

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 272
5593998

BETWEEN TE ARAIWINI HOLO'IA
 Applicant

A N D BUPA CARE SERVICES NZ
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, Advocate for Applicant
 Shelley Eden, Counsel for Respondent

Investigation Meeting: 12 and 13 July 2016 at Gisborne

Submissions Received: 28 June and 13 July 2016 from both parties

Date of Determination: 11 August 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Te Araiwini Holo'ia, claims that she was unjustifiably disadvantaged as a result of being suspended on 18 September 2015, and unjustifiably dismissed on 8 October 2015 for serious misconduct, by the Respondent, BUPA Care Services NZ Limited (BUPA).

[2] BUPA denies that Ms Holo'ia was unjustifiably suspended or dismissed and claims that she was justifiably suspended and subsequently justifiably dismissed.

The issues

[3] The issues for determination are whether or not Ms Holo'ia was:

- (a) Unjustifiably disadvantaged as a result of being suspended;

(b) Unjustifiably dismissed.

Prohibition on publication

[4] **I order that the name of the BUPA clients referred to in this determination, and any information which may lead to their identification, is subject to a permanent non-publication order and not to be published. The clients are to be referred to by letters bearing no relationship to their actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Background facts

[5] BUPA is a global health and care company offering health insurance, medical subscription and other health and care funding products. It runs care homes, retirement and care villages, and provides primary care diagnostic and wellness centres, hospitals and dental clinics.

[6] BUPA has 56 age care facilities throughout New Zealand. The facilities incorporate independent living for the elderly, as well as residential age care facilities (rest homes) and hospitals.

[7] BUPA also has rehabilitation facilities which provide intensive rehabilitation programmes to residents who are recovering from injuries, neurological disorders or otherwise need respite care. The BUPA rehabilitation facility in Gisborne (the Facility) provides 24 hour, live-in rehabilitation care service with each of the residents living at the rehabilitation facility for the duration of the rehabilitation programme

[8] Ms Holo'ia commenced employment with BUPA on 31 August 2015 in the position of Rehabilitation Coach at the Facility, and was employed subject to an individual employment agreement (the Employment Agreement). The Employment Agreement stated:

11.3 ***Termination for serious misconduct***

Notwithstanding any other provision in this agreement, the employer may terminate this agreement summarily and without notice in the case of substantiated serious misconduct on your part, as detailed in the company's code of conduct.

11.4 ***Suspension***

In the event the employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with you and considering your views, suspend you on pay whilst the investigation is carried out.

12. ***Acknowledgment of the agreement clause***

The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it

is in writing and signed by both parties. You acknowledge that:

- (a) You have been advised of your right to take independent advice on the terms of this agreement;*
- (b) You have been provided with a reasonable opportunity to take that advice;*
- (c) You have read these terms of employment and understood these terms and their implications; and*
- (d) You agree to be bound by these terms of employment and the employer's policies and procedures as implemented by the employer from time to time.*

13. Declaration

BUPA Care Services offers the individual employment agreement to:

Employee's name [Name]

I declare that I have read, fully understood and accepted the conditions of this agreement detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[9] Below the declaration clause, Ms Holo'ia had signed the Employment Agreement and dated it 31 August 2015. The Employment Agreement had been authorised on behalf of BUPA by Ms Bridget Boot, Manager.

[10] Ms Holo'ia was also provided with the BUPA Code of Conduct which set out, under the heading: '*Vision: Dedicated*' that BUPA placed an obligation on the employee to act with the utmost honesty and integrity at all times and stated:

Reflected in this Code of Conduct is the importance of trust and confidence in the relationship between BUPA Care Services and you, our employee. If trust and confidence is broken we have to re-examine and possibly end the employment relationship.

[11] Under clause 10: "*Serious Misconduct*" it noted the following:

10.24 Dishonesty, including acts of fraud, misappropriation, unauthorised possession or alteration inside or outside of BUPA Care Services or any other acts considered by BUPA Care Services to be dishonest or unethical.

...

10.46 Unauthorised removal or possession of company funds, or the unauthorised possession of or causing wilful damage to property of the employer, another employee, a client, resident or visitor.

...

10.51 Personal conduct of an employee, within or outside working hours, which seriously harms the BUPA Care Services' trust and confidence in the employee or BUPA Care Services' reputation with its clients, residents, their families or the general public.

10.52 Acting in a manner that brings the employee or the company into disrepute, or failing to act in an official capacity, that results in bringing the company or the employee into disrepute.

[12] The Code of Conduct was signed by Ms Holo'ia on 29 June 2015 against the statement which read:

I [Ms Holo'ia's name] agree that I have read, understood and will follow BUPA Care Services' Code of Conduct whilst engaged by BUPA Care Services.

Events 12 September 2015

[13] During September 2015 Mr B was a client residing and receiving rehabilitation care at the Facility following a physical injury.

[14] On the morning of Saturday, 12 September 2015, Ms Holo'ia had taken a number of clients in a BUPA adapted vehicle from the Facility into Gisborne town centre for an outing. She said that Mr B had joined them in order to shop and purchase a gift for his niece. He had shopped independently whilst she assisted the other clients with their shopping and he had sent her a text message in regard to the timing of the return journey.

[15] On the return journey to the Facility, Mr B had asked her to stop the van so he could purchase some energy drinks. Ms Holo'ia said that after they stopped, Mr B insisted that he wanted her to take his EFTPOS bank card and buy the drinks for him as it would inconvenience the other residents to get his wheelchair out of the van.

[16] Mr B gave Ms Holo'ia his EFTPOS card, and when she asked for his PIN number, he said he would text this to her because he did not want the other residents to hear it. After she had bought the energy drinks, Ms Holo'ia said she showed Mr B the text message stating his PIN number and deleted it in front of him. She then drove the clients back to the BUPA care facility.

