New Zealand Employment Relations Authority Decisions

Graham v Gladstone Retail Limited (Auckland) [2016] NZERA 536; [2016] NZERA Auckland 359 (1 November 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 359
5601113 & 5602995

BETWEEN MARY-ANNE GRAHAM Applicant in matter 5601113 and Respondent in matter

5602995

AND GLADSTONE RETAIL LIMITED

Respondent in matter 5601113 and Applicant in matter

5602995

Member of Authority: Robin Arthur

Representatives: Richard McNaughton, Counsel for the Applicant

Tim Oldfield, Counsel for the Respondent Investigation Meeting: 11 and 12 August 2016 in Hamilton Determination: 1 November 2016

DETERMINATION OF THE AUTHORITY

A. **The dismissal of Mary-Anne Graham by Gladstone Retail Limited (GRL) was not justified in all the circumstances at the time that the decision to dismiss her was made.**
   B. **In settlement of her personal grievance for unjustified dismissal and within 28 days of the date of this determination, GRL must pay Ms Graham the following sums, which have been reduced by one half due to conduct by her that contributed to the situation giving rise to her grievance:**

(i) $6483.75 as lost wages; and

(ii) $3500.00 as compensation for humiliation, injury to feelings and loss of dignity

C. GRL's application for a penalty to be awarded against Ms

Graham for breach of the terms of her employment agreement is declined.

D. Costs are reserved with a timetable set for memoranda to be lodged if the parties are not able to resolve any issue of costs between themselves.

Employment Relationship Problem

[1] Gladstone Retail Limited (GRL), the operator of a Pak 'n Save supermarket in Mill Street, Hamilton dismissed Mary-Anne Graham as the manager of its delicatessen and seafood departments on 11 November 2015.

[2] Ms Graham was dismissed for serious misconduct. She had admitted instructing a staff member on 8 November to cook chickens marked with a use-by date of 8 November but to then write 9 November on the traceability sheet used for recording

details of the preparation and cooking of chickens.

[3] Ms Graham accepted the store's rules prohibited cooking chickens on the use- by date or later. Her instruction to the staff member to write a later date on the traceability sheet was a direction to falsify a company document.

[4] Her decision to have those chickens cooked that day and her direction to the staff member about what to write on the sheet were both actions capable of amounting to serious misconduct. The company business rules identified "falsification, or being party to falsification of any company ... document" as an example of serious misconduct "which may result in summary dismissal". Those rules were incorporated into Ms Graham's terms of employment by a clause in her employment agreement.

[5] However Ms Graham raised a personal grievance about her dismissal because she considered the decision to dismiss her and how it was reached was unjustified.

[6] At issue was whether GRL had done enough to investigate the circumstances in which Ms Graham came to do what she did that day and whether its decision to dismiss her for that conduct was then fairly made. One question about the fairness of

what happened was whether Ms Graham had an adequate opportunity to have whoever on GRL's behalf was to make the decision about any disciplinary consequences for her misconduct, first hear directly from her about the prospect of dismissal and to then consider what she had to say before making that decision. Another question was whether the disciplinary sanction imposed on her was proportionate to that later imposed on another member of the supervisory staff who was also involved in the incident.

[7] In response to Ms Graham's personal grievance application GRL not only lodged a statement in reply but also made its own separate application for a penalty to be imposed on her for breaching her employment agreement. It said her actions warranted a $10,000 penalty for breach of company policy and of the rules that formed part of her terms of employment. GRL also submitted that some of any penalty awarded should be paid to it and not the Crown.

[8] The Authority investigated the personal grievance claim and the penalty claim jointly.

The Authority's investigation

[9] For the purposes of the Authority's investigation written witness statements

were lodged by:

• Honey Ropata, GRL's human resources and compliance manager, who along with store manager Stefan Hance, had carried out the disciplinary investigation of Ms Graham's conduct; and

• Hamish Walton, GRL's director and owner-operator of the Pak 'n Save supermarket, who signed a letter dated 11 November 2015 advising Ms Graham of her dismissal and the reasons for it; and

• Ms Graham; and

• her husband Andrew Warren who accompanied her at a disciplinary meeting on 9 November 2015 and who had separate conversations with Mr Hance and Mr Walton before Ms Graham was dismissed; and

• Debbie Cathro, a former GRL employee who was assistant deli manager at the time of the 8 November 2015 incident involving Ms Graham and who, 12 days after Ms Graham's dismissal, was the subject of a disciplinary

investigation in which she received a final written warning for her part in what happened that day; and

• Inna Mitchell, GRL's former commercial manager who had attended the 9

November disciplinary meeting with Ms Graham and who had resigned from her own position on 3 December 2015.

[10] Mr Hance left GRL's employment in early 2016 and now works in the South Island. No arrangements were made for him to give evidence about his role in GRL's disciplinary inquiry into Ms Graham's conduct.

[11] Each witness who had provided a witness statement attended the investigation meeting. Under oath or affirmation they answered questions from the Authority member and the parties' representatives. The representatives also provided closing submissions on the issues for determination.

[12] As permitted by 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[13] The issues for determination under Ms Graham's application were:

(i) Had GRL fully and fairly investigated the allegations Ms Graham's

conduct on 8 November 2015?

(ii) Was GRL's decision to dismiss Ms Graham within the range of responses that a fair and reasonable employer could have made in all the circumstances at the time?

(iii) If GRL's actions were not justified, should Ms Graham be awarded

remedies of:

(a) Lost wages; and/or

(b) Compensation under s123(1)(c)(i) of the Act?

(iv) If any remedies were awarded, should they be reduced (under s124 of the Act) due to blameworthy conduct by Ms Graham contributing to the situation that gave rise to her grievance?

[14] Under GRL's application, the issues for determination were:

(i) Did Ms Graham breach terms of her employment agreement, by directing cooking of chicken past its use-by date and altering records?

(ii) If so, should she pay a penalty and, if so, of what amount?

(iii) Should some or all of any penalty awarded be paid to GRL under s 136(2)

of the Act?

[15] In respect of both applications, the other issue for determination was whether either party should contribute to the costs of representation of the other party?

The law

[16] Section 103A of the Act required GRL's actions to be assessed objectively

against the test of justification:

(2) The test is 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 or action occurred.

