomfortably with his acceptance in cross-examination that both he and Mr Larsen concluded the meeting by agreeing to go away and think about things over night, which is what then occurred. It also sits uncomfortably with the fact that Mr Ellish *did* return from holiday and continued to work for the company doing productive tasks for a period of time; and his evidence in cross-examination that it was not until 25 July that he realised that Mr Larsen had engineered his departure; and that evidence was itself at odds with earlier evidence that he had found the meeting of 10 June, and being told it was the end of the road, particularly devastating just before leaving on holiday.

[31] I think it is more likely than not that the pivotal conversation on 10 June involved two experienced business-savvy people who were having a frank discussion how things were going and where to from here. Mr Ellish knew that he was not performing in the role and was a willing participant in the conversation. Mr Ellish indicated that he wished to leave the company; he did not want to confront the likely next step, namely a more intensive coaching or performance management process. That was a choice that was open to him. He and Mr Larsen agreed to think about things overnight and to meet again the next day. The next day Mr Ellish confirmed that he wanted to leave the company. The conversation then moved to the terms of his departure, which involved an extended notice period during which time he could search for other work (while remaining employed). Mr Larsen then drafted a letter based on their discussion. The letter was not signed by Mr Ellish until the following day,12 and was then counter-signed by Mr Larsen. A dispute arose some weeks later about the calculation of his final pay. Mr Larsen advised Mr Ellish that he would not be paid out for his anticipated annual leave and Mr Ellish got very upset about that. He left the office and immediately sought advice from an employment advocate. He did not return to the workplace. The letter advising that Mr Ellish had a grievance for being unjustifiably dismissed followed shortly after that.

[32] It remained unclear why Mr Ellish reacted so negatively to Mr Larsen's proposed approach to the final pay calculation, given the express terms of the letter he had signed and the fact that he appears not to have secured any sales during the intervening period. Mr Ellish gave evidence that he asked Mr Larsen why he was not being paid out his anticipated leave if he had been dismissed, to which Mr Larsen said he had not dismissed Mr Ellish. Mr Larsen denied that this exchange occurred, and it is notable that it was not a feature of evidence given by Mr Ellish in the Authority (as he accepted in cross-examination).

[33] Mr Ellish's conduct immediately after having been told of Mr Larsen's approach to his final pay is also telling. In cross-examination Mr Ellish accepted that he was a very experienced sales person and that if he was being forced out of the

12 In cross-examination Mr Ellish indicated that this was likely.

company against his will during the course of the discussions on 10 June his first port of call would have been to seek legal advice; or talk to a trusted friend. He did not do so. Rather he sought advice well after he had returned from leave and only once it became apparent that Mr Larsen did not consider that he should be paid for the anticipated leave he had just taken. It seems more likely that the reaction to being told that the company was proposing to make a deduction from his final pay was symptomatic of an earlier voluntary decision to leave the company on terms which then fell into dispute.

[34] Mr Fussey submits that, where an employee speaks openly about the difficulties they are having in meeting the requirements of the role, the employer raises termination as a feasible option and an agreement to terminate is subsequently reached, this does not of itself constitute termination being at the employer's initiative. I accept that it may not necessarily push the termination into the employer dismissal range of the spectrum, but it will almost certainly enhance the risks associated with such a finding being made.13 While I have concluded that it is more likely than not that Mr Ellish was not dismissed by the company the case was not clear cut. The risks could have been minimised by Mr Larsen adjourning the meeting and encouraging Mr Ellish to seek advice and support when the conversation moved to performance management and departure. In other cases the failure to do so may well have been fatal. It was not in this case having regard to the particular circumstances of the case, including the particular circumstances of the two protagonists.

[35] Mr Ellish was not unjustifiably dismissed. He effectively resigned on mutually agreed terms. His challenge is accordingly dismissed.

Residual matters

[36] Finally, and for completeness, it is convenient to touch on an argument advanced by the company, namely that if there was a dismissal and if it was unjustified, any relief ought to be reduced for contribution – the contribution alleged to be Mr

13 See *Marshall*, above n 4, at 404–405.

Ellish's poor performance in failing to make any sales during his time with the company, that led to the meeting that resulted in termination. There are difficulties with this submission. Poor performance itself cannot justify a reduction for contribution under s 123 of the Employment Relations Act 2000. Rather, any poor performance must:

(a) be shown to have contributed to the situation giving rise to the grievance;

(b) be blameworthy; and

(c) require a reduction in remedies.

[37] The issue was discussed in *Paykel Ltd v Ahlfeld*.[14] There the Court found that:

The Tribunal should then have come to the third step in the inquiry, that is to say whether the respondents actions required a reduction. The Tribunal would have been entitled to form the view, on the evidence that was led, that *such lack of performance as may have existed were not sufficiently blameworthy to justify a reduction in the remedies because they had not been properly brought to the respondents attention and he had not had the opportunity of correcting his performance. The onus was on the appellant to show that the respondent had in fact failed to perform his management duties to such a degree that his remedies should be reduced*. Clearly the situation would have been different had the respondent been told of his shortcomings, given clear instructions, and had failed to improve his performance or to have obeyed the instructions. I have perused the transcript and exhibits and it was open to the Tribunal to conclude, on the balance, that these allegations were not proved by the appellant.

[38] I do not understand the Court in *Paykel* to be suggesting that simply following an appropriate process would have been sufficient to meet the second requirement set out above. Rather, the employer must satisfy the Court that the employee's poor performance was blameworthy. Blameworthiness connotes an element of culpability

14 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC) at 341 (emphasis added). This was in the context of s 40(2) of the Employment Contracts Act 1991. A similar approach has been adopted in later cases, such as *Goodfellow v Building Connexion Ltd T/A ITM Building Centre* [2010] NZEmpC 82.

or wrongdoing.[15] In cases involving dismissal for poor performance, a reduction for contribution will, in my view, rarely be appropriate.

[39] The reasons why Mr Ellish continued to struggle to make sales remained unclear. If I had found that he had been unjustifiably dismissed, I would not have been satisfied based on the evidence before the Court that the failure to make any sales (poor performance), giving rise to the grievance (unjustified dismissal), was blameworthy in the sense required. Accordingly I would not have considered it appropriate to reduce the amount I would otherwise have awarded in Mr Ellish's favour on the basis of contribution.

[40] Nor was I drawn to a submission for the company that issues with accessing the company files ought to be taken into account in assessing remedies, citing the Court of Appeal's judgment in *Salt v Fell*.[16] There the Court of Appeal indicated that:

[83] Subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies under s 123 itself.

[41] If I had found that Mr Ellish was unjustifiably dismissed, I would not have had regard to issues relating to file access in assessing remedies. Mr Larsen was aware that Mr Ellish appeared to have tried to access company files, raised a concern with Mr Ellish (which Mr Ellish rejected), and decided not to take things any further. In this unsettled factual context I would not have concluded that the thresholds identified by the Court in *Salt v Fell* (misconduct and misconduct of a truly significant nature) had been met. And I would not have made a reduction to the remedies on the basis of subsequently discovered misconduct.

Summary of orders

[42] In summary Mr Ellish was not unjustifiably dismissed from his employment with Network Service Providers Ltd, and his challenge to the Authority's determination fails.

15 Thus being "worthy" of "blame". See Cambridge Dictionary "blameworthy"

< https://dictionary.cambridge.org/dictionary/>.

16 *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155.

[43] The parties are encouraged to agree costs. If costs cannot be agreed I will receive memoranda, with the company filing and serving within 20 working days; Mr Ellish a further 20 working days; and anything strictly in reply within a further five

working days.

Christina Inglis Chief Judge

Judgment signed at 8.55 am on 13 October 2021