[17] After lunch, Ms Holo'ia said Mr B asked her to go to his flat and get his EFTPOS card, handing her his remote control so she could gain access to the flat. She had located Mr B's EFTPOS card and when she had given it to Mr B, he had asked her to go to the bank and withdraw \$2,000.00 from his account as he wanted to give some money to his niece.

[18] Ms Holo'ia said that because she had deleted Mr B's EFTPOS number, he had given it to her again and she had written it on her hand.

[19] She had then visited a bank in Gisborne and extracted the money from Mr B's bank account as he had requested. She had taken with her another resident, Ms C, to whom she was providing one-on-one care at that time and told her that she was going to withdraw some money as requested by Mr B. She had not informed the duty manager of the shift or any other member of staff of her errand.

[20] Following her return to the Facility, Ms Holo'ia said she approached Mr B who was in the hallway to give him his money, and he had told her to meet him in the Gym. Accordingly, she went to the Gym and handed Mr B the \$2,000.00, his EFTPOS card and the receipt from the EFTPOS machine. There were no witnesses to this exchange.

Events 16 September 2016

[21] Ms Holo'ia said that she was working an evening shift on Wednesday, 16 September 2015 when a staff member, Mr Joseph Moana, mentioned that Mr B had told him that \$1,000.00 was missing from his bank account.

[22] A message about Mr B's missing money was placed on the whiteboard in the staff office. This was usual practice in order to inform the incoming duty Leader and staff members on the next shift about any issues which had arisen during the previous shift.

[23] Later that evening Mr Moana had come into to the office after assisting Mr B to get ready for bed and told Ms Holo'ia that Mr B had told him it was actually \$2,000.00 that was missing.

[24] Ms Holo'ia said she thought this might be the same amount of \$2,000.00 Mr B had asked her to withdraw from his bank account on 12 September 2015, so she went to Mr B's flat to talk to him. She had asked Mr B if he remembered that he had asked her to take \$2,000.00 from his bank account on 12 September 2015, however, he had said that it had been stolen.

[25] Ms Holo'ia said they had sat in silence for a little while and she had asked Mr B again if it was the \$2,000.00 he had asked her to withdraw from his bank account on his behalf. Again he told her that the money had been stolen.

[26] As she was leaving his flat, Ms Holo'ia said that Mr B had asked her to tell the other staff members that the bank had telephoned and left a message about the withdrawal, and she was to remove the message from the whiteboard in the staff office.

[27] She said that Mr B also told her that he had claimed that the \$2,000.00 was missing because she had refused to help him in a matter involving another client, Ms D, for whom he had affection.

[28] Ms Holo'ia had returned to the staff office and told the other members of staff that the bank had called and told Mr B that they had made a mistake. As a result, Mr Moana and Ms Grace TeNahu, the shift Duty Leader, wiped the message off the whiteboard.

17 September 2015

[29] Ms Cecilia Storm, Regional Manager, said she had received a telephone call from Ms Boot on 17 September 2015. Ms Boot had received a call from Ms Karin Johansen, an employee at the Stewart Centre, which provided day programmes for people with disabilities. Ms Boot said Ms Johansen told her that Mr B had disclosed to her that one of the BUPA employees had taken \$2,000.00 from his bank account.

[30] Ms Boot told Ms Storm that she had driven to the Stewart Centre to talk to Ms Johansen and to Mr B and that during their conversation Mr B had shown her the online bank statement which showed the \$2,000.00 withdrawal.

[31] Ms Boot told Ms Storm that Mr B wanted to report the matter to the Police and that he was starting to believe that Ms Holo'ia might have taken the money as he had given her his PIN number the weekend before. Ms Storm said she immediately sought advice from the BUPA HR Adviser, Ms Rochelle Hamilton.

[32] Ms Hamilton said she heard about the incident involving Ms Holo'ia on 17 September 2015 when she received a telephone call from Ms Storm who had just finished speaking with Ms Boot. Ms Hamilton said she and Ms Storm discussed the fact that they would need to investigate the allegation and that it might be advisable if Ms Holo'ia were placed on paid suspension throughout the duration of the investigation. Ms Hamilton had discussed the suspension process with Ms Storm and sent her a script for a suspension meeting.

[33] Ms Storm telephoned Ms Holo'ia on 17 September 2015, told her of the allegation and that BUPA needed to investigate. Ms Storm advised Ms Holo'ia during the telephone conversation on 17 September 2015 that:

- the allegation was that she may have stolen money from Mr B;
- it was a serious matter and needed to be investigated;

- the purpose of the meeting the following day, 18 September 2015, would be to discuss the possibility of suspension and to hear Ms Holo'ia's comments on the proposal before a decision was made;
- Ms Holo'ia was invited to bring a support person or a representative with her to the meeting and to seek advice on her rights before attending the meeting.

[34] Ms Storm said that on the afternoon of 17 September 2015, Ms Boot had helped Mr B, who was unable to write due to his disability, to make his complaint to the Police and thereby became aware of the exact details of the transaction. These were that a withdrawal of \$2,000.00 had been made from his bank account via an ATM machine at 1.45pm on Saturday, 12 September 2015, and from Mr B's verbal statement to the Police it appeared that Ms Holo'ia may have been responsible.

Suspension Meeting 18 September 2015

[35] Ms Holo'ia attended the meeting to discuss the suspension on 18 September 2015. Ms Boot conducted the meeting; Ms Storm was not physically present at the meeting but telephoned into the meeting and was present via speaker phone. Ms Boot conducted the meeting using the suspension script that had been prepared by Ms Hamilton.

[36] Ms Holo'ia said she had been told that she was accused by Mr B of stealing \$2,000.00 from him which she had done by withdrawing it from his bank account using his EFTPOS card on Saturday, 12 September 2015. Ms Holo'ia said she had not been given any further details at that point and she was not given a copy of a complaint by Mr B.

[37] Ms Storm said she had advised Ms Holo'ia during the meeting that it was her opportunity to respond to the proposal to suspend her during the investigation, although not to respond to the allegation itself.

[38] Ms Holo'ia said that she had considered suspension to be a good option as it would prevent discomfit in the workplace whilst the investigation took place.

[39] After considering Ms Holo'ia's response, the decision to suspend her had been confirmed.

[40] The outcome of the meeting was confirmed in a letter dated 18 September 2015 from Ms Storm. The letter stated:

This letter is to confirm the decision made and advised verbally to you on 18 September by Bridget Boot, Facility Coordinator regarding your suspension from BUPA Care Services duties.

Suspension was considered as the result of an allegation that, on 12 September you stole \$2,000 from a rehabilitation client, [Mr B]'s bank account by making a cash withdrawal using his EftPos card. This allegation raised concerns that you may have breached BUPA Care Services Code of Conduct resulting in serious misconduct.

You will recall that you were given the opportunity to respond to the potential for suspension before any decisions were made. Additionally you were advised that you could have a support person present however you declined to have a support person present but advised that you were comfortable for the meeting to proceed.

At the meeting, after taking time to consider our proposal to suspend you told us that you agreed with the suspension and that you felt it was appropriate. You also told us that you would not like [Mr B] to feel uncomfortable with you present in the workplace

... I decided that suspension was appropriate. ...

The suspension is on full pay for the duration of the investigation ...

In addition we would like to offer you the services of our employee assistance programme (EAP) which is a confidential counselling service available to all our company employees.

[41] Ms Storm said that same day, 18 September 2015, she and Ms Boot interviewed Mr Moana. Ms Boot and Mr Moana met in person and she had been joined to the meeting by telephone speaker phone.

Mr Moana's statement

[42] Mr Moana told Ms Boot and Ms Storm that at or about the evening meal on 16 September 2015, Mr B had disclosed to him that \$1,000.00 was missing from his bank account. Mr Moana had told the other employees about the missing money and Ms TeNahu had written the incident up on the whiteboard in the office so that the next Duty Leader, Mr Andrew Jones, would be able to investigate the next morning.

[43] Mr Moana said that later that night Mr B had disclosed to him that actually \$2,000.00 was missing, not \$1,000.00, and he had suggested that Mr B, who was agitated and distressed, contact his bank the following morning with the support of the Duty Leader, Mr Jones.

[44] After Mr Moana had returned to the staff office and told Ms Holo'ia the amount was actually \$2,000.00, she had told him that she needed to go and see Mr B. She had been with Mr B for about 15 to 20 minutes and upon her return to the staff office she had told him and Ms TeNahu that while she had been with Mr B he had received a call from the bank saying there had been a mistake and that \$20.00 had been withdrawn from his account, not \$2,000.00

[45] After a discussion about the matter, he, Ms Holo'ia, and Ms TeNahu had decided that they could remove the note from the whiteboard as the issue appeared to have been resolved.

[46] Mr Moana said that on the following day, 17 September 2015, he had commented to Mr B that it was good the bank had called about its mistake; however Mr B had looked confused and asked who had told him that information. When Mr Moana had told him it had been Ms Holo'ia, Mr B had abruptly ended the conversation.

Ms Boot's statement

[47] Ms Boot made a statement on 18 September 2015 outlining her conversations with Mr B on 17 September 2015

[48] She stated that after she had been contacted by Ms Johansen on 17 September 2015, she had driven to the Stewart Centre where Mr B had told her that money had been taken from his bank account, and he felt badly about it because he had disclosed his PIN number.

[49] Mr B had told her about the incident on 12 September 2015 when he had asked Ms Holo'ia to use his bank card to purchase some energy drinks for him, he had texted her his PIN number and he had believed she would delete it afterwards.

[50] On or about 1.15 p.m. that day, Ms Holo'ia had asked Mr B if she could use the toilet in his flat, he had agreed and given her the remote device for access which she returned approximately 30 minutes later.

[51] He had attended the Stewart Centre on 16 September 2015 for help with budgeting and to learn how to use internet banking. Whilst in the process of doing so, he had realised that \$2,000.00 had been removed from his bank account. He had been shocked and could not understand what had happened.

[52] That evening he had informed Mr Moana that \$1,000.00 had been taken from his bank account, this had been a lie, and he had said he felt bad about that. As he had only given his PIN number to one person, Ms Holo'ia, he began to suspect her involvement, however he been concerned at this thought as he had believed he could trust the BUPA employees.

[53] Later that evening he had told Mr Moana that the missing amount was actually \$2,000.00 After Mr Moana had left, he had heard someone entering his flat using a key, it was Ms Holo'ia and she was upset and crying. He said she had told him that she had taken the money as she was behind in her rent payments and was hoping to repay the \$2,000.00 before he realised it was missing.

[54] Ms Boot said she had supported Mr B to make his verbal statement at the Police Station where she had learnt the additional information that the money had been taken from the ANZ machine in Gisborne at 13,35 p.m. on 12 September 2015 and that Ms Holo'ia had said to Mr B that she would tell the other employees a story that would stop the matter being reported or handed over.

[55] Ms Boot stated that she had checked the Facility records and handover notes, but there had been nothing recorded about the incident in them.

Disciplinary meeting 22 September 2015

[56] Ms Storm decided that there was sufficient evidence to move to a disciplinary meeting. She emailed Ms Holo'ia on 18 September 2015 and attached a copy of the statements made by Mr Moana and Ms Boot as well as a copy of the Code of Conduct. She had also attached a copy of the letter dated 18 September 2015.

[57] The letter reiterated the allegations, stated that it raises concerns regarding breach of the employment Agreement and the BUPA Code of Conduct, and stated:

You need to be aware that is a finding of misconduct is established, a possible consequence of this could be disciplinary action and in the case of serious misconduct, may ultimately result in your dismissal from Bupa Care Services.

[58] Ms Holo'ia said she had not received the email as it had been sent to an incorrect email address because her email address had changed since she completed her application form, and she had not updated BUPA with the new email address.

[59] Ms Storm said that Ms Holo'ia had not arrived at 2.10pm on 22 September 2015, which was 10 minutes after the meeting was due to commence,. She had telephoned Ms Holo'ia who had told her that she had not received the letter inviting her to the meeting.

[60] Ms Storm had sought advice from HR as to how to proceed then called Ms Holo'ia back and advised her that either BUPA would postpone the meeting, or she could come in and read the documents before they began the meeting.

[61] Ms Holo'ia said she decided that she would prefer the meeting to take place and to read the documents before it took place. Ms Storm said she told Ms Holo'ia that the meeting would be delayed if she would prefer to do so after she had had the opportunity to read the documents.

[62] Ms Holo'ia arrived for the meeting and confirmed she was happy to proceed without a support person present. Ms Storm and Ms Boot gave her a copy of the letter dated 18 September 2015 and the statements from Ms Boot and Mr Moana and left Ms Holo'ia in the office to read them.

[63] Ms Storm and Ms Boot returned to the office 15 minutes later at which time Ms Holo'ia informed them that she wished to continue with the meeting. Ms Storm said she explained to Ms Holo'ia that the purpose of the meeting was to give her the opportunity to provide her side of the story. It was explained to Ms Holo'ia that the meeting could be adjourned at any time. Ms Holo'ia gave permission for BUPA to take notes of the meeting and to save it on her file.

[64] Ms Holo'ia said she had understood the allegation made by Mr B that she had stolen \$2,000.00 from his bank account, but denied taking the money and provided her explanation of events. Specifically Ms Holo'ia said she:

- had not asked to use the toilet in Mr B's flat;
- had not been crying when she went to his flat; and
- did not tell Mr B that she was behind in paying her rent

[65] Ms Holo'ia was informed that the Police had been contacted and that Ms Boot had supported Mr B to make a complaint. Ms Holo'ia said that she had explained that when she had started working at BUPA she had believed that she and Mr B had had a good relationship. After a little while, Mr B had asked her to stop two other clients from being friends and she had advised him she could not do that.

[66] In relation to the events on Saturday, 12 September 2015 Ms Holo'ia explained that after the initial cash withdrawal in the morning, Mr B had later that day asked her to withdraw \$2,000.00 from his account which he had said was intended for his niece. When she had returned to the facility with the money she had met Mr B in the Gym, given him his money and his card and the receipt.

[67] Ms Storm asked her if she had reported the incident to anyone and she explained:

No because I did not think I had to, the duty lead asked me if [another client] had taken any money out and then I started to tell him that [a client] had also spent some money but the duty lead said that because [the client] was independent I did not need to hand that information over, so I thought that because [Mr B] is independent I did not need to tell about [Mr B]'s money.

[68] Ms Holo'ia provided her version of what had occurred between her and Mr B later in the evening of 16 September 2015 in his flat, saying that he had told her in relation to his making of the allegation: "*this is because you did not help with [Ms D]*". Ms Holo'ia said the following day she had taken Mr B to drop his gift to his niece.

[69] Ms Storm said that Ms Holo'ia denied Mr B's version of event: that she had admitted the theft because she was behind in her rent, and saying that she paid her rent every few weeks. Ms Storm asked if Ms Holo'ia was prepared to provide evidence that she was not behind in her rent and Ms Holo'ia texted her landlord who telephoned a few minutes later.

[70] With Ms Holo'ia's permission, she spoke to her landlord who confirmed that Ms Holo'ia was behind with the rent, and had made a recent catch up payment of \$750.00.

[71] There was an adjournment in the meeting of approximately 15 minutes. During that time Ms Storm said she had sought advice from a member of the HR department. When the meeting was reconvened, she and Ms Boot had informed Ms Holo'ia that they would have to verify certain aspects of her statement and that they would need to investigate further. They advised Ms Holo'ia that she needed to remain available, confirmed her email address and asked her to monitor her emails. The meeting then concluded.

Further Investigation

[72] Ms Storm said that in the period from the meeting on 22 September 2015 to 30 September 2015, she carried out further investigation with support from Ms Hamilton. In particular, she:

- (a) with permission from Ms Holo'ia, obtained copies of her bank statement showing her rent payments;
- (b) searched Mr B's room although she was aware that over 10 days had passed since the incident;
- (c) sought a clarifying statement from Mr Moana;
- (d) sought a statement from Ms TeNahu;
- (e) met with Ms Crystale Ribbon;
- (f) sought clarification from Mr B on some points;
- (g) sought clarification from Ms Boot; and
- (h) sought information from Mr B's niece, Ms E.

[73] Ms Ribbon informed BUPA that she had been visited by Ms Holo'ia and Ms TeNahu on 29 September 2015 and had felt pressurised by them into making a statement. The statement contained the information that Mr B had told her on 10 September 2015 that he would like to give his niece a gift and money in order that she could purchase a car. Ms Ribbon also told Ms Boot that Ms Holo'ia had told her that she and her husband were intending to purchase a car.

[74] Mr B's room had been searched but neither the money nor the receipt that Ms Holo'ia claimed she had given to him were found.

[75] Ms Boot provided a statement about a meeting with Mr B's niece, Ms E, in which Ms E confirmed that Mr B had given her body spray and chocolates as a gift for her birthday, but no money. She had also voluntarily provided Ms Boot with screen shots of a text exchange between her and Mr Raroa (Ms Holo'ia's brother) in which she confirmed to him that Mr B had not given her any money.

[76] Ms Boot also provided notes in which she recorded the police having telephoned and advised that they had interviewed Ms Holo'ia on 27 September 2015. She had accompanied Mr B to a meeting with the police on 29 September 2015 during which she had become aware that Ms Holo'ia had not informed the police about the alleged telephone call from the Bank during the evening of 16 September 2015 informing Mr B that the transaction on 12 September 2015 was a bank error.

[77] Mr B confirmed that the first he had learnt about the alleged telephone call from the Bank had been when Mr Moana had referred to it.

[78] Ms TeNahu stated that she had written the message about Mr B's missing money on the whiteboard in the staff office after Mr Moana reported it on 16 September 2015, and she had later wiped it off when Ms Holo'ia had returned from Mr B's flat, and said he had received a call from the bank while she was there to the effect that it was a clerical error. Ms Holo'ia had said Mr B was embarrassed about it and wanted the message removed.

[79] Ms Storm telephoned Ms Holo'ia on 29 September 2015 to update her and let her know that BUPA was still investigating. She said Ms Holo'ia thanked her for the feedback.

[80] On 1 October 2015, Ms Storm sent a letter by email to Ms Holo'ia which stated:

Re: Formal Disciplinary Meeting

Further to our meeting on 22 September, we are writing to reconvene the formal disciplinary meeting to discuss the allegations raised in our letter of 18 September. As you will recall, we adjourned our previous

meeting so that we could conduct further investigation, which we have now done ...

Please find attached a copy of the additional information we have received which we will be seeking your comment on at the meeting. We will request that you meet with us on Tuesday, 6 October 2015 at 11am in the meeting room in order for you to further respond to the allegations detailed in the abovementioned letter. Present with me will be Rochelle Hamilton HR Adviser.

At the meeting we will receive any further comments or responses you would like to make and we may ask you some clarifying questions before we can make a decision how to proceed ...

You are welcome and encouraged to seek advice regarding this process and to bring a support person or representative with you to this meeting. If this meeting time is not suitable please phone me immediately on 021 536 908 to arrange an alternative time ... In addition we would like to offer you the services of our employee assistance programme (EAP).

[81] The letter was signed by Ms Storm. Attached to the letter dated 1 October 2015 were the additional statements from Mr Moana and statements from Mr Jones, Ms Boot, Mr B and the statements from Ms Ribbon and Ms TeNahu. Also attached were screenshots of messages between Mr B and his niece and between Mr B's niece and Mr Raroa.

[82] Ms Storm also told Ms Holo'ia that BUPA was prepared to meet the Police with her as she had requested, but that the meeting on 6 October 2015 would not involve the Police as it was part of BUPA's disciplinary process.

Disciplinary Meeting 8 October 2015

[83] The meeting held on 8 October 2015 was attended by Ms Holo'ia and her sister as her support person, and also by Ms Storm and Ms Hamilton.

[84] Ms Holo'ia said she did her best to answer all of the questions she had been asked as truthfully as possible. In relation to the comment that she had been able to purchase a new car because she had stolen the money and used it for that, she said that that was not true because she had purchased the car with her husband and a dealer had arranged a hire purchase agreement for the full purchase price plus fees. No deposit had been paid.

[85] She said that she had stated on more than one occasion during the meeting that several staff were saying that Mr B had spent money on another resident including shoes, magazines and food.

[86] Ms Holo'ia had also explained during the meeting that she had talked with her landlord and they had explained that she was not behind with her rent. She had been happy to

provide Ms Storm with her bank details because they would confirm that she was not behind with her rent payments.

[87] In relation to the \$750.00 payment made to her landlord on 16 September 2015, Ms Holo'ia explained that the payment had covered three weeks rent made up of a fortnightly payment plus an additional week's rent of \$250.00 because the landlord had requested that a week was paid in advance. The payment had come from her husband's pay which also went into the bank on 16 September 2015.

[88] Ms Storm said during the meeting, she and Ms Hamilton had obtained Ms Holo'ia's response to additional statements and information which had been sent to her and asked some clarifying questions.

[89] The meeting had been adjourned for 40 minutes in order that they could consider Ms Holo'ia's responses, after which they adjourned again to decide on what the proposed outcome ought to be.

[90] Ms Storm said that BUPA had been provided with two very different versions of what had happened. She said in essence it was Mr B's word against that of Ms Holo'ia, although BUPA had tried to find additional corroborating evidence. In considering whose evidence to prefer, she and Ms Hamilton had taken the following factors into account:

- (a) They had found Ms Holo'ia's explanations at the 22 September and 8 October 2015 disciplinary meetings to be inconsistent with other evidence and sometimes with her own earlier statements which undermined her credibility. For example:
 - (i) In the 22 September 2015 meeting, Ms Holo'ia had claimed that her landlord was mistaken that she was behind in her rent and that she had made a catch up payment of \$750.00. Ms Holo'ia had claimed that she had made an arrangement with her landlord that she would pay \$750.00 every three weeks, however, this was not supported by her bank statements which showed regular payments of \$250.00 per week and one additional \$750.00 payment, nor was her explanation supported by her landlord;
 - (ii) In the 22 September 2015 disciplinary meeting, Ms Holo'ia told BUPA that when she went to visit Mr B after finding out that he had told Mr Moana the sum of \$2,000.00, was missing, Mr B had told her that he was making the claim because she had not helped him in

relation to Ms D, and then told her to tell her colleagues that the bank had called to report it had made a mistake.

However, in the 8 October 2015 disciplinary meeting, Ms Holo'ia claimed that once Mr B had told her he was making the claim because she would not help him with Ms D, she had immediately continued with her duties.

When Ms Hamilton had reminded her that her explanation of events in the previous meeting had involved a call from the bank and her telling her colleagues about it, she had then said: "*oh yeah, I remember now*", and changed her version of events accordingly;

- (iii) During the disciplinary meeting on 22 September 2015, Ms Holo'ia described a conversation which she said had taken place when she arrived at Mr B's flat, whilst in the 8 October 2015 disciplinary meeting she had claimed that the first comment Mr B had said to her was: "*I'm doing this because you won't help me with [Ms D]*".
- (iv) At the meeting on 8 October 2015 Ms Holo'ia said she had taken Mr B to his niece's house to drop off her birthday gift on 13 September 2015. However, after consulting the mobility van logbook it was confirmed that the date had been 12 September 2015;
- (b) Ms Storm said she and Ms Hamilton regarded Ms Holo'ia's reaction upon discovering that Mr B was claiming that she had taken the missing \$2,000.00 and wanted to report it to the Police to be consistent with someone who was trying to cover up the theft while making arrangements to pay the money back.
- (c) Further, not only had Ms Holo'ia failed to report that she had withdrawn \$2,000.00 for a BUPA client which was a highly irregular thing to do, but on the evening of 16 September 2015 when she found out that Mr B was allegedly "*framing her*", she still did not report that she had withdrawn the money, and in fact went to great lengths to hide the incident;
- (d) In addition, on 17 September 2015, when Ms Storm had telephoned Ms Holo'ia to inform her that Mr B had reported the theft to the Police, even at that point Ms Holo'ia had not disclosed that Mr B was allegedly framing her. She had not in fact done so until the 22 September 2015 meeting;

- (e) Ms Storm said that when she and Ms Hamilton asked Ms Holo'ia why she had not reported the withdrawal despite having had multiple opportunities to do so, Ms Holo'ia was unable to provide an explanation.
- (f) In addition, Ms Holo'ia admitted she had lied to her work colleagues about the call from the bank but was unable to explain why she had done so. Despite this being apparently linked to Mr B's threat, it did not make sense that she would not expose what Mr B was doing, and this undermined her credibility seriously;
- (g) Ms Storm also pointed out that Mr B's niece had confirmed that she had not received any money from him and Mr B remained consistent in his story throughout the investigation which was that money had gone missing and Ms Holo'ia had admitted taking it.

Key aspects of Mr B's version of events were supported by the evidence they had obtained, for example, the rent situation which supported Mr B's statement that Ms Holo'ia had told him she had stolen the money because she was behind on her rent;

- (h) A further example they held was in Mr Moana's statement in which he recounted the conversation he had had with Mr B when he told him it was good news the bank had called about the mistake but Mr B had looked confused and did not seem to understand to what Mr Moana referred.

They had considered this to be consistent with Mr B's explanation that Ms Holo'ia had said she would make up a story to tell her colleagues so that a theft did not get reported, but that he did not know what that story would be;

- (i) Ms Storm said that Mr B had never shown any signs of dishonesty or memory loss and he did not suffer from any mental health issues;
- (j) She and Ms Hamilton had not considered that they could place very much weight on the evidence they had obtained from Ms Ribbon which supported Ms Holo'ia's story that Mr B had told her he wanted to give the money to his niece to buy a car because Ms Holo'ia had met with Ms Ribbon and other members of staff before their evidence was given which opened a risk of collusion;

- (k) Mr B had been adamant that Ms Holo'ia was the only person on the staff to whom he had given his PIN number and they considered him to be very protective about his PIN number.
- (l) Mr B's family had not provided any information or knowledge about the missing \$2,000.00 despite having had ample opportunity to have done so; and
- (m) They had considered Mr B's initial lie about the amount of money taken, however they considered that his later explanation that he felt very uncomfortable about the situation as it involved a member of BUPA's staff and was embarrassed that something like that had happened to him, assuaged any fears they had as to his credibility.

[91] Ms Hamilton supported Ms Storm's view of the meeting on 8 October 2015 with Ms Holo'ia and her credibility. She said she felt the evidence they had obtained supported Mr B's version of events and not Ms Holo'ia's. In particular:

- (a) Ms Holo'ia had admitted to withdrawing the money but only after she began to believe that CCTV footage existed that would implicate her in the withdrawal. Ms Holo'ia claimed she was asked to withdraw the money for Mr B to give to his niece. However, Mr B's niece confirmed that she did not receive any money from him;
- (b) Ms Holo'ia's landlord had confirmed that she was behind in her rent and her bank statement showed that Ms Holo'ia had made a one-off catch up payment of \$750.00 a few days after the money had been withdrawn. This had occurred in the middle of her regular weekly rent payments. This was consistent with Mr B's evidence that Ms Holo'ia had admitted taking the money to him because she was behind on her rent. They had thought the chance of Mr B fabricating a lie which was consistent with this evidence was extremely unlikely;
- (c) Mr Moana's evidence as to Mr B's confusion about the explanation given for the bank call; and
- (d) There was no report or record made by Ms Holo'ia of what was a very significant withdrawal of cash. Further, rather than exposing Mr B when he allegedly told her that he intended to frame her for theft, Ms Holo'ia appeared to have gone out of her way to lie to her colleagues to prevent the matter from being handed over and investigated. She said Ms Holo'ia could not satisfactorily explain her behaviours or her motives when she was questioned.

[92] Ms Hamilton said although Ms Storm was the ultimate decision-maker she supported the decision which was to dismiss.

[93] The meeting held on 8 October 2015 had been adjourned for 40 minutes during which time Ms Storm and Ms Hamilton had carried out some further clarification issues. When the meeting resumed, they had given Ms Holo'ia a copy of the van's logbook showing that she took Mr B to his niece's house on Saturday 12 September 2015 and not the Sunday 13 September 2015. Ms Holo'ia had accepted that she was confused about the date but that she did not dispute the difference.

[94] The meeting was adjourned for a further 15 minutes.

[95] After the meeting resumed, Ms Storm announced that the preliminary decision reached was dismissal with immediate effect. She believed that the evidence supported the version of events given by Mr B and that she and Ms Hamilton had found that the evidence provided by Ms Holo'ia had many inconsistencies, with her telling them different things at the two meetings that had been held with her, and during the meeting that day, the evidence did not match with the other information gathered.

[96] Ms Hamilton had added that it seemed unlikely that Ms Holo'ia would have behaved as she did if she believed that Mr B was going to falsely accuse her of theft and rather they believed that her actions in failing to report the withdrawal and lying to her team about the call from the bank appeared to be the actions of someone who had stolen money and was attempting to cover it up while she made arrangements to pay it back.

[97] She also said that Ms Holo'ia had said that she was not behind in her rent but information from her landlord and her bank statement showed otherwise and supported Mr B's statement that she had taken the money because she was behind in her rent payments.

[98] Ms Hamilton had concluded that she and Ms Storm believed that there had been a breach of the BUPA Code of Conduct and that the conduct which breached it amounted to serious misconduct.

[99] Ms Storm had asked if Ms Holo'ia wanted time to think about the preliminary dismissal proposal and provide some feedback before there was a final decision, but Ms Holo'ia had not wished to do so. Therefore they had confirmed the decision of summary dismissal.

[100] The decision to dismiss was confirmed in a letter addressed to Ms Holo'ia dated 9 October 2015 and signed by Ms Storm. The letter was written confirmation of the decision

to dismiss for serious misconduct. It set out the findings which were advised verbally during the meeting on 8 October 2015 as being:

1. *That on Saturday, 12 September you stole \$2,000 from rehabilitation client [Mr B]’s bank account by making a cash withdrawal using his EftPos card.*
2. *That on 16 September when [Mr B] raised this issue with staff you approached him and asked him not to tell anybody about it, stating that you planned to pay him back.*
3. *That this behaviour constitutes theft and is a serious breach of the trust placed in you by [Mr B] and by BUPA.*

We have made this decision on the balance of probabilities based on the information gathered in our investigation which included your response at meetings.

[101] The letter continued by stating that it was considered to be a breach of the Employment Agreement and the BUPA Code of Conduct setting out the specific clauses of the Code of Conduct as being clauses 10.24, 10.46, 10.51 and 10.52:¹

[102] It was confirmed that the termination would take effect immediately without notice.

[103] Ms Holo’ia raised a personal grievance for unjustifiable disadvantage and unjustifiable dismissal on 22 October 2015. The parties met in mediation subsequently but this did not resolve the matter.

Determination

Was Ms Holo’ia unjustifiably disadvantaged as a result of being suspended by BUPA?

[104] Ms Holo’ia is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and 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;

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

- a. An unjustifiable action by the employer, which

¹ See paragraph [11]

- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[106] Ms Holo'ia must therefore establish that there was some unjustifiable action by BUPA which affected her terms and conditions of employment to her disadvantage.

[107] The Employment Agreement stated at clause 11.4 that BUPA could suspend on full pay an employee who was to be investigated for alleged misconduct provided it discussed the suspension proposal with the employee concerned and considered his or her views prior to confirming suspension.

[108] By signing the Employment Agreement on 31 August 2015 Ms Holo'ia confirmed that she had read and accepted the conditions as set out in it, including the suspension clause.

[109] There are several leading judgments which establish the law on justification for suspension. The Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is a requirement to apply the rules of natural justice to a decision involving suspension².

[110] Additionally there is a legislative requirement that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (1)-

- i. requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- ii. without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-*
 - 1. access to information, relevant to the continuation of the employees' employment; about the decision; and*
 - 2. an opportunity to comment on the information to their employer before the decision is made.*

² [1993] 2 ERNZ 546

[111] Ms Storm had advised Ms Holo'ia during the telephone conversation on 17 September 2015 the nature of the allegations against her and that it was a serious matter. She was advised of her right to have a support person present at the meeting to discuss the suspension proposal the following day.

[112] Ms Holo'ia was advised prior to the commencement of the meeting on 18 September 2015 that she could have a support person with her, but confirmed that she wished to proceed with the meeting.

[113] Ms Holo'ia confirmed that at the start of the meeting she had been further informed that the allegation of money stolen by Mr B involved an amount in the sum of \$2,000.00 being taken from his bank account by her having used his bank card to do so on 12 September 2015.

[114] I find that this was sufficient information regarding the nature of the allegation against her for Ms Holo'ia to be able to consider the proposal suspension. Her evidence at the Investigation Meeting was that she had agreed with the suspension proposal after being invited to discuss it. BUPA took her views into consideration when making the decision to suspend on full pay.

[115] I find that there was no unjustifiable action by BUPA in relation to the decision to suspend Ms Holo'ia that would give rise to an unjustifiable disadvantage personal grievance claim.

[116] I determine that Ms Holo'ia was not unjustifiably disadvantaged as a result of being suspended by BUPA.

Was Ms Holo'ia unjustifiably dismissed by BUPA?

[117] Ms Holo'ia was dismissed on 8 October 2015. The Test of Justification in s103A Employment Relations Act 2000 (the Act) states:

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.

[118] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. BUPA 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.

[119] In accordance with s 103A (3) of the Act the Authority must also 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 ...*

[120] The Court of Appeal in *Ritchies Transport Holdings Limited v Merennage*³ (*Ritchies*) endorsed the analysis to be applied when analysing an employment investigation as described by Judge Inglis in the Employment Court judgment⁴ in which Her Honour stated at paragraph [78]:

An employer must satisfy the Court on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. That decision must be made out not only on the evidence known to the employer at the time but that which would have been available after proper inquiry by it. An employer must base the decision to dismiss on a reasonably founded belief, honestly held, that serious misconduct has occurred

³ [2016] NZCA 191

⁴ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEMPC 198

[121] The allegation against Ms Holo'ia was of theft. It was a serious allegation. In *Honda New Zealand Ltd v New Zealand Boilermaker's Union Inc*⁵ the court observed at [78] that: "where a serious charge is the basis of justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave."

[122] BUPA was required, acting as a fair and reasonable employer, to determine whether or not it was more probable than not that serious misconduct had occurred.

[123] As observed in *Ritches*⁶, the decision to dismiss must be based upon a reasonably founded belief, honestly held, that serious misconduct had occurred.

[124] I find that BUPA carried out a fair process, in particular Ms Holo'ia was:

- advised of the allegations made by Mr B;
- provided at all stages of the supporting evidence and of the investigation and further investigatory steps carried out by BUPA;
- advised of the right to representation prior to all the meetings and availed herself of this right at the disciplinary meeting held on 8 October 2015;
- able to provide a full explanation during the disciplinary meetings held on 22 September and 8 October 2015.

[125] There was no dispute that Ms Holo'ia withdrew the \$2,000.00 from Mr B's bank account. Ms Holo'ia claimed that she had given this money to Mr B who had intended it as a gift for his niece. He had denied doing so.

[126] Therefore the decision for BUPA as a fair and reasonable employer to make was whom to believe. BUPA accordingly made initial enquiries and followed this up by further investigation after meeting with Ms Holo'ia on 22 September 2015.

[127] While Ms Holo'ia stated during the disciplinary meeting held on 8 October 2015 that Mr B may have spent the money on gifts namely: "*new shoes, magazines and food*" for Ms D, I find that this statement was considered by Ms Storm as not being a reasonable alternative explanation on the basis that Ms Holo'ia mentioned it as rumour, and it was unlikely to account for the sum of \$2,000.00 in relation to the gifts mentioned by Ms Holo'ia.

[128] The conclusion made by BUPA regarding the allegation made by Mr B was based upon the evidence that:

⁵ [1991] NZLR 392 (CA)

⁶ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEMPC 198

- Ms Holo'ia admitted to taking \$2,000.00 out of Mr B's bank account on 12 September 2015;
- Mr B said Ms Holo'ia had admitted to him that she had taken the \$2,000.00;
- Ms B said Ms Holo'ia had told him she had taken the money because she was in arrears on her rent payments. Ms Holo'ia's landlord had confirmed that Ms Holo'ia was behind on her rent payments and had made a top-up payment;
- Ms B's niece confirmed she had not received money from him;
- The expenditure Ms Holo'ia attributed to Mr B spending on Ms D would not have amounted to \$2,000.00;

[129] BUPA considered Mr B to be a credible witness whose version of events was supported by corroborating evidence, such as the rent arrears evidence as supported by Ms Holo'ia's landlord.

[130] BUPA did not consider Ms Holo'ia to be a credible witness on the basis that her explanations were inconsistent, and not supported by other evidence. She had admitted to lying to her colleagues, but had not explained why she had done so.

[131] I find that Ms Storm as the decision maker had reasonable grounds for concluding that Ms Holo'ia had committed serious misconduct.

[132] BUPA stated in the letter dated 9 October 2015 that it believed, on the balance of probability that Ms Holo'ia had committed theft, and that this was: "*a significant breach of the trust placed in you by [Mr B] and by BUPA*".

[133] Trust and confidence are an essential component of the relationship between an employer and employee. The BUPA Facility at Gisborne provided rehabilitation services: some of the clients had suffered brain injury, all were vulnerable and all were dependent upon the care provided by BUPA and its employees at the Facility.

[134] I have considered the statement in the confirmation of dismissal letter dated 9 October 2015 that BUPA considered Ms Holo'ia to have stolen \$2,000.00 from Mr B's bank account and that this behaviour constituted theft. Theft is a criminal charge to be assessed against the criminal standard of 'beyond reasonable doubt'; consequently I find it was not open to BUPA to make such a conclusion.

[135] In the Court of Appeal case *Airline Stewards & Hostesses of New Zealand IUW v Air New Zealand Ltd*⁷ the Court stated:⁸

What are the reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which the reasonable employer could safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously[,] the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable inquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

[136] BUPA stated that it had reached the conclusion that Ms Holo'ia had committed theft : *"on the balance of probabilities"* and that it found this to be: *"a significant breach of the trust placed in her by Mr B and BUPA.*

[137] I find that it was essential that BUPA could have trust in Ms Holo'ia as an employee at the Facility to act honestly and ethically, particularly with regard to a client's financial affairs. It concluded after a full and fair investigation that it no longer had that essential trust.

[138] Having considered the matter I conclude that the statement in the letter dated 9 October 2015 was poor drafting which constituted a defect in the process, but that this was minor and did not result in Ms Holo'ia being treated unfairly⁹.

[139] I determine that the decision to dismiss Ms Holo'ia was one that a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred.

[140] Even had I found the defect more than minor and the dismissal of Ms Holo'ia unjustifiable on that basis, I would have found Ms Holo'ia's level of contribution¹⁰ so significant that I would have awarded her no remedies.

⁷ [1990] 3NZLR 549

⁸ Ibid at page 555 [556]

⁹ S. 103A(5)9a) and(b) of the Act

¹⁰ S. 124 Employment Relations Act 2000

Costs

[141] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[142] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority