

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 546
3042372

BETWEEN IAN HADWIN
Applicant

AND CARBINE AGINVEST
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Andrew Schirnack, Counsel for the Applicant
David France, Counsel for the Respondent

Investigation Meeting: 7 – 9 August 2019 at Auckland

Submissions: 23 August 2019 from Applicant
30 August 2019 from Respondent

Determination: 23 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Ian Hadwin, claims that he was unjustifiably dismissed by the Respondent, Carbine Aginvest Limited (Carbine).

[2] Mr Hadwin also claims that he was unjustifiably disadvantaged by Carbine obstructing him receiving a redundancy payment.

[3] Mr Hadwin claims that he is owed wage arrears arising from Carbine's failure to pay him annual holidays in accordance with the Holidays Act 2003.

[4] Carbine denies that Mr Hadwin was unjustifiably dismissed and claims that he was justifiably dismissed for using his position as Chief Financial Officer (CFO) to arrange a write-off of a personal loan from Carbine without authorisation or knowledge of the Board of Directors.

[5] Carbine denies that Mr Hadwin was unjustifiably disadvantaged as a result of not receiving an offer of employment from the purchasers of Carbine.

The Authority's investigation

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this 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.

Note

[7] Due to the name change which occurred subsequent to the termination of Mr Hadwin's employment, I refer to Carbine as Tru-Test during the time period until 28 September 2018 to avoid confusion.

Issues

[8] The issues for determination are whether or not Mr Hadwin:

- Was unjustifiably dismissed by Carbine
- Was unjustifiably disadvantaged by Carbine
- Is owed arrears of outstanding holiday pay entitlements, and if so in what amount

Background

[9] Carbine was known as Tru-Test Corporation Limited (Tru-Test) until 28 September 2018. It operated animal management systems which included manufacturing of animal weighing systems, electric fencing and milk meters for the testing of herds. It also supplied cooling systems and pre-cooling systems for dairy farming and maintenance programmes for those including farm holding tanks (FHT).

[10] In 2017 Tru-Test was in the process of splitting the business into dairy and non-dairy or farm resource management (FRM) operations for the purposes of selling the FRM operation.

[11] Mr John Loughlin, Chairman of the Board of Carbine, said that a term sheet for the proposed sale of what was then known as the Tru-Test operations was signed with Datamars S.A. and Datamars Limited (Datamars) on 29 August 2017.

[12] Mr Hadwin commenced employment at Tru-Test on 1 July 2003. He was employed as CFO and was issued with an individual employment agreement which was updated in June 2011 (the Employment Agreement).

[13] The Employment Agreement contained the following clauses:

10 Termination

You or the company may terminate your employment by six months prior written notice, or by the company making a payment of salary in lieu of all or part of the notice period. The Company may terminate your employment without notice if you are guilty of serious misconduct.

11 Redundancy

At any time, the Company may implement redundancies for genuine business reasons.
.....

Unless otherwise specified in your appointment letter, the following shall apply if employment is to be terminated due to redundancy

- The Company will give you two additional months notice, or payment in lieu of such notice at the discretion of Tru-Test, after five years continuous and unbroken service with Tru-Test.

ADDENDUM TO STANDARD AGREEMENT

Should you be made redundant as a result of the takeover of the company, you will be entitled to receive the equivalent of 12 months' salary as compensation.

The PIL Loan

[14] By letter dated 20 February 2013, Tru-Test's parent company Tru-Test Corporation, agreed to provide financial assistance to Mr Hadwin's personal investment company, Portofino Investments Limited (PIL) by purchasing outstanding Portofino loan obligations to the value of \$238,500.00 (the PIL Loan).

[15] The terms of the PIL Loan to Portofino were set out in a letter to Mr Hadwin dated 20 February 2013 and signed by Mr Rhys Jones, Tru-Test Board Remuneration Committee. The letter stated that:

...

- Tru-Test will purchase the outstanding PIL loan obligations from Des and Keith to the value of \$238,500.
- Tru-Test will pay you an annual "special STI to the value of the grossed up amount of the interest cost on your \$495,000 loan for a period of up to 3 years. This STI will not impact your existing contractual rights to an STI or LTI payment. This will be paid in February each year commencing 2013.
- Tru-Test requires PIL to dispose of all its TT shareholding at the nearest liquidity event following the TT share price being valued over \$1.50. If the TT share price does not rise above \$1.50 within three years from now, then TT will fund the difference between the liquidity price and \$1.50 at the time of liquidation. If the TT share price is over \$1.50 at the time of liquidation then you will prioritise any profit above \$1.50 to refund the special STI paid by TT. Should there be a shortfall in profit to repay all the special STI then you will not be required to repay this. However if further profit remains after all the special STI has been repaid it can be retained by you.

[16] The PIL Loan was recorded in both the 2013 and 2014 Annual Reports. It was recorded as fully impaired and Mr Loughlin explained that accounting standards require any asset to be labelled as impaired if there was not reasonable certainty as to the value of the asset being at least its book value.