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

(a) whether, having regard to the resources available to the employer, the

employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the

employee before dismissing or taking action against the employee; and (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[17] The test "encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the

employer's ultimate decision in the light of that finding".[1]

1 *Air New Zealand v V* [2009] NZEmpC 45 at [36].

[18] Since legislative amendments in 2011, and as explained by the Employment Court, this statutory test "contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer" in the particular circumstances of any case.2 A dismissal within the range of such responses must be found justified. However the statutory test "does not preclude the Authority from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established".3 And, further:4

... [a] failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. ... [H]owever, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[19] When required to prove during an Authority investigation that its dismissal of Ms Graham was justified, GRL bore the burden of establishing to the standard of the balance of probabilities that its course of action to ascertain the facts, and its decision that those facts warranted dismissal, was reasonable.5 The nature and quality of GRL's evidence gave the Authority about the reasonableness of its actions had to be commensurate with the gravity of the allegations it made about Ms Graham's conduct and the consequence of dismissal imposed on her.6

The incident and the inquiry

[20] Ms Cathro was in charge of the deli on Saturday, 7 November 2015 while Ms

Graham was on a rostered day off. On that day a new delivery of chickens, dated 12

November, were put on top of an earlier delivery dated for use by 8 November. When Ms Graham came to work on Sunday 8 November she found the earlier delivery had not been used as she expected on the previous day. She discussed the matter with Ms Cathro and looked at some of the chickens dated for use by 8 November. Her examination of the chickens included smelling them. Ms Graham then ordered a staff

member to cook those chickens for sale that day but to write down 9 November as the

2 *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [23].

3 At [24].

4 At [26].

5 *Whanganui College Board of Trustees v Lewis* [2000] NZCA 136; [2000] 1 ERNZ 397 (CA) at

6 *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [100] and [108].

use-by date that had been on their packaging. In a statement Ms Cathro signed later that day she wrote:

I take responsibility for not checking dates on Saturday. I had a discussion with [Ms Graham] today about putting the 8th.11.15 cooked and out in hotbox and dating it the 9th.11.15. I agreed with her so I am responsible as well.

[21] The staff member told to cook the chickens had doubts about what Ms Graham told her to do. She spoke separately to Ms Cathro about those concerns. Ms Cathro said she would put her own signature on the traceability sheet and encouraged the staff member to go ahead with the cooking as Ms Graham had instructed. While the staff member then did as she was told, she also talked about her doubts to another employee. That other employee immediately reported the situation to store duty manager Chris Stark. He then contacted Ms Ropata by telephone for advice about what to do. On Ms Ropata's instructions Mr Stark promptly had the cooked chickens removed (before they were put out for sale in the store), took photos of some remaining boxes of chickens with the 8 November use-by date, took statements from Ms Cathro and the two staff members referred to, and removed the traceability sheet from the department.

[22] Before Mr Stark removed the sheet Ms Cathro made some changes to it. In a column labelled "use-by date" she changed the date of 9 November, which she had earlier written in the lines for the relevant two batches of chickens, to the correct date of 8 November. Ms Graham also made a change to the sheet. Ms Graham crossed out Ms Cathro's initials and wrote in her own. Ms Graham later explained she wrote in her own initials in order to take responsibility for the 8 November chickens being cooked that day and for the incorrect use-by date that was earlier entered on the sheet.

[23] Ms Graham also telephoned Ms Ropata that afternoon about the incident. During that call she made the comment: "I have just lost my job, haven't I?" Ms Ropata said she did not want to discuss the matter over the phone but a meeting would

be arranged for the next day. Ms Ropata rang Mr Walton to let him know about the incident. Mr Walton's evidence was that Ms Ropata and Mr Hance had "full delegated authority" to deal with the issue but kept him updated about progress of the disciplinary process.

[24] That process began with Mr Hance giving Ms Graham a letter on the morning of 9 November advising her of a disciplinary meeting. The letter set out an account of events, said she had admitted the serious misconduct of falsifying records and advised her "a possible outcome of the disciplinary action is termination of your employment". The letter did not propose a time and date for the disciplinary meeting but Ms Graham contacted her husband, Mr Warren and they decided to attend a disciplinary meeting at 1pm that day. Mr Warren recorded the meeting. The recording and a transcript of it were part of the evidence in the Authority's investigation.

[25] Mr Hance, Ms Ropata and Ms Mitchell represented GRL at the meeting. Ms Graham was shown the traceability sheet and four written statements – one from Mr Stark, one from Ms Cathro, one from the staff member instructed to cook the chickens and one from the worker who reported the issue to Mr Stark. Ms Graham said she did not want to go through those statements. When Mr Hance asked why not, she replied: "Because I know what I did". Mr Hance asked her to confirm that she agreed she had "falsified the records having instructed a staff member to do so". Ms Graham replied: "Absolutely, I am not denying any of it".

[26] After describing Ms Graham's admission as "very up front" Mr Hance asked her what she wanted out of this and what she thought should happen. The transcript notes recorded her answer as:

I know that you have to follow procedure, I know all the safety all I can say is the fact that wastage and either way I was going to get a slap on the hand for throwing them out, wasting them. What I want out of this, I honestly don't know.

[27] Mr Warren then spoke about Ms Graham coming home from work upset in recent weeks because she was "finding it so difficult through lack of help, lack of support, through everyone being on your case all the time about wastage". He also referred to "all this trouble with Patricia". Those comments referred to two circumstances Ms Graham thought relevant, as least indirectly, to her later personal grievance claim.

[28] Patricia is Ms Graham's daughter. She had worked in the supermarket's

seafood department. Her employment had ended under the terms of a confidential

settlement agreed at a meeting on 9 October. In early October Ms Graham was upset when told her daughter was to be subject to a disciplinary process over a performance issue. At that time Ms Graham told Ms Ropata she would resign because she thought what was happening with Patricia was unfair. A few days later Ms Graham apologised for her "outburst" and said she wanted to stay in the job.

[29] Mr Warren's other reference was to a performance improvement programme that Mr Hance had begun with Ms Graham. The programme focussed on improving gross profit margins in the seafood department. Ms Graham had begun managing that department, in addition to the service deli department, in May 2015. A review of the programme on 5 November noted results remained below target.

[30] In his comments at the 9 November disciplinary meeting Mr Warren had then gone on to criticise staff who had not cooked the chickens with an 8 November use-by date on 6 or 7 November, days when Ms Graham was not at work. Mr Hance responded that "as part of our investigation we will have uncovered that other things could have been done [by] staff members and they will be followed up with individually or through an employment process".

[31] After some discussion about work pressures Ms Graham felt she was under, Mr Hance made the following summarising comment: "So as I understand it, what you are saying in that [Ms Graham] is under stress and that is a factor that has caused her to make the judgement she did yesterday". He asked Ms Graham if she wanted to say anything else. She replied "no".

[32] Mr Hance then told Ms Graham that all information would be reviewed. He also offered her the opportunity to go home, on pay, for the remainder of the day's shift. She did. By telephone Mr Hance later made arrangements for Ms Graham to return to work the next morning.

[33] Meanwhile Ms Ropata carried out some further investigation by checking other traceability sheets and speaking to other staff. As a result of her inquiries Mr Hance called Ms Graham to his office around 10 am on 10 November. He told her further allegations had been made and a second disciplinary meeting would need to be held. It was not clear from the evidence how much detail Mr Hance gave Ms Graham

about those allegations at that time. A file note made by Ms Ropata showed they included allegations that Ms Graham had instructed staff to put cheese past its use-by date on pizzas, had dealt with harshly with some staff, and had 'berated' the employee who told Mr Stark about the chickens cooked on 8 November.

[34] After ringing Mr Warren to tell him that further allegations had been made Ms Graham spoke to Mr Hance and Ms

Ropata. They made arrangements with her for a further disciplinary meeting to be held at 3pm the next day, 11 November. Ms Graham said she would go home on stress leave until then and would get a medical certificate for doing so. As she left the premises she encountered Mr Walton and told him she was going home on stress leave. He told her there was no such thing as stress leave and asked if it was sick leave. She said she was taking sick leave that had been agreed with Mr Hance and Ms Ropata. At that time Mr Walton was not aware a second disciplinary meeting had been set with Ms Graham or that Mr Hance and Ms Ropata knew Ms Graham was leaving the premises on sick leave.

[35] Mr Warren took Ms Graham to see her doctor soon after. Her doctor gave her a medical certificate stating she was unfit to work from 10 November to 24

November. Mr Warren delivered the certificate to Mr Hance that afternoon. Mr Hance told Mr Warren that the 11 November disciplinary meeting might still go ahead whether Ms Graham attended or not. Shortly after Mr Warren returned to his own workplace he received a call from Mr Hance advising Ms Graham had to be at the meeting. The call was on speaker phone, with Ms Ropata also present. Mr Walton came into the room and joined the conversation with Mr Warren. He said he happened to be nearby and had heard what was being said. Mr Walton said he had "interrupted the conference call" with Mr Warren because he "got a strong sense [Ms Graham] was delaying things". He was responding to comments by Mr Warren that Ms Graham could not be made to attend the disciplinary meeting and was not, because of the stress she was under, able to make any decisions about her work situation. Mr Walton said "a decision would be made without her" if Ms Graham did not attend the next day. Mr Warren then asked to meet personally with Mr Walton to sort things out "man-to-man". Mr Walton agreed to meet but, although Mr Warren later disputed the phrase was used, said their conversation would be on a "without prejudice" basis.

[36] The two men met at the supermarket later that day. In giving their evidence at the Authority investigation meeting both men, by mutual consent but for different reasons, waived any "without prejudice" privilege there might have been in the private conversation they had on 10 November. For Mr Walton the purpose in doing so was to be able to say he had heard from Mr Warren, as someone he was entitled to see as Ms Graham's representative, about what she might say about the prospect of dismissal. For Mr Warren the purpose was to be able to say Mr Walton had said during their conversation that Ms Graham should resign.

[37] Mr Walton confirmed he had, during a free-ranging conversation lasting around 90 minutes, said Ms Graham had the option of resigning as, unless different information came to light, he understood her dismissal was an "almost inevitable" result. The conversation also canvassed the circumstances in which the employment of Ms Graham's daughter, Patricia, had ended a month earlier. Mr Walton had insisted that had no connection with what might happen with Ms Graham.

[38] After that discussion Mr Warren and Ms Graham spoke with a legal advisor, Richard McNaughton. Mr McNaughton had previously been involved in the discussions with Mr Hance and Ms Ropata that resulted in Patricia's employment with GRL ending in October under the terms of a confidential settlement.

[39] At 10.21pm that night Mr McNaughton sent Mr Walton an email advising Ms Graham would not attend the meeting set for the following day. He said he was in Wellington all week and would call Mr Walton "on Monday", that was six days later, unless Mr Walton wanted to talk to him by phone sooner. Mr McNaughton provided a contact phone number. He also referred to the conversation Mr Warren and Mr Walton had earlier that day, as follows:

We are also advised that you gave our client an option of resigning. We advise that our client is totally distraught over your offer to her that she could resign. Our client is on sick leave and is not to be contacted by you or any other member of your staff until I have spoken with you on Monday. We understand you have been provided with a medical certificate that relates to [Ms Graham].

[40] The next day Mr Hance and Ms Ropata, with legal advice, drafted a letter of dismissal that was then delivered to Ms Graham's home letter box later in the day. Ms Ropata's evidence was that Mr Walton signed the letter, which was over his name and designation as "owner operator", on the basis of a recommendation from her and

Mr Hance. After summarising the events that led to the disciplinary meeting, the letter included the following statements about the dismissal decision:

Had a staff member not intervened and complained to the Duty Manager we believe you would have proceeded to have put these chickens on display for sale in clear breach of our food safety policy. ...

The events you have accepted constitute serious misconduct under your employment contract. While we acknowledge your long service and hard work, your decision as a department manager to deliberately breach our food safety rules in spite of your protest within your department, cannot be tolerated. This not only sets an extremely bad example to your staff, but also potentially puts the health of our customers at risk and could seriously damage the reputation of our business.

As a result we have made the decision to terminate your employment by way of

summary dismissal without notice. ...

As you are aware, following the disciplinary meeting on Monday, a large number of similar allegations have been raised by your senior staff about you. They have also raised a large number of other concerns about your behaviour. We proposed to you that we meet to discuss these today. However, you have declined to attend a further meeting. As a result, we have not taken these allegations into account in reaching our decision today.

[41] Following Ms Graham's dismissal Ms Cathro was appointed as acting manager of the deli and seafood departments. Ms Cathro was called to a disciplinary meeting 12 days after the dismissal of Ms Graham. A GRL file note described the meeting as being about "her involvement in re-dating chickens" with Ms Graham on 8

November. The delay in holding the meeting was due to Ms Ropata having taken family leave from the night of 11 November to attend to a seriously ill child. On 23

November Ms Cathro was issued with a final written warning and continued in her acting department manager role until she left GRL's employment around March 2016. By then other disciplinary matters had arisen and Ms Cathro's employment ended by agreement.

The disciplinary investigation – failures to be full and fair

[42] There were three aspects of GRL's disciplinary investigation and decision about Ms Graham's misconduct that significantly failed to meets its statutory obligations under s 103 A of the Act, when assessed against the standard of evidence required in the Authority to prove its actions were reasonable.

[43] Firstly, Ms Graham was not given a suitable opportunity to be properly heard by GRL's decision maker about the prospect of dismissal. There was some doubt if it was Mr Hance and Ms Ropata who effectively made the final decision or whether Mr Walton did so. However on neither scenario was Ms Graham dealt with fairly over the question of whether she should be dismissed for her admitted conduct.

[44] Secondly, the delay in conducting a disciplinary investigation into Ms Cathro's conduct on 8 November, and the significantly different sanction imposed on her for that conduct, was not satisfactorily explained.

[45] Thirdly, GRL's evidence and submission that further allegations about Ms Graham's conduct were put aside and had no effect on its dismissal decision was not convincing. The insistence on proceeding with a disciplinary meeting despite Ms Graham's medical certificate which said she was unfit for work, and without making further inquiry about its bona fides or effect, disclosed a level of haste that was not consistent with giving her a reasonable opportunity to respond to all the employer's concerns or with genuinely considering any explanation she could provide that was

relevant to the question of whether or not to dismiss her for serious misconduct.7

[46] For reasons that follow those defects in the process followed by GRL were more than minor and resulted in Ms Graham being treated unfairly.8

Being heard by the decision maker

[47] GRL's evidence did not clearly and convincingly establish whether it was Mr Hance and Ms Ropata who made the dismissal decision or whether that decision was, in fact and reality, made by Mr Walton. Ms Ropata's oral evidence demonstrated the equivocality of the arrangements in place at the time. She both described herself and Mr Hance as having made the decision but also as having made a recommendation to Mr Walton, who signed the letter of dismissal drafted over his name. In his oral evidence Mr Walton agreed he received a recommendation from Mr Hance and Ms Ropata but, to paraphrase what he said, suggested any decision then made by him was really a formality endorsing their recommendation after a conversation to check what

they had done to come to the recommended conclusion. He described such a check as

7 Employment Relations Act 2000, s 103A(3)(c) and (d).

8 Employment Relations Act 2000, s 103A(5).

challenging and questioning whether they had followed appropriate processes. However he also accepted that in a supermarket business such as his, "the owner/operator in the end makes the decision".

[48] One other particular circumstance also affected how GRL handled this disciplinary investigation. It arose from how GRL's employment of Ms Graham's daughter had come to an end under the terms of a confidential settlement in October. Mr Hance and Ms Ropata made those arrangements when Mr Walton was away overseas. Mr Walton said he was "puzzled and disappointed" with the outcome Mr Hance reached, which Mr Walton thought was too generous in light of issues raised about the performance of Ms Graham's daughter. It was clear from Mr Walton's evidence that his disappointment resulted in

him making it known he would closely watch how Mr Hance and Ms Ropata investigated Ms Graham's conduct on 8

November.

[49] Mr Walton said it was "not normal" in his business for him to be asked to sign disciplinary letters but Mr Hance had written the dismissal letter for Ms Graham expecting Mr Walton to sign it. He could not recall being asked to sign any other such letters previously. However Mr Walton said Mr Hance was "nervous" about this particular case because Mr Walton had "taken the view [Mr Hance] had not got it right with the last one with Patricia and he was wanting to make sure he got this right". As a reasonable inference from Mr Walton's evidence on this point, Mr Hance clearly intended and understood Mr Walton would be taking responsibility for making the decision to dismiss Ms Graham.

[50] The point was important because, facing the prospect of dismissal, Ms Graham had the right to be heard in person by whoever was making the final decision, not just about whether she had committed serious misconduct (which she admitted) but also about whether the disciplinary sanction for that misconduct should be dismissal. In *Irvine Freightlines Limited v Cross* Judge Palmer stated:9

It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.

9 [1993] 1 ERNZ 424 at 442.

[51] In Ms Graham's case Mr Hance and Ms Ropata had not produced a written report on their investigation and recommendation. They gave Mr Walton verbal reports throughout including, by 11 November, their conclusions and what they thought the outcome should be. However neither an oral nor a written report was a sufficient substitute to Mr Walton hearing from Ms Graham before deciding on the disciplinary consequence. In *Quinn v BNZ* the Court emphasised that a report on the

employee's position or explanation was not sufficient:10

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

[52] It was not sufficient for GRL to say Ms Graham had a 'real and purposeful hearing' on the prospect of dismissal, and anything she might wish to say in mitigation before a decision on whether such a sanction should be imposed, when she spoke to Mr Hance and Ms Ropata on 9 November. The recording and transcript of the meeting showed the issue was not squarely discussed because Mr Hance and Ms Ropata were still investigating the 8 November incident and gathering information. It would have been too early to have sought any plea she might have wanted to make on why dismissal should not be imposed or whether there were suitable alternative sanctions. Mr Hance did ask: "What do you want actually out of this? What do you think should happen?" Neither question was directly soliciting a response to the prospect of dismissal. Consequently it could not be said Mr Hance and Ms Ropata, if they were truly the decision makers, heard from Ms Graham on this important aspect.

[53] Alternatively, it was not sufficient to say Mr Walton had heard from Ms

Graham through Mr Warren when they have their "man-to-man" discussion on 10

November. Mr Walton did refer to the likely prospect Ms Graham would be dismissed and could consider resigning instead. He said his comment was stated to be conditional on the information that was available to him at that time, which was what Mr Hance and Ms Ropata had told him about how things looked. There was no reason to doubt Mr Walton's evidence on that point and he could not fairly be

criticised for saying what he said in what he understood at the time was to be a frank,

10 [1991] 1 ERNZ 1060 at 1070.

off-the-record conversation. However that aspect of their discussion was not intended to be and, as a matter of evidence to the necessary standard, did not amount to canvassing alternatives to dismissal or any points in mitigation that an employer acting fairly and reasonably should seek and consider before imposing the ultimate disciplinary sanction.

[54] The opportunity to make 'a plea in mitigation', and perhaps propose lesser sanctions than dismissal, is not an abstract intellectual exercise or empty formality. The employment relationship is of a personal nature. Employees in relatively small workplaces, including those in senior supervisorial positions such as that Ms Graham held, will often be well known to managers or owners making the decision. There may be personal, family and other social factors relevant for the ultimate decision maker to consider along with the technical factors about terms in employment agreements, workplace rules and the

information available about what happened to lead to the disciplinary process. The law does not require the decision-maker to then necessarily be persuaded by any such plea made by the worker or their representative. An employer fairly assessing all relevant factors may, ultimately, decide other factors concerning the serious misconduct and its effect on the employment relationship are of greater weight and make a final decision other than what was hoped for by the worker. But the law does require the decision maker to allow the worker such a direct opportunity and to then, at least, listen to what the worker may have to say before imposing a disciplinary sanction.

[55] Ms Graham's admitted serious misconduct made dismissal likely but not

necessarily inevitable. That was evident from the decision GRL made on 23

November in respect of Ms Cathro's conduct on 8 November. She was comparably

culpable, for reasons discussed later in this determination, for what had occurred on 8

November but received only a final written warning. Asked what difference the opportunity to suggest alternatives to dismissal might have made, Ms Graham said she could have proposed demotion and closer monitoring of her work. Prior to the 8

November incident she had already suggested standing down from her responsibilities for the deli department to work solely on the seafood department but had not yet had a response to that idea.

[56] While GRL submitted Ms Graham had not put forward any alternatives, she was not given a proper opportunity to do so. GRL also had the view that, even if she had the opportunity at the time, it would have made no difference to its eventual decision. Its subjective view, in hindsight, was not the standard on which the necessary assessment had to be made. Objectively, in all the circumstances at the time, a fair and reasonable employer could not have failed to at least ask. Having not done so, such an employer could not say with sufficient certainty answers Ms Graham might have given the decision maker could have made no difference to the decision to be made on behalf of GRL.

Disparity of treatment and outcome

[57] GRL submitted there was no unjustified disparity between its treatment of Ms Graham and Ms Cathro over their conduct on 8 November or the disciplinary outcome imposed. It submitted Ms Cathro had not instructed the staff member to falsify traceability records and, in making false entries herself on the sheet she was only "following orders". However if any disparity was found, GRL submitted that was adequately explained by the difference in Ms Graham's role as department manager and Ms Cathro's role as second-in-command. Further any disparity was submitted to be justified because of its "very minor nature" and because Ms Graham's serious misconduct involved serious food safety issues.

[58] GRL relied on a proposition drawn from the Employment Court's decision in *Air New Zealand Limited v Samu* that consistency was desirable, and should be looked for in safety matters, but was not in principle superior to safety (including in its application to Ms Graham's case, food safety).11 It was a proposition subject to the Court of Appeal's later observation in the *Samu* case that consistency was not a relevant factor in that case but "[i]n some cases it may be".12

[59] GRL submitted there was "no rule" that misconduct of workers had to be considered simultaneously. In this case, however, GRL's decision to first investigate and discipline only Ms Graham amounted to a failure to sufficiently investigate

allegations that was then relevant to the proportionality and fairness of the

11 [1994] 1 ERNZ 93 at 95.

12 [1995] NZCA 504; [1995] 1 ERNZ 636 at 639.

disciplinary outcomes imposed.13 GRL had no credible explanation as to why its investigation of Ms Cathro's conduct was not begun at the same time, particularly as she provided a signed statement to Mr Stark on 8 November admitting she was "responsible as well". Ms Ropata suggested there were not sufficient resources for her and Mr Hance to conduct a simultaneous investigation of the conduct of Ms Graham and Ms Cathro because of the upcoming Christmas shopping season. It seemed illogical then that a disciplinary interview of Ms Cathro occurred 12 days closer to that busy season. Ms Ropata also had time to interview Ms Cathro on 9

November for information that contributed to the disciplinary investigation of Ms Graham. While Ms Ropata was absent from work from the evening of 11 November, for indisputably essential reasons, she and Mr Hance could have at least begun a disciplinary investigation of Ms Cathro's conduct on 9 and 10 November, if they were in fact being even-handed about everyone who was responsible for potentially dangerous breaches of important food safety policies.

[60] The difference in status of Ms Graham and Ms Cathro was not an adequate explanation of the difference in inquiry conducted or its outcome. Ms Cathro was the acting departmental manager when the error of placing a later batch of chickens on top of an earlier batch occurred. She accepted responsibility for not checking the dates on 7 November. The

discussion she and Ms Graham had on 8 November about cooking the chickens resulted in a plan that seemed to solve a problem for both of them – for Ms Cathro's error on 7 November and for Ms Graham's concern on 8

November that she would be blamed for wastage.

[61] While Ms Cathro did not issue the initial instruction to the staff member to cook the chickens on their use-by date and to falsify the record, Ms Cathro reinforced the instruction to go ahead when the staff member expressed doubt. Ms Cathro stated she would put the false details on the sheet herself. She did so, only changing them to the correct date once she knew Mr Stark had been told about what was happening. In that respect it was Ms Cathro who falsified a company document that day, an act

classified as serious misconduct in GRL's disciplinary code.

13 Employment Relations Act 2000, s 103A(3)(a).

[62] The following two passages from statements written on 8 November, and available to Mr Hance and Ms Ropata from the morning of 9 November, were relevant. The staff member instructed to cook the chickens included this information:

When I spoke to [Ms Cathro] about not wanting to sign my name, she said "you won't get into trouble. It will be fine". I then said "no, I don't want to sign my name because if a customer gets sick it will be my fault". [Ms Cathro] then said "fine, I'll do it".

[63] Mr Stark's own statement included this account of his discussion with Ms

Cathro:

I then grabbed the traceability sheet to check what had been written down and spoke to [Ms Cathro] with regards to whether or not they were safe to cook. ... [Ms Cathro] said in her opinion the chickens were still ok to be cooked being the last day of use.

[64] Ms Cathro's own statement written on 8 November also accepted she was responsible for what had happened.

[65] In that light there was little credibility in what Ms Ropata's file note recorded from the disciplinary meeting held with Ms Cathro on 23 November. Ms Cathro was said to have accepted "in full" an allegation that she had signed the incorrect date on a traceability sheet at Ms Graham's instruction. She apologised for doing something she knew was wrong but, according to the note, said she "was still just following orders from her Department Manager". Although not said by Ms Cathro, the file note included a conclusion she was intimidated by Ms Graham and "felt that there would be repercussions if she did not do as she was told". The conclusion was not consistent with information GRL representatives had from the staff member, Mr Stark and Ms Cathro herself written on the day of the incident. According to that information Ms Cathro had pushed the reluctant staff member to continue to carry out an instruction that she knew was wrong, had told Mr Stark the chickens were ok to cook, and had herself taken equal responsibility for what had happened.

[66] Ms Ropata's note also recorded that Ms Cathro was remorseful, tearful, and accepted what she did was wrong. Ms Cathro's admission and remorse was sufficient to impose only a final written warning. Ms Graham's admission and remorse over the same incident was held to nevertheless warrant dismissal.

[67] Given they were the two senior members of the department, with Ms Cathro acting regularly as the manager (including during a recent period of extended annual leave taken by Ms Graham), there was no justifiable basis on which different outcomes could have been imposed for their participation in the same course of

conduct on 8 November.14 If the breach of policy and the bad example set to other

employees warranted Ms Graham's dismissal, a fair and reasonable employer could

not have imposed a lesser sanction on Ms Cathro.

[68] The decision of GRL to accept that a manager – as Ms Cathro was immediately promoted to be on a permanent basis once Ms Graham was dismissed – could deliberately breach the store's food safety policy but still be trusted to work in that capacity if she was later very sorry about it, reasonably had to apply in equal measure to Ms Graham or not at all. While a decision to *either* impose a final written warning *or* to dismiss were within the range of responses that an employer, having completed a full and fair investigation, could have made, a fair employer could not reasonably have imposed different outcomes in all the circumstances at the time those particular decisions were made. As a result of what GRL did in respect of Ms Graham, but not Ms Cathro, there was a defect in its process that was more than minor and resulted in Ms Graham being treated unfairly.

Haste and likely negative effective of other inadequately investigated allegations

[69] A third failing was apparent from the inadequate evidence of GRL about its decision to go ahead with a dismissal

decision on 11 November, despite Ms Graham's medical certificate, and its supposed setting aside of other allegations gathered on 9

November and notified (as least in general form) to her on 10 November.

[70] The additional allegations about Ms Graham's conduct were summarised in a file note Ms Ropata made on the morning of 10 November. They resulted from discussions Ms Ropata had with Ms Cathro and two staff members on 9 November, including the employee who had reported the 8 November incident to Mr Stark. That employee was the source of several of the allegations. She had made a written complaint in August 2015 about Ms Graham as a result of an argument about who was responsible for there being no oil in the department to make mayonnaise needed

for salads the next day. GRL's files showed there were two other complaints from

14 *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 at [45].

staff about Ms Graham – both made in 2013, some two years earlier. Ms Ropata could not recall who was the source of an allegation that Ms Graham had instructed staff to use cheese past its use-by date on pizzas for sale at the deli.

[71] There was considerable doubt the additional allegations would have withstood closer scrutiny. For example, Ms Ropata's file note stated Ms Graham had "a warning ... on file for striking a staff member". At the Authority investigation meeting Ms Ropata accepted what she had written in the note was not true. In July

2013 a worker made a written complaint that Ms Graham hit her when the worker dropped a hot chicken. However a file note made by the store manager at that time said Ms Graham had explained her contact with the worker was "only a tap", she was happy to apologise to the worker, and the worker was "happy to leave it at that". There was no warning.

[72] While GRL said it put aside the additional allegations aside, they clearly had an effect on the pace with which it then proceeded to decide on a disciplinary outcome for Ms Graham's conduct on 8 November. As Ms Ropata acknowledged in answer to a question at the Authority investigation meeting, "they couldn't at that time help but dim my view of her".

[73] Mr Walton accepted, again in answer to a question, that there was "no pressing factor" that required a decision about Ms Graham's employment to be made on 11

November although he wanted the matter resolved as soon as possible so the department, and the supermarket generally, could get on with its business. However he considered the decision should be made on 11 November, whether or not Ms Graham attended the scheduled disciplinary meeting, because he had a "strong sense" that she and her advocate were "delaying" progress. This sense arose from Ms Graham providing a medical certificate and from Mr McNaughton's 10 November email saying he was not available until the following Monday, six days away. However Mr McNaughton had also provided a telephone number and said Mr Walton could contact him if he wanted to discuss matters before Monday. Mr Walton could not recall if he had tried to contact Mr McNaughton by telephone.

[74] Ms Graham's medical certificate stating she was unfit for work was effectively

ignored. A disciplinary meeting was a work meeting. If GRL doubted the bona fides

of the certificate it could not, if acting fairly, have discounted it without further inquiry about when a meeting could reasonably be held. GRL did not do so because it had too narrow a view of the need to hold a further disciplinary meeting with Ms Graham. It submitted the further meeting was not necessary as it had sufficient to proceed to dismissal on the basis of the admissions Ms Graham made about her misconduct and had 'put aside' the other allegations. However, for reasons already given, there was still an obligation to give Ms Graham a real opportunity to personally address the decision maker about the prospect of dismissal once GRL had completed the clarifying and checking Mr Hance had referred to before he adjourned the 9

November disciplinary meeting. According to the meeting transcript "adjourn" was the word Mr Hance used. It means to break off a meeting with the intention of resuming it later.15

Was dismissal within the range of responses available in the circumstances?

[75] In all the circumstances at the time that GRL proceeded with a decision to dismiss Ms Graham on 11 November, a fair and reasonable employer could not have gone ahead to make such a decision without first checking when it might reasonably be able to hear from her, given the medical certificate, or seeking some other form of response or submission from her about the prospect of dismissal or other alternatives. GRL's failure to do so was more than a minor defect in its process and resulted in Ms Graham being treated unfairly. Mr Walton said hearing further from her would have made no difference but that was a subjective view. The test is applied on the

objective basis of what a fair and reasonable employer could have done.16

[76] Cumulatively the defects in its process, for the reasons given above, meant that the decision to go ahead to dismiss Ms Graham, at the time and in the way that it was made, was not within the range of responses open to a fair and reasonable employer at the time. If GRL's inquiry and decision had proceeded without those defects, it could not now be said with sufficient certainty how different its substantive decision may then have been.17 In those circumstances, Ms Graham's dismissal was unjustified and she was entitled to an assessment of remedies for her personal

grievance.

15 Concise Oxford English Dictionary (11th ed, Oxford University Press, 2004).

16 Employment Relations Act 2000, s 103A(1) and (2).

17 *Howard v Carter Holt Harvey* [2014] NZEmpC 157 at [53].

Remedies

Lost wages

[77] Ms Graham's evidence established she lost wages for a period of around three months as a result of her unjustified dismissal. She got a new job, with a different supermarket chain, in early February 2016. Her evidence also established she made sufficiently diligent efforts in those three months to mitigate her loss by searching for jobs suitable to her previous supermarket and retail sector experience.

[78] In assessing the period of loss no further adjustment was required to allow for contingencies that might otherwise have affected her earnings in that time. Ms Cathro has continued working for GRL in that three month period and it was likely that, but for her dismissal, Ms Graham would also have done so.

[79] Ms Graham was entitled to an order for reimbursement of three months ordinary time remuneration.18 Her pay slips showed she was typically paid for 47.5 hours at "ordinary time" each week. At her hourly rate of $21 her weekly ordinary time earnings were $997.50. Calculated on an annual basis and then divided by 12 to reach the monthly amount of $4322.50, an award of lost ordinary time remuneration for three months totalled $12,967.50. It was subject to a reduction for contributory

conduct assessed later in this determination.

Compensation for humiliation, injury to feelings and loss of dignity

[80] Ms Graham's statement of problem sought an order of $20,000 compensation under s 123(1)(c)(i) of the Act. An award at that level was not warranted in the circumstances.

[81] Some factors that contributed to Ms Graham's feelings of distress around 8

November and the subsequent disciplinary process had to be excluded from any assessment of compensation for her unjustified dismissal. One such factor was the pressure she felt from the programme in place to improve business results for the seafood department. The evidence did not establish GRL has instigated that

programme or carried it out unfairly. There was no basis for compensating Ms

18 Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Graham for what she said was the "stress and worry" associated with meeting those

demands.

[82] A second excluded factor was any upset Ms Graham felt about the end of her daughter's employment and how that had come about one month earlier. It was not distress arising from Ms Graham's unjustified dismissal.

[83] A third factor was the sense of upset and embarrassment Ms Graham felt about the decision she made on 8 November to order the cooking of the chickens and the falsifying of records. She knew it was contrary to store procedure and safety policies

– as she admitted at the 9 November disciplinary meeting – and was embarrassed that it came to the knowledge of the supermarket managers. GRL did not have to compensate her for whatever sense of humiliation or loss of dignity she felt as a result of her own actions.

[84] Excluding those factors, Ms Graham evidence about the distress caused by her dismissal was that she was frequently tearful, sometimes during job interviews, because she "felt ashamed of being fired". She had problems sleeping and, for some time, avoided leaving the house in case she ran into anyone she knew. Mr Warren's evidence corroborated what Ms Graham

said about her upset at losing a job into which she had put her “heart and soul”. Although mindful of the need not to keep compensatory payments artificially low, the sum of $7000 was the modest but appropriate level of award to compensate Ms Graham for the loss of dignity and

injury to her feelings resulting solely from her unjustified dismissal.19 It was subject

to a reduction for contributory conduct, assessed below.

Reduction of remedies due to blameworthy conduct

[85] Ms Graham’s admitted conduct required a substantial reduction of the remedies awarded to her because what she did contributed in a significant and blameworthy way to the situation that gave rise to her grievance.

[86] While she was not responsible for GRL’s inadequate disciplinary process and

its hasty conclusion (which had made her dismissal unjustified), her direction to a junior staff member to falsify food safety documentation was conduct deeply

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

impairing of the confidence and trust GRL was entitled to rely on from an employee in Ms Graham’s position. She compromised not only her own obligations to GRL to follow food safety procedures but also the obligations of the junior staff member given the instruction. Although the action of other staff averted the risk, Ms Graham also created potential harm to public safety and the store’s reputation for observing food safety standards. Ms Graham’s oral evidence at the Authority investigation meeting revealed she still had little insight into the seriousness of those risks or the food science rationale for the store rule about use of the chickens before their use-by date. She insisted her visual and olfactive inspection on 8 November confirmed the chickens were safe to cook on their use-by date.

[87] Her conduct on 8 November was a breach of duty and that fault was causative of the situation in which she was subsequently dismissed, albeit unjustifiably. Ms Graham’s culpability was so serious, the significant reduction of one half of the remedies awarded was required to appropriately mark her contribution to the situation.20 Applying that reduction left $6483.75 as the amount due as the remedy for lost wages and, under s 123(1)(c)(i) of the Act, $3500 as the amount due for compensation.

GRL’s application for a penalty

[88] GRL sought the imposition of a penalty on Ms Graham because her direction to a staff member to cook chicken on its use by date and then altering the records were breaches of terms of her employment agreement.

[89] There was significant doubt over whether Ms Graham’s own initialling of the traceability sheet, once she knew that Mr Stark had been told about what had happened, was done deceitfully and in a way that breached terms of her employment agreement and the general good faith obligation. A penalty could not have been warranted on that ground. It was her earlier action, by directing a staff member to cook the chickens and write in a different date, that clearly breached those contractual and statutory duties. As well as breaching store rules, the direction to falsify food safety documentation impaired the confidence and trust implied as a term of GRL’s employment agreement with Ms Graham as a service manager in its supermarket.

What Ms Graham told the worker to do also put that worker at risk of breaching store

20 *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [217] - [222].

rules about food safety and keeping accurate records. In that way Ms Graham’s actions made her potentially liable to a penalty under both arms of s 134 of that Act – for breaching her own employment agreement and instigating breaches by another person.

[90] However the penalty sought was not warranted for three reasons. Firstly, it sought to penalise Ms Graham in what was effectively a form of ‘triple jeopardy’ for actions for which GRL had already punished her by dismissing her. Secondly, GRL’s penalty application appeared, on any objective assessment, to be intended to discourage Ms Graham from pursuing her grievance in the Authority. For policy reasons, that was not an approach that should be encouraged. Thirdly, GRL’s evidence in support of the penalty was not sufficiently compelling when assessed under the factors relevant at the time.

[91] GRL sought to have Ms Graham’s admitted serious misconduct applied to the outcome of the Authority investigation in three ways – firstly, as justification for its decision to dismiss her; secondly, if the decision to dismiss her was found in some part to not have been fairly made, as the basis for reducing remedies for blameworthy conduct by her that had contributed to the situation; and thirdly, by a penalty.

[92] Dismissal is the most severe disciplinary sanction available to an employer. It is an action that may be imposed, when

done fairly and for good reasons, to punish a worker for actions or omissions that go to the heart of the employment relationship. It is effectively a penalty in the hands of an employer in its private capacity rather than as an act of public censure by the state. If imposed, dismissal can have significant financial effect on a worker, worth many thousands of dollars depending on when a new job is found, as well as the wider social and emotional consequences of a dismissal. Mr Walton, appropriately, acknowledged that was so in his answers to questions at the Authority investigation.

[93] However GRL had also submitted that if some flaw was found in its dismissal of Ms Graham, any remedies awarded to her should be reduced by 100 per cent because her conduct on 8 November was dishonest and "the antithesis of good faith". It was a submission addressing issues that the Authority was obliged to consider under s 124 of the Act if any remedies were awarded. Blameworthy conduct by her could

legitimately result in a significant reduction of remedies. A decision of a full bench of the Employment Court released after the Authority investigation meeting of Ms Graham's case and shortly before release of this determination has declared that s 124 does not permit complete removal of a previously established remedy.21 However the relevant point in relation to GRL's claim was that Ms Graham could be substantially penalised for blameworthy conduct under s 124 of the Act by the reduction of remedies that she would otherwise receive for unjustified actions by GRL against her. So, in addition to the first 'jeopardy' of dismissal for her actions, she also faced a

costly second risk of reduced remedies in relation to those same actions.

[94] In that light the claim for a penalty also put her at 'triple jeopardy' of further consequences for the same actions for which she could already have been punished – either by her dismissal being found to have been justified or by her remedies for an unjustified dismissal being reduced by some significant level.

[95] As a matter of public policy the Authority should also be slow to impose a penalty in circumstances where, as here, it appears to have been sought as a litigation tactic to discourage a worker from pursuing a personal grievance. When Ms Graham, raised a personal grievance, the response sent to her representative by GRL's solicitors included this statement: "If Ms Graham proceeds with her claim, Pak 'n Save Mill St intends to seek a penalty against Ms Graham for a breach of her employment agreement". GRL later lodged a separate application for a penalty when it lodged its statement in reply to Ms Graham's unjustified dismissal application to the Authority. A cautionary observation made in an Employment Court decision about employers suing former employees for damages could apply in equal measure to claims for penalties made in a similar manner. In *George v Auckland Council* the Court referred to "reactive claims or threats of claims against those taking personal grievances" undermining the statutory framework for resolving employment

relationship issues.22

[96] Even if the 'triple jeopardy' and public policy concerns were not decisive in considering its penalty claim, GRL provided no sufficiently compelling evidence Ms Graham's actions required imposition of a penalty, when assessed against factors

applicable at the time of those actions. A recent amendment to the Act has specified

21 *Think Steel*, above n 20, at [216].

22 [2013] NZEmpC 179 at [147].

factors for such an assessment but came into effect after Ms Graham's actions.23

Relevant factors, in GRL's submission, were summarised in the Employment Court's earlier decision in *Tan v Yang & Zhang* and could be applied suitably adapted for assessment of the effects on an employer rather than a worker.24

[97] Applying those factors, it was clear Ms Graham's breach of her terms of employment was serious and some of the evidence she sought to advance in her application to the Authority could be said to show a lack of remorse for what she did, or at least a very limited understanding of the potential risk from her actions on 8

November. For example she said she had smelt the chickens before telling the staff member to cook them and remained convinced they posed no real health risk.

[98] However other relevant factors were not compellingly established. There was no evidence Ms Graham's breach was anything other than a one-off occurrence. While GRL was vulnerable to the potential commercial effects from such an event, the power of the employer to impose dismissal, and other lesser disciplinary sanctions, in such cases was sufficient to meet the need for deterrence – that is a strong message to other employees not to act in the same way. Further GRL's evidence of any impact on its business was weak. It submitted it had "suffered intangible loss because its food safety policies were undermined by a managerial employee." Mr Walton gave evidence of having heard some "gossip and talk" from staff, their families and customers that some people would no longer buy products from the supermarket's delicatessen. He provided no specific details of that "feedback" and no verification of any actual impact on sales or reputation.

[99] Some aspects of what happened in this event, it could be inferred, enhanced rather than detracted from the store's reputation. While Ms Graham had acted wrongly, other staff had quickly brought the issue to the attention of the store manager. Prompt action ensured the chickens were not put on sale. A regular external audit, coincidentally held two days later, confirmed procedures were otherwise followed apart from two identified discrepancies that an external auditor was reportedly satisfied had since been appropriately rectified. The incident disclosed

an overall culture committed to meeting public safety requirements.

23 Employment Relations Act 2000, s 133A (effective from 1 April 2016).

24 [2014] NZEmpC 65 at [32].

[100] For the reasons given GRL had not established grounds on which the Authority could and should impose a penalty for her actions, in addition to the substantial reduction of remedies already imposed on her for her contribution to the situation.

Costs

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

[102] If they are not able to do so and an Authority determination on costs is needed Ms Graham may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum GRL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.25 The relevant daily tariff for this matter, commenced before 1 August 2016, was $3500. It may assist the parties to resolve the matter of costs to know a preliminary view I have formed, based on matters raised in the evidence and submissions heard at the Authority investigation meeting. A reduction of the daily tariff to $3000 could appropriately apply due to time and expense unnecessarily spent on dealing with fruitless allegations by Ms Graham about the authenticity of some documents and the fairness of the performance

improvement programme implemented for the seafood department. Any further upward or downward adjustments would then apply from that starting point.

Robin Arthur

Member of the Employment Relations Authority

25 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]- [108].