[17] The Board agreed to extend the PIL Loan terms on 25 January 2015 on basically the same terms as the 2013 loan. The letter confirming the PIL Loan extension stated that it would not be extended beyond a further three years:

- Tru-Test will pay you an annual “special” STI to the value of the grossed up amount of the interest cost on your \$495,000.00 loan for a period of up to 3 years. The special SI loan will not be extended past 3 years. ...
- Tru-Test requires PIL to dispose of all its TT shareholding at the nearest liquidity event following the TT share price being valued over \$1.50. If the TT share price does not rise above \$1.50 within three years from now, then TT will fund the difference between the liquidity price and \$1.50 at the time of liquidation. If the TT share price is over \$1.50 at the time of liquidation then you will prioritise any profit above \$1.50 to refund the special STI paid by TT. Should there be a shortfall then you will not be required to pay this. However if further profit remains after all the special STI has been repaid it can be retained by you.

[18] A term sheet was entered into between Tru-Test and a related company and Datamars for the purchase of Tru-Test on 29 August 2017. The term sheet detailed the mechanism for a potential liquidity event that had the potential to result in the share price for Tru-Test Corporation exceeding \$1.50. This would have required repayment by Mr Hadwin of all or some of the PIL Loan.

[19] One of the express terms of the Sale and Purchase Agreement (SPA) between Tru-Test and Datamars was that Datamars would make offers of employment to all employees of Carbine prior to completion of the sale of the business. The offers would be of employment in the same capacity and on terms which were the same as, or no less favourable than, those applying to the employees’ existing employment conditions with Tru-Test.

[20] It was also a term of the SPA that the offers of employment would: “be conditional on both Completion occurring and the Employee remaining employed by the relevant Vendor until Completion.”¹

[21] On 19 July 2018 Mr Hadwin said he was telephoned by the Chief Operating Officer (COO) of Datamars about the potential finance structure of the ongoing business. In that conversation options for his employment post transfer were discussed and the Datamars COO

¹ Execution Version Sale and Purchase Agreement

told him that following his transfer to Datamars, he would probably be surplus to requirements and that his employment would terminate due to redundancy upon or shortly after the takeover.

[22] As a result of this conversation Mr Hadwin said he understood that he would be offered employment by Datamars should the sale be completed, and shortly thereafter he would be made redundant at which point he would become entitled to the payments as set out in the Employment Agreement.

Appointment of Mr Mander as CEO

[23] Mr Greg Muir, at that time Managing Director, announced his resignation in an email to the employees, including Mr Hadwin, on 5 September 2017. In the email it was stated that Mr Simon Mander was appointed as CEO.

[24] Mr Hadwin said that whilst he was aware that Mr Muir was resigning from the Managing Director role prior to 5 September 2017 he had believed that there would be a lengthy hand over period between him and Mr Mander.

[25] In his capacity as CFO Mr Hadwin had been involved in processing the necessary paperwork to remove Mr Muir as a director of Tru-Test in the days leading up to 11 September 2017 when Mr Mander was to assume control as CEO.

[26] Mr Mander said that he had assumed responsibility as CEO as soon as his appointment was announced and on 7 September 2017, he had emailed Mr Hadwin to request a meeting with him and request information. He met with Mr Hadwin the following day, 8 September 2017.

Delegated Authorities

[27] In an email to Mr Hadwin dated 7 September 2017 Mr Mander had requested a copy of Tru-Test's Delegated Authorities. Mr Loughlin explained that delegated authorities were a control framework which allowed members of the management team to act and operate within defined financial levels, with major items being referred to the Board for authorisation.

[28] A schedule of the Tru-Test Delegated Authorities had been issued on 18 August 2016 by a member of Mr Hadwin's financial team. The accompanying email to the Delegated Authorities schedule stated: "The Accounts Payable Team is not able to process an invoice that has not been correctly coded and signed by an employee with the appropriate Delegated Financial Authority.

[29] The approved Delegated Authority level for Mr Hadwin was \$100,000.00 and for Mr Muir \$150,000.00.

[30] Mr Hadwin emailed the Tru-Test Board members on 8 September 2017 forwarding to them the notice of annual meeting and a copy of the letter sent to shareholders on 6 September 2017. The attached letter from Mr Loughlin stated that Mr Mander had been appointed as CEO and that Mr Muir: “will thus handover to Simon as Chief Executive Officer with immediate effect.”

[31] Mr Hadwin had emailed the Board Members on 8 December 2017 with a director resolution noting the Board’s acceptance of Mr Muir’s resignation and appointing Mr Mander as CEO: “with immediate effect”.

Write-off of the PIL Loan 20 September 2017

[32] Mr Hadwin emailed Mr Muir on 11 September 2017 referring to a conversation between them regarding “*the loan to my investment company Portofino Investments from TT of \$238,500.*”

[33] Mr Hadwin stated in the email that he would: “*still have responsibility to repay some of the loan if a liquidity event occurs before 31 January 2018 at above \$1 per share. After this time the obligation to repay the loan ceases*”. Mr Hadwin asked Mr Muir to confirm his: “*agreement to this treatment by return email.*”

[34] Mr Muir replied to the email stating: “*I can confirm your email accurately covers the current agreement(s) both written and verbal between you, PI and TT.*”

[35] On 20 September 2017 Mr Hadwin directed one of his direct reports to: “*please process a JNL in Sept to offset these two accounts – loan to Portofino and also the provision.*”

[36] As a result, the loan from Tru-Test to PIL was written off and removed from Tru-Test’s accounts and the relevant provisions reduced which meant that Mr Hadwin would not have to repay the personal loan made to him in respect of PIL Loan authorised by the Board.

[37] On 4 December 2017 Mr Loughlin said that Mr Hadwin had emailed him and asked him to approve the grossed up Short Term Incentive(STI) payment under the PIL Loan arrangement. In the email, Mr Hadwin stated: “I haven’t taken Simon through all of this so I thought it was best to come to you for approval.”

[38] Mr Loughlin said he had approved the grossed up STI payment stating in his return email to Mr Hadwin: “\$35,958.21 approved, being the final payment due February 2018 under the arrangement formalised in January 2015.

[39] Mr Loughlin said he had not been aware on 4 December 2017 when he approved the STI payment to Mr Hadwin that the PIL Loan had been written off in September 2017 and the relevant provisions reduced because Mr Hadwin had not advised himself or the Board or the Board Remuneration Committee that this had occurred

Awareness of the write-off of the Loan

[40] Mr Mander said he had become aware of the PIL Loan in June and July 2018 when Mr Loughlin had made a reference to it in connection with a possible incentive for Mr Hadwin. He had not made any enquiry about it as he considered it was an existing matter between the Board and Mr Hadwin.

[41] In early August 2018 Mr Loughlin had asked Mr Mander to ascertain what was happening in regard to the PIL Loan. Mr Mander said he had no knowledge of the terms of the PIL Loan and no reason to suppose there was any issue with it. He asked the General Manager Finance for information on the PIL Loan. After receiving some information, he had then searched Mr Muir's emails and discovered the emails between him and Mr Hadwin dated 11 September 2017.

[42] He had written to Mr Loughlin on 10 August 2018 advising him that he had read the PIL Loan documents and the email correspondence between Mr Hadwin and Mr Muir. He provided his initial view, which was that the PIL Loan should be repaid and that Mr Hadwin was conflicted.

[43] Mr Loughlin said he had asked Mr Mander what date the PIL Loan had been written off and who had authorised it, in response to which Mr Mander had sent him the emailed correspondence between Mr Hadwin and Mr Muir.

[44] Mr Loughlin said he had also spoken to Deloitte, Tru-Test's Auditors, who informed him that they had no knowledge of the PIL Loan write-off or the reduction of the relevant provision.

Disciplinary Process

[45] Mr Mander wrote to Mr Hadwin on 16 August 2018 advising him that he had become aware of the write-off of the PIL Loan and was commencing an investigation into the incident.

[46] Mr Mander subsequently wrote to Mr Hadwin on 20 August 2018 advising him of Tru-Test's concerns about Mr Hadwin's conduct in writing off a PIL Loan from Tru-Test to his personal investment company PIL without the knowledge or authority of the Board who had

agreed to make the PIL Loan to him. Mr Hadwin was invited to attend a meeting to discuss the allegations, the letter dated 20 August 2018 stated:

...we wish to get your response to allegations that in your capacity as CFO of Tru-Test Limited:-

- a. You directed the write-off of a loan of \$238,500.00 from Tru-Test Corporation Limited to your personal investment company, Portofino Investments Limited in circumstances where you had no authority to do so;
- b. That the loan amount written off exceeded the delegated financial authority of not only the CFO role but also that Managing Director/CEO role at Tru-Test Limited;
- c. That you did not inform the Board, and did not inform the Remuneration Committee of your actions, either before you wrote off the loan, or after writing off the loan; and
- d. That your actions were a conflict of interest.

[47] The letter noted that if the allegations were substantiated, a possible outcome was summary dismissal. It also outlined all the information that had been ascertained from Mr Mander's investigation to that point, and attached all relevant documents relating to the PIL Loan and the write-off which included the email correspondence between Mr Hadwin and Mr Muir on 11 September 2017.

Disciplinary meeting 24 August 2018

[48] Mr Hadwin attended the meeting on 24 August 2018. In addition to Mr Hadwin and Mr Mander the meeting on 24 August 2018 had been attended by Mr Schirnack representing Mr Hadwin, Mr France representing Tru-Test, and a representative from People Passion who took notes.

[49] Mr Hadwin provided a written response to the allegations which he read out at the beginning of the meeting on 24 August 2018. Mr Hadwin's explanation was that:

- a. he was justified in dealing only with Mr Muir regarding the write-off of the PIL Loan, since he was the only person he had dealt with when Tru-Test had purchased and renewed the loan;
- b. he was justified in agreeing with Mr Muir to write the PIL Loan off in September because the Finance team needed to deal with it in advance of the Datamars sale, and he did not consider there would be a liquidity event prior to 25 January 2018 which would trigger the PIL Loan; and
- c. he was not trying to avoid having to repay the PIL Loan.

[50] Mr Mander said that during a break in the meeting on 24 August 2018 he had considered the written responses of Mr Hadwin and concluded the meeting by explaining that he wanted to review some of the points which had been raised.

Further investigation steps

[51] Following the meeting, Mr Mander had sought explanations from Board members concerning the PIL Loan, the write off and other matters raised by Mr Hadwin during the 24 August 2018 meeting.

[52] Mr Mander wrote to all the Board Members on 28 August 2018 setting out a comprehensive list of questions to which he required a response. Specifically he had wanted to understand their perspective on:

- the nature of the PIL Loan arrangements;
- the impairment of the PIL Loan;
- what, if any, discussions Board Members had directly with Mr Hadwin about the PIL Loan or the write off;
- what the directors expected would happen at the end of the three year period; and
- the role and responsibility of the Board and Mr Muir in relation to the PIL Loan and the write off.

[53] Mr Mander also emailed Mr Muir a list of questions but before doing so telephoned him to inform him that he would be emailing him. Mr Muir provided a response to the questions on 30 August 2018 setting out his summary of events relating to the PIL Loan and stating:

I believe Ian was conscious of cleaning up legacy accounting issues and accordingly documented the current state of the Portofino loan to me in an email (11/9/17) – to which I replied that he had (in my opinion) captured all activity and agreements to that date.

[54] After receiving this letter, Mr Mander said he had contacted Mr Muir again and asked: “Did you approve Ian to write off the Portofino loan in your email reply to him on the 11th September 2017?” He believed this to be a key question and a key point of difference for him at this stage in the investigation.

[55] Mr Muir replied stating: “I think Ian’s understanding of the 25/1/15 doc was that; if there was no liquidity event before the end of January ’18 the loan would be extinguished – this was consistent with my understanding of how the Rem Cttee/Board wished to handle the matter”

[56] Mr Mander also sought information from the member of the Finance team who had written off the PIL Loan on Mr Hadwin's instruction.

[57] Mr Mander wrote to Mr Hadwin on 3 September 2018 setting out the information he had ascertained following the further enquiries he had made following the 24 August 2018 meeting. Mr Mander stated:

The Board members have expressed the view in the answers to my questions that they did not consider you or Greg Muir had the authority to unilaterally write off the loan in September 2017, and that the expectation was that the loan would be repaid including that the arrangement would have been extended past January 2018 if a liquidity event had not occurred before then.

The concerns as outlined in the allegations in my letter dated 20 August 2018 remain. In particular, the concern remains that you did not have the authority to organise the write off of the loan, that your writing off the loan was a conflict of interest and you should have been aware of this, particularly given your position as CFO, and that the authority of the Board needed to be sought before the loan was written off. It is still unclear why you organised the write off in September, at the time Greg Muir was leaving.

Communication to Datamars 6 September 2018

[58] Mr Mander emailed Datamars on 6 September 2018 requesting that notice of termination of employment by Datamars and a conditional offer of employment to Mr Hadwin not be distributed as planned on 15 September 2018 until he approved that happening in writing. Mr Mander stated in the email: "I am currently investigating a confidential matter and this must be resolved before we can proceed".

[59] Mr Mander said he had considered it not appropriate to proceed with either notice of termination of employment or an offer of employment with Datamars whilst the investigation with Mr Hadwin was ongoing and there was genuine uncertainty about a conclusion.

[60] Following the email Mr Mander said he was contacted by Datamars and asked if the matter he was investigating could disrupt the sale, and he had replied that it would not and was a separate matter. Mr Mander said he did not provide any detail of the investigation and he wished to protect Mr Hadwin's reputation by not disclosing to Datamars the detail of the matters he was investigating.

Mr Hadwin's response 10 September 2018

[61] Mr Hadwin provided a response to the letter on 10 September 2018 which set out:

- He had an honest belief that the PIL Loan would be extinguished in January 2018 if there was no liquidity event;

- He believed it was appropriate to speak to Mr Muir because he had been the person who had interacted with him about the PIL Loan;
- He believed there would be a significant changeover period between Mr Muir and Mr Mander;
- It was legitimate to process the PIL Loan write-off in September 2017 as part of the separation of accounts exercise; and
- He wanted to have a discussion with the Board to resolve what was clearly a misunderstanding.

Preliminary Decision 11 September 2018

[62] Mr Mander wrote to Mr Hadwin by letter dated 11 September 2018 in which he advised that his preliminary decision was that Mr Hadwin's actions constituted serious misconduct and that his preliminary view was that the appropriate disciplinary action would be summary dismissal. The letter included Mr Mander's conclusion that:

- a. The 25 January 2015 agreement did not authorise you to write off the loan without Board authority or state that the loan would expire in January 2018 if no liquidity event occurred. ... Therefore the letter cannot be a source of authority for your instruction to write the loan off;
- b. The email correspondence in September 2017 does not provide authority for you to write the loan off:
 - i. The 11 September correspondence does not contain a direct request from you to Greg Muir to write off the loan. ...
 - ii. Mr Muir's reply does not purport to give you approval to write off the loan or provide authority to write off the loan.
 - iii. Mr Muir's response [on 11 September 2018] does not confirm that his email gave you authority to write off the loan.
- c. At the time of the 11 September 2017 emails, Mr Muir was no longer Managing Director of the company and was removed as director of the company on 11 September 2017. You were aware that Greg Muir had handed over the CEO role to me on 6 September 2017. You were aware that Mr Muir was to be removed as a director as you were involved in processing the necessary paperwork. ..
- d. On your interpretation of the 23 January 2015 agreement (which I do not accept for the reasons stated above), the loan would be extinguished in January 2018. Therefore on your account, the loan should not have been written off until January 2018. Your explanation in this regard is that you wanted the write off done in September, as you were providing business accounts for the FRM sale and this would ensure the accounts were clean for the Datamars due diligence in November 2017. However, the loan and the provision in the accounts would have no impact because they 'netted' each other off and would not have affected due diligence.

[63] The letter from Mr Mander concluded with an invitation for Mr Hadwin to attend a meeting on 24 September 2018 to provide his response to the preliminary decision.

[64] Mr Muir emailed Mr Loughlin on 18 September 2018 asking whether or not Mr Loughlin would: “review the course this matter is taking and that you’re happy “the right outcome” is being worked on.” Mr Loughlin responded by email dated 18 September 2018 stating that: “Simon is simply running an investigation process. He is not the decision maker in this”.

[65] Mr Hadwin emailed Mr Loughlin on 21 September 2018 asking to meet with the Board directly, to which Mr Loughlin responded by stating that: “there is a proper process running here which Simon is running on behalf of the Board”.

[66] Mr Loughlin stated:

All the Board are absolutely clear that the loan was not to be extinguished at January 2018. The whole exercise was a good faith one by the Board to compassionately support a valued employee through a difficult time. It was always a loan (i.e. repayable) and the only basis by which it might be extinguished was if there was a liquidity event at a low price within a defined timeframe. The letter states this clearly. If your interpretation of the letter went beyond what was written then the proper course of action was to seek written confirmation from the Author(s) of the letter. AS CFO you know the proper standards of paperwork that is required to support decisions, changes, accounting entries, etc.

[67] The email from Mr Loughlin also advised that Mr Mander was conducting a formal process: “on behalf of the Board.”

Further written statement

[68] Mr Hadwin provided a further written statement in advance of the meeting to be held on 24 September 2018 in which he reiterated that:

- (i) he had had an honest belief that the loan would be written off in January 2018 and therefore there was no gain for him by writing it off early;
- (ii) if there was a liquidity event prior to January 2018 he was happy to repay the loan;
- (iii) he had undertaken additional transaction related responsibilities in addition to his usual duties throughout the investigation process; and

(iv) he wanted to apologise.

[69] During the meeting held on 24 September 2018 which was attended by Mr Schirnack and Mr France, Mr Hadwin read his written statement and after an adjournment answered further questions from Mr Mander. These were focused on Mr Hadwin's understanding of what authority Mr Muir had to at the time of the 11 September 2018 emails and when the instruction was given to write off the loan on 20 September 2018.

[70] Mr Mander said that on 26 September 2018 he emailed all Board members informing them that the disciplinary investigation was complete and he was in a position to make a decision on whether Mr Hadwin's amounted to serious misconduct and if so, whether dismissal was the appropriate outcome. He had advised that his intended outcome was dismissal, explained his reasoning for that, and sought approval.

[71] Mr Mander said that in reaching a decision as to the appropriate outcome, he had considered all relevant factors, including Mr Hadwin's length of service and his hard work especially in the Datamars sale. However he did not consider that these considerations outweighed the seriousness of Mr Hadwin's conduct in failing to exercise the utmost duty of care and avoid conduct which compromised his obligations to behave diligently.

[72] Mr Mander said that he considered it important to seek Board approval for his decision that dismissal was the appropriate outcome on the basis that Mr Hadwin was the CFO, an important and senior role within Tru-Test.

[73] Mr Loughlin responded by email dated 26 September 2018 stating: "I confirm my approval in respect of the board delegating to you the authority to determine this matter and to take actions that flow from your decision".

[74] The other members of the Board also confirmed in emails to Mr Mander their confirmation and accord with Mr Loughlin's view.

Final Decision 27 September 2018

[75] Mr Mander and Mr Hadwin met on 27 September 2018 and Mr Mander presented the disciplinary outcome letter which advised:

- Mr Hadwin's conduct gave rise to a serious conflict of interest;
- The PIL Loan agreement was entered into with the Remuneration Committee of the Board but the Remuneration Committee did not approve the PIL Loan write off, nor were they asked to do so by Mr Hadwin;

- Mr Muir was no longer in the role of Managing Director or CEO on 11 September 2017 and was being removed as a director;
- Mr Hadwin's explanation that he believed Mr Muir had authority to write off the PIL Loan at the time was accepted. However Mr Mander did not accept that it was reasonable for Mr Hadwin to proceed with the PIL Loan write off given it was a loan that personally benefitted him;
- Mr Hadwin's explanation that he believed the PIL Loan would be written off in January 2018 was accepted but it was noted that the Board members had a different view

[76] The letter concluded by advising Mr Hadwin that his employment was summarily dismissed from that date, 27 September 2018 on the basis that:

As CFO of the company you are expected to act with the utmost duty of care and to ensure that you did not engage in conduct which compromised your obligations to act diligently and in the best interests of Tru-Test Limited at all times. Your actions have deeply impaired the company's trust and confidence in you.

[77] Mr Mander said that before making the decision to dismiss Mr Hadwin he had advised Mr Hadwin by letter dated 27 September 2018 that he considered Mr Hadwin's conduct while in Tru-Test's employment gave rise to a serious conflict of interest and constituted serious misconduct. As a result the decision was to summarily dismiss him, effective that day.

[78] PIL repaid the full PIL Loan in December 2018 out of a capital distribution made following the sale of Tru-Test to Datamars.

Was Mr Hadwin unjustifiably dismissed by Carbine?

[79] Mr Hadwin was dismissed from his employment with Carbine for serious misconduct. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- ii. 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.

[80] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[81] Mr Hadwin was the CFO of Tru-Test. As set out in the Job Profile his responsibilities included:

- the performance of the financial and information systems reporting for Tru-Test Corporation and its subsidiary companies through the Finance and IS&IT Teams.
- To manage the company's financial and information systems so as to provide financial services and information which enable the company to achieve its strategic goals.

[82] Mr Hadwin was regarded by the Board as a: "valued employee", which Mr Loughlin stated in the email to Mr Hadwin dated 21 September 2018 that being the reason for providing the PIL Loan to him.

[83] The PIL Loan was a loan of considerable value to Mr Hadwin personally. In addition to Tru-Test purchasing outstanding loan obligations owed by Portofino of \$238,500.00, Tru-Test also agreed to pay Mr Hadwin an annual 'special' bonus to enable him to cover interest payments on a \$495,000.00 bank loan taken out by PIL, Mr Hadwin's personal investment company of which he was the sole beneficiary.

[84] Mr Hadwin was therefore an employee who was in a position of considerable authority within Tru-Test and highly regarded by the Board. Mr Hadwin was also a director of Tru-Test and as such had a fiduciary duty to act in a manner that reflected that duty. As such he commanded a high level of trust.

[85] The terms of the PIL Loan were set out in the letter to Mr Hadwin dated 20 February 2013. The Remuneration Committee of the Board extended the PIL Loan by letter dated 25 January 2015. Significantly, that letter did not state that the PIL Loan would be written off three years after 25 January 2015 if a liquidity event had not occurred in that period.

[86] On 25 August 2017 a Term Sheet was signed by the Board which envisaged the sale of Tru-Test to Datamars. That Term Sheet detailed a potential liquidity event, and this had the potential to place value into the PIL Loan. I find that as CFO Mr Hadwin would have been

aware that this was the case, and that if it occurred it could place value into the shares and this in turn would require repayment of some if not all of the PIL Loan.

[87] Within a month of the Term Sheet being entered into Mr Hadwin instructed one of his direct reports to write-off the PIL Loan. Mr Hadwin's evidence was that he believed he had the approval of Mr Muir to do so.

[88] I have difficulty accepting that this was a reasonable belief on the part of Mr Hadwin on the basis that by 11 September 2017 Mr Hadwin was aware that:

- (i) Mr Muir had resigned on 5 September 2017;
- (ii) he had met with Mr Mander with a view to providing him with information on 8 September 2017;
- (iii) Mr Mander had been appointed as CEO and assumed control as CEO with effect from 11 September 2017; and
- (iv) Mr Hadwin had been involved in processing the paperwork to remove Mr Muir as a director of Tru-Test in the period prior to 11 September 2017.

[89] The email from Mr Muir dated 11 September 2017 stated that Mr Muir accurately summarised the current agreements between Mr Hadwin, PIL and Tru-Test but did not expressly state that Mr Muir authorised Mr Hadwin to write-off the PIL Loan.

[90] Moreover in circumstances in which Mr Hadwin as CFO was responsible via the Accounts Payable Team for overseeing the correct application of the Delegated Authorities, he would have been aware that neither he nor Mr Muir had the delegated authority to authorise the write-off of the PIL Loan.

[91] The PIL Loan had been made by the Board, the 2013 and the 2015 letters had both been signed by Mr Rhys Jones on behalf of the Tru-Test Board Remuneration Committee and whilst I accept that Mr Muir had been the interface between the Board and Mr Hadwin in this matter, Mr Muir nonetheless had not authorised the PIL Loan, nor did he have the requisite financial authority to agree to it being written off.

[92] By not obtaining approval from the Board to write-off the PIL Loan I find that Mr Hadwin had put himself in a position whereby he could potentially be viewed as seeking to obtain a benefit for his own investment company by avoiding the possibility that the investment company would have to repay the loan. In circumstances in which Mr Hadwin was the CFO

and a Director of Tru-Test and stood to benefit personally by the write-off of the PIL Loan, there was a clear conflict of interest.

[93] Mr Hadwin's evidence was that he considered there had been pressure on him as CFO to present 'clean' accounts and the PIL Loan write-off had been necessitated by the need to deal with it in advance of the Datamars sale. However there is no evidence that the Board gave instructions to write off the loan. In addition he did not believe there would be a liquidity event to trigger the repayment.

[94] However I note that the PIL Loan had been fully impaired in the Tru-Test accounts. In addition if Mr Hadwin believed that there would be no liquidity event and the PIL Loan would be extinguished in January 2018, it is difficult to understand why he believed it necessary to write-off the PIL Loan three months prior to that date, especially without obtaining permission from, or informing, the Board.

[95] In the circumstances in which Mr Hadwin stood to benefit personally by the PIL Loan write-off I find it behoved him to act in a manner which was fully transparent and in line with his duties as a Director pursuant to the Companies Act 1993. I find he failed to do so by not informing the Board, the Remuneration Committee or informing Tru-Test's auditors of his action in giving instructions to have the PIL Loan written off.

[96] I find that in the circumstances Tru-Test acting as a fair and reasonable employer could have acted, had substantive justification for dismissing Mr Hadwin.

Procedural Justification

[97] In accordance with s 103A (3) of the Act, Tru-Test was required to carry out a fair investigation and follow a fair procedure. The Authority must consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

Identity of the decision-Maker

[98] Mr Mander was the person who conducted the disciplinary investigation into Mr Hadwin's actions. It is submitted on behalf of Mr Hadwin that the Board was the true decision-maker in the disciplinary process.

[99] Mr Mander was the CEO of Tru-Test and Mr Hadwin's direct manager. It was Mr Mander who ran the investigation process, who met with Mr Hadwin, considered his explanations, undertook further investigations, and who advised Mr Hadwin of the outcome decision.

[100] It is clear that Mr Loughlin believed at the outset of the process that it would be the Board which made the decision about Mr Hadwin's conduct, however Mr Loughlin's evidence was that a different view had subsequently been taken on the basis that Mr Mander had interviewed Mr Hadwin and fully considered the matter.

[101] Mr Mander's evidence was that he believed he was the decision-maker in the process although he considered that he needed Board approval for any final decision he made.

[102] In considering whether or not seeking Board approval for a decision implies that the Board was the decision maker in the process I observe that in *X v Auckland District Health Board* the Employment Court described a policy which required a senior manager to consult with a more senior manager was: "a sensible check on, and balance to, serious decision-making".²

[103] A decision to dismiss, particularly a senior employee who was held in high regard by the Board was a serious decision, one not to be made lightly and I find that the fact that Mr Mander consulted the Board as to his final decision before confirming it to Mr Hadwin does not mean that he abdicated his decision-maker status to the Board.

[104] In support of this conclusion I note that prior to Mr Mander communicating the final decision to Mr Hadwin, the Board had confirmed its approval of the matter being delegated to him and Mr Mander taking the requisite actions flowing from his decision.

The Procedure followed

[105] During the process followed by Mr Mander he initially carried out investigation by reading the loan documentation, the emails between Mr Hadwin and Mr Muir and by speaking to the Auditors. He had then written to Mr Hadwin outlining Tru-Test's concerns about his conduct in writing off the PIL Loan and inviting him to a meeting to provide his explanation.

² *X v Auckland District Health Board* [2007] ERNZ 66 at [161]

[106] Mr Hadwin had legal representation at the meeting held on 24 August 2018 and provided a full response to the allegations.

[107] Following the meeting Mr Mander carried out further investigations, including emailing Mr Muir. Following the response from Mr Muir, Mr Mander had followed it up by asking what he considered to be the key question of whether or not Mr Muir had given Mr Hadwin approval to write off the PIL Loan.

[108] Mr Muir's response had been considered by Mr Mander in addition to the further information sought from the Board members and from Mr Hadwin's direct report who had been instructed to write off the PIL Loan.

[109] Mr Mander provided to Mr Hadwin the information his further investigations had elicited to which Mr Hadwin provided a response. Mr Mander had responded by providing a preliminary decision and invited Mr Hadwin to a meeting to discuss the preliminary decision prior to a final decision being reached.

[110] Mr Hadwin spoke to his written response to the preliminary decision at the meeting held on 24 September 2018. Mr Mander had considered Mr Hadwin's response and asked further questions of Mr Hadwin before confirming a final decision.

[111] I find that Mr Mander carried out a fair and reasonable investigation.

Suspension

[112] I have considered whether Mr Hadwin should have been suspended by Tru-Test during the investigation process.

[113] Mr Hadwin was a senior and trusted executive within Tru-Test. As observed in *Sefo v Sealord Shellfish Ltd* suspension prior to investigation and determination of allegations of serious misconduct may and do affect an employee's employment or one or more conditions to his or her disadvantage.³

[114] Given the potential for damage to Mr Hadwin's reputation prior to any conclusion being reached, I find that Tru-Test acted as a fair and reasonable employer in not suspending Mr Hadwin.

³ *Sefo v Sealord Shellfish Ltd* CC4A/08 at [33] See also: *Birss v Secretary of State for Justice* 1 NZLR 513 at p521

[115] I determine that Tru-Test acted as a fair and reasonable employer could have acted in all the circumstances at the relevant time and that Mr Hadwin was not unjustifiably dismissed by Tru-Test.

Was Mr Hadwin unjustifiably disadvantaged by Carbine?

[116] Mr Hadwin is claiming unjustifiable disadvantage on the basis of Tru-Test taking unjustified action which disadvantaged him as regards his terms and conditions of employment.

[117] Disadvantage grievances are assessed in light of s103 (1)(b) of the Act which states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[118] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[119] Mr Hadwin must therefore establish that there was some unjustifiable action or actions by Tru-Test which affected his terms and conditions of employment to his disadvantage.

[120] Following his conversation with the Datamars COO on 19 July 2018, Mr Hadwin's evidence was that he had a reasonable expectation that after following Completion and the transfer of his employment to Datamars he would be made redundant and receive a payment of 20 months' salary from Datamars calculated as 8 months' notice (or payment in lieu thereof) and a compensation payment of 12 months' salary, in accordance with the terms of the Employment Agreement.

(a) Unjustifiable Action

[121] On 6 September 2018 Mr Mander instructed Datamars not to issue an offer of employment to Mr Hadwin until such time as he notified Datamars of his approval to do so in writing.

[122] At the time of issuing the instruction to Datamars Mr Mander was in the process of conducting a disciplinary investigation which had not been concluded. He did not provide any detail of the investigation to Datamars.

[123] Whilst I accept that Mr Mander did not disclose details of the investigation involving Mr Hadwin to Datamars, I find that Tru-Test had a statutory duty of good faith towards Mr Hadwin which involved not acting in a way which would adversely affect the trust and confidence between it and Mr Hadwin.

[124] The Sale and Purchase Agreement stipulated that offers of employment would be provided to employees prior to Completion and there was no requirement that Tru-Test needed to take any action in that situation.

[125] I find that the action taken by Mr Mander in instructing Datamars not to proceed with an offer of employment to Mr Hadwin was not in good faith or justified.

(b) Terms and conditions of employment affected to disadvantage

[126] Mr Hadwin expected to receive an offer of employment from Datamars. I find that the failure to provide a letter offering him employment with Datamars after Completion did not affect Mr Hadwin's terms and conditions of employment with Tru-Test, his employer, he continued to be employed on the same terms and conditions of employment.

[127] The responsibility for a redundancy payment did not lay with Tru-Test in a situation in which it did not make him redundant. That responsibility lay with Datamars following Completion and the transfer of his employment to Datamars provided that it then made him redundant.

[128] The sale to Datamars was due to be completed on 28 September 2018. At this date Mr Hadwin's employment with Tru-Test had been terminated for serious misconduct and he was no longer an employee.

[129] As a result any offer of employment made to him by Datamars prior to Completion would not have taken effect since the execution of the transfer was dependent on both Completion occurring and Mr Hadwin being an employee of Tru-Test at that date. There was therefore no loss of a redundancy payment as a result of Mr Mander's email dated 6 September 2018.

[130] I determine that Mr Hadwin not unjustifiably disadvantaged by Carbine.

Is Mr Hadwin owed arrears arising from Carbine's failure to pay annual holiday pay?

[131] Mr Hadwin claims that he was not paid annual holiday pay on incentive payments paid to him in May 2013, May 2014 and June 2015. The parties have agreed that holiday pay is

payable in respect of these three STI payments and are in the process of finalising this issue. This issue therefore does not require determination by the Authority.

[132] A case conference call will be arranged to progress the remaining issues in respect of holiday pay entitlements and interest arising therefrom.

Costs

[133] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority