

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 514
3245519

BETWEEN MARTIN HOMISAN
 Applicant

AND MACKENZIE DISTRICT
 COUNCIL
 Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
 Glen Jones and Jackie Behrnes, counsel for the Respondent

Investigation Meeting: 7 and 8 May 2024 in Christchurch

Submissions received: On the day

Final information received: 27 May 2024

Determination: 27 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Homisan was employed by Mackenzie District Council (MDC). He left a piece of paper on the wall board next to his open plan desk that included words he wrote saying, “I still DON’T trust my CEO”. MDC carried out a disciplinary process. MDC decided to dismiss Mr Homisan without notice for serious misconduct on the basis that he had breached the Code of Conduct for MDC and an obligation of loyalty to MDC as a senior employee. Mr Homisan raised a grievance for unjustified dismissal. He says the procedure

and the substance of the decision were unfair and unjustified and claims compensation and lost earnings as a result.

[2] MDC denies the claims and says it was justified to summarily dismiss Mr Homisan for serious misconduct and that any fault in procedure was minor or could only attract a low level of compensation. It further says that any remedies should be reduced for contribution based on the way Mr Homisan responded and ‘doubled down’ on his explanation as to why he continued not to trust the CEO when asked about the ‘sign’.

The Authority’s investigation

[3] An investigation meeting was held across two days. I heard evidence from Mr Homisan. For MDC I heard from Ms Kereikepa, the human resources manager; Mr Dickson, the general manager whose direct report was Mr Homisan’s immediate line manager; and the Chief Executive of MDC, Ms Oosthuizen. I asked questions of each witness, and gave Mr Homisan and Mr Jones, counsel for the respondent the opportunity to do the same. I heard oral submissions from Mr Homisan and Mr Jones after the evidence was heard. At the end of the investigation meeting (and confirmed in my Directions the following day) I asked for further information from MDC and gave Mr Homisan the opportunity to comment on this. This related to confirmation of Mr Homisan’s salary at the time of termination and evidence that an invite to the first disciplinary meeting was forwarded by Mr Homisan to his line manager. That process concluded on 27 May 2024 when I received Mr Homisan’s written comment. I then reserved my written determination.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination are:

- a. Did the decision makers for MDC have an ulterior motive to dismiss Mr Homisan other than the reasons given to dismiss him?
- b. Was Mr Homisan unjustifiably dismissed because MDC did not sufficiently or fairly investigate the allegation of serious misconduct before concluding the outcome of summary dismissal for serious misconduct?
- c. If Mr Homisan was unjustifiably dismissed what if any compensation is he to receive under s 123(1)(c)(i) of the Act and for lost earnings under s 123 (1)(b) of the Act?
- d. Are any remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?
- e. Should either party contribute to the other party's costs?

Did the decision makers for MDC have an ulterior motive to dismiss Mr Homisan other than the reasons given to dismiss him?

[6] Ms Oosthuizen and Mr Dickson have both responded to claims of bias from Mr Homisan in their respective evidence. I will deal with this aspect of Mr Homisan's claim first. This is because a finding that an employer had no good reason to dismiss for the formal reasons given, but rather had an ulterior reason to exit an employee from a workplace is serious and would (if found to likely have happened) mean that I may find the dismissal was not genuine and therefore unjustified.

[7] I will consider each chronological aspect to what I understand Mr Homisan's claim is in relation to an ulterior motive.

Employment at another District Council

[8] Some of Mr Homisan's evidence and his questioning of some witnesses included his unhappiness about the way he says he was treated by Ms Oosthuizen and or Mr Dickson when each was senior to him at a prior employer, also a local body entity. I accept that Mr Homisan's employment ended with that entity when his role was made redundant as a result of a restructuring process. He confirms that he did not challenge the justification of the redundancy and explains reasons for this that include what he describes as difficulty at the

time getting representation. Mr Homisan also raises unhappiness with his pay and circumstances during the first Covid 19 lockdown with that previous employer entity and blames in particular the actions of Mr Dickson as a then manager with that entity at the time.

[9] Ms Oosthuizen and Mr Dickson both explained that redundancies with that previous entity related to cost cutting required by the elected Council and as senior public servants they were implementing this instruction. They both gave plausible straight forward explanations about this in response to Mr Homisan's claim that they both have, as far back as this time, been motivated to end his employment. Mr Homisan's oral evidence to me included he believed that Ms Oosthuizen had a 'master plan' to exit him from MDC although then under cross examination appeared to confine this intent to Mr Dickson and things going wrong at MDC including 'institutional racism' from when he arrived. In oral evidence Mr Homisan did not satisfy me in his answers to me about what he based this claim on.

[10] I found that Mr Dickson explained in a straightforward way his view about the Covid 19 lockdown situation that Mr Homisan had raised. Ms Oosthuizen gave evidence that she praised Mr Homisan for work he did in that employment to secure a significant project. It is submitted for MDC that this doesn't support Mr Homisan's position that she unreasonably did not support him in his economic development role either with that employer or with MDC. I agree.

[11] While I acknowledge the apparent very heightened concern that Mr Homisan links to his previous employment and his then redundancy I do not find he has shown that Mr Dixon and or Ms Oosthuizen carried over an ulterior motif into MDC resulting in a decision to dismiss Mr Homisan under the guise of other reasons. In short I find Mr Homisan's claims about this unproven.

Background history before the dismissal at MDC

[12] Before issues were raised with Mr Homisan about the 'sign', MDC had commenced a disciplinary process in about October 2022 that related to his use of a pool vehicle. That process remained unresolved at the time he was dismissed in June 2023. Mr Homisan refers

me to that process as being part of the reason that MDC wanted to dismiss him and draws my attention to the eight months duration of that process by the time of his dismissal and the stress he felt from it. MDC submits that the process relating to the 'sign' was completely separate and that delays were in part explained by responding to questions and delays by Mr Homisan's then representative. Mr Homisan also went on sick leave or stress leave and there was a declining by Ms Oosthuizen of paid 'wellness leave' that Mr Homisan requested at this time. Managers at MDC gave evidence that they were not aware of the issues of stress or that Mr Homisan's immediate line manager continued to report that she was monitoring the situation.

[13] Standing back from the above I find that the 'car pool use' process on the face of it appeared to have continued for a long time. I can understand that Mr Homisan like any employee may have been stressed. However, after hearing from all three managers for MDC I found nothing that supported that the commencement of the 'sign' disciplinary process was somehow part of what motivated its findings and the dismissal decision. The process each dealt with separate issues.

[14] For the sake of chronological completion here I note that as well as the above 'carpool use' disciplinary process, Mr Homisan had raised a disadvantage grievance through a different representative about that process and then later withdrew this grievance. He then in January 2023 raised a grievance himself against Ms Oosthuizen relating to the way he believed she had been treating him in his employment with a focus on her either not understanding or accepting the things he was proposing or wanting to do in relation to his role as an economic development officer for MDC (and before with the previous entity). Ms Oosthuizen's evidence includes that she took advice and did not directly participate in that process which included her not participating in an unresolved mediation the day after the 'sign' was discovered in the workplace. MDC fronted the mediation and Mr Dickson, Mr Homisan's one up manager who led the 'sign' discipline process attended that mediation. I will return to the relevance of this below when considering the justification of the dismissal claim that Mr Homisan brings.

Was Mr Homisan unjustifiably dismissed because MDC did not sufficiently or fairly investigate the allegation of serious misconduct before concluding the outcome of summary dismissal for serious misconduct?

[15] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified within the scope of what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This is an objective test and does not involve the Authority replacing what it thinks the outcome should have been. A range of responses by the employer could be found as justified under the test.¹

[16] Under s103A(3) of the Act the following factors are considered to measure an objectively reasonable employer's fair process leading to a decision to dismiss:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback

[17] In addition to the above, other factors may be considered² but procedural unfairness alone will not support an unjustified dismissal if they are only minor and did not result in an employee being treated unfairly.³

The process and outcome considered

[18] Mr Dickson emailed Mr Homisan a letter dated 1 June 203 requesting he attend a disciplinary meeting. The letter included MDC's concern about a 'sign' that Mr Homisan had allegedly written on a sheet of paper and put on a board next to his desk saying, "I still

¹ *Cowen v Idea Services Ltd* [2020] ERNZ 252 at [39]; and recently referenced and explained in *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133 at [14].

² Section 103A (4) of the Act.

³ Section 103A (5) of the Act.

DON'T trust my CEO.” The CEO referred to is Ms Oosthuizen. While Mr Homisan in the investigation meeting and in a later part of the disciplinary process challenged the decision makers as to whether he had in fact written the sign, his evidence to me was otherwise consistent in that he had written on the paper which was in fact a feedback form from a ‘trust’ exercise run by the MDC some time before. He says he found the paper in his desk when looking for material to take to the scheduled mediation the next day in relation to the grievance he had raised against Ms Oosthuizen. I accept as likely that Mr Homisan had filled in that form with the words “I still DON'T trust my CEO” but at a time prior to the day he put it on the wall next to his desk.

[19] The above letter explained that other staff had seen and commented on the ‘sign’, one stating they had seen the ‘sign’ about mid-morning on 16 May 2023. Ms Oosthuizen attached her statement. The letter indicated that Mr Homisan’s immediate manager at some time removed the sign from the wall when it was pointed out to her. Mr Dickson’s evidence included an email from that line manager to him saying she had told Mr Homisan it was ‘inappropriate’ and had removed it when brought to her attention. I find it likely the ‘sign was on the wall and noticed by others for about half a day’ having been removed by about 1.30pm.

[20] The above letter explained three things that MDC was concerned about if the conduct relating to the sign was ‘substantiated’:

- a. Under the MDC Code of Conduct:
 - Behave in a way that upholds the [MDC] Values and Reputation.
 - Treat our elected members, customers, members of the public and all other [MDC] personnel or persons associated with [MDC] with fairness, dignity, respect and courtesy.’

- b. A breach of the obligation of loyalty towards the employer, MDC. The letter explained: ‘...your conduct represents a breach of loyalty which you are obliged to show towards your employer and directly impacts the relationship of trust and confidence which we must hold in you as a senior employee.’

[21] Mr Homisan's role was a senior role as an Economic Development Officer.

[22] The above letter attached the MDC 'Code of Conduct', Mr Homisan's individual employment agreement (IEA) and the 'MDC Disciplinary Policy and Procedures Policy' (Disciplinary Procedure) and a copy of the abovementioned statement of an employee who had seen the sign.

[23] At this stage I find that MDC's letter was inviting Mr Homisan to attend a meeting with a support person or representative to allow him a process in which to give his feedback and that it had provided the material for him to do that. MDC also communicated how it considered the matter serious including the potential for summary dismissal. I find that MDC at this stage had raised its concerns about what it was concerned about, giving Mr Homisan an opportunity to engage with that.

[24] Mr Homisan then attended a meeting as invited on 9 June 2023 with Mr Dickson, Ms Kereikeepa, and for just the first part of the meeting, his line manager. Ms Kereikeepa took handwritten bullet point type notes.

[25] I pause here to comment that the above notes and the notes Ms Kereikeepa took at a second disciplinary meeting are likely the best contemporaneous evidence of what was said in those meetings. I accept the evidence of the MDC managers who say that these notes are a fair reflection of what was said in the meetings. Mr Homisan while making general reference to the accuracy of the notes has also confirmed relevant aspects of them. Mr Homisan in the second disciplinary meeting that I refer to below refers to having respect for Ms Kereikeepa in contrast to the way he considered other managers. I find nothing to show me that Mr Homisan was ever provided the notes to check as to their accuracy but had been sent them after the meetings.

[26] In the 9 June 2023 meeting Mr Homisan was referred to the material in the 1 June 2023 letter. His responses started with challenging that Mr Dickson had missed the

preliminary process in the disciplinary policy. He specifically referred to the disciplinary procedure for MDC at 2.1:

Management will investigate the case and establish the facts. If, after the investigation, management believe that it is reasonable to proceed with disciplinary procedures: the employee will be advised that the manager intends to have a disciplinary meeting with them.

[27] Mr Homisan is recorded as challenging that he had not been part of that first fact finding stage suggesting it was a 'done deal' before a disciplinary process was commenced. The notes are not verbatim and only record Mr Dickson outlining the process. Mr Homisan is recorded as then responding to Mr Dickson asking him to comment on the material he had been sent.

[28] Mr Homisan's responses are then recorded in relation to the 'sign' put up by his desk as including:

- a. that he put the paper up when he found it in the process of preparing to leave to attend a mediation in Christchurch in relation to a grievance he had raised against Ms Oosthuizen and the way she alleged she treated him; he referred to being stressed about getting a pool car to attend the mediation; he referred to having left for the mediation and 'forgot about the note'; that it was regrettable that others saw the 'note'; that it was in his personal space, a personal note on a personal work board; that he was unsure how many people saw the sign, it was not accessible from the main corridor and people would have to go out of their way to see it; that he accepted one other staff member saw it; that his immediate manager had told him she had removed it; that he questioned why Mr Dickson had not removed the sign given his 'executive' powers; that it was not a 'sign' to send a message to others but was written as feedback on a form from an earlier anonymous exercise conducted for staff at MDC.

[29] I find the above supports that Mr Homisan was given the opportunity to provide his reasons and feedback about how the paper with the words got onto the board by his desk. I find little that would be more than a minor fault in the process if MDC did not apparently

follow an initial fact finding process as per 2.1 of the disciplinary policy. My main reason is because essentially Mr Homisan did not deny the action but rather had explained how he came to put the paper on his wall.

[30] At the 9 June 2023 meeting the issue is then recorded as moving to the sentiment behind the words. When Mr Dickson asked Mr Homisan to explain “I still DON’T trust my CEO” Mr Homisan refers to the personal grievance he had already raised against Ms Oosthuizen and that it remained ‘very clear’ what this was about. He said he was unhappy about decisions Ms Oosthuizen had made in relation to the performance of his economic development role citing her decision declining him to give a presentation to an external group. Mr Homisan referred to being unwell and stressed about this. Mr Homisan expressed the view that Ms Oosthuizen knew nothing about economic development, and the area that he worked in. He explained he was unhappy with being stopped by her from working on another project and felt Ms Oosthuizen had destroyed any sense he had that she had trust and confidence in him. Mr Dickson is recorded as then asking, “Are you still holding the view that you don’t trust [the] CEO?” Mr Homisan is recorded as again referring to it all being in the ‘PG’ but then that the PG had been ‘dismissed’ and that this is ‘what MDC thinks of [his] concerns.’ Mr Homisan also refers to Ms Oosthuizen not talking to him and is recorded as saying: ‘So no reason to change [my] opinion of [Ms Oosthuizen]’. Mr Dickson replies: “Not sure what you’re saying.’

[31] Mr Homisan then refers to the way economic development decisions are made and references what appears to be matters relating to previous work with a different employer. It is recorded as ending with ‘Have little trust of CEO and Exec. ’

[32] Mr Dickson then is recorded as asking, “Might not be picking this up right are you saying that you don’t trust CEO based on past events?”

[33] Mr Homisan is then recorded as noting that Ms Oosthuizen only recently spoke to him as part of the (still live) disciplinary process relating to the pool vehicle use. He refers to this having gone on for 8 months (at the time).

[34] Mr Dickson is then recorded as asking if Mr Homisan has 'any further points?' Mr Homisan replies that he believes 'this is just another set up - way its been structured is just another behavioural pattern - it will involve all types of responses.'

[35] When Mr Dickson asked for clarity about those comments Mr Homisan is recorded as 'not going to explain.' He is then recorded as saying it was 'regrettable that others saw the paper' 'regrettable oversight' 'part of the culture question form'. I take these comments to state what had been a consistent explanation by Mr Homisan about the 'sign' in these proceedings which is that it was not a 'sign' to send a message to others but feedback to MDC when it had asked for it in the earlier exercise, albeit not submitted in that exercise. Ms Kereikeepa gave plausible oral evidence about the process of that earlier exercise which was with an externally engaged consultant and involved submitting anonymous feedback. Mr Homisan confirmed to me in his oral evidence that he had not in the end submitted the form in that exercise, rather he found it as described above before he attended the mediation for his grievance against Ms Oosthuizen.

[36] At this point in the record of the meeting Mr Dickson then asks about whether Mr Homisan understands that the matter is 'serious'. Mr Homisan is recorded as replying, 'Yes. As previous CEO said, working at MDC is not for sissies.' Mr Dickson then said, 'Need to make sure you understand.' Mr Homisan said 'Yes. Understand.' Ms Kereikeepa interjected and checked if Mr Homisan understood that the matter was serious and may have a serious outcome. Mr Homisan's response was 'There still is'. When this was questioned for clarity by Mr Dickson, Mr Homisan is recorded as explaining that things had been 'ongoing for some time, nothing's changed, it was noticed from outside, that his PG was not taken seriously, therefore how can I trust the CEO, that something was seriously wrong with the MDC and that's why people leave. He finishes with saying that people were leaving because of Mr Dickson and Ms Oosthuizen. Mr Dickson is then recorded as giving Mr Homisan some statistics about resignations for the past three years and the meeting is recorded as closing with an explanation of next steps but without recording what specifically was explained about the next steps.

[37] Standing back from the above, I observe here that MDC would have been well aware that Mr Homisan had a live disadvantage grievance with the way he claimed he was being treated in his employment by the ‘CEO’. That this remained unresolved at the time and would have also been known. Mr Dickson confirms he attended the unsuccessful mediation in respect of that grievance which would have been the day after the ‘sign’ was observed by him. MDC had also instructed its counsel to write⁴ to Mr Homisan on 6 June 2023 responding ‘formally’ to the grievance after the mediation had been unsuccessful. The letter from counsel for MDC ended with ‘I am not sure how the parties resolve this grievance, given the nature of our discussions to date, but that is for you to consider.’ I take Mr Homisan’s view about his grievance having been ‘dismissed’ by MDC to sit within this context.

[38] Despite the above overlapping process, Mr Dickson for MDC then wrote to Mr Homisan on 9 June 2023, the same day that the above meeting occurred. The letter set out:

- a. Mr Homisan was to attend another meeting on Monday 12 June 2023 at 3.00pm. The next working day after Friday 9 June 2023.
- b. Ms Oosthuizen would attend the meeting ‘in accordance with the Disciplinary Policy & Procedures (paragraph 2.4).’ That paragraph (if Mr Homisan looked it up) says that only the Chief Executive Officer could dismiss an employee.
- c. Mr Homisan was invited to bring a support person.
- d. That at the meeting, MDC would summarise the information it had collected and Mr Homisan’s responses from the 9 June 2023 meeting and that he would have an opportunity to give feedback at the meeting.
- e. The letter also included that:

You will be given the opportunity to respond and provide any further information that you wish to be considered in relation to the issue of whether you have committed an act of serious misconduct and /or the possible sanction of summary dismissal, should serious misconduct be found to have occurred. We will then adjourn the meeting so that all the facts and information available to us is considered before

⁴ Letter from counsel for MDC to Mr Homisan dated 6 June 2023 at page 75 of the Respondent’s Bundle of Documents.

determining whether serious misconduct has occurred and, if it is found that it has occurred, what sanction is appropriate.

[39] The letter goes on to explain ‘you will be required to attend a reconvened meeting, where we will inform you of the outcome and any action that may be taken.’ The letter goes on to say that if serious misconduct is found this may result in summary dismissal. The letter then goes on to say that the details of this meeting (date and time) would be provided no later than 9am, Tuesday 13 June 2023.’

12 June 2023 meeting

[40] The meeting records that Mr Homisan and direct manager (who Mr Homisan describes as his friend beyond the workplace) was present. The record of notes taken about her presence were: ‘Same as Friday (9/6/2023) Not to talk but to provide support to MH [Mr Homisan]’.

[41] Also present were Mr Dickson, Ms Kereikeepa and Ms Oosthuizen.

[42] Mr Dickson is recorded as opening with a description of the process (but no details of what that was) and then the following under ‘Facts to date’:

- Acknowledged that [Mr Homisan] had provided a copy of the sign [to MDC]
- Mr Homisan didn’t consider it a sign but a form as part of a trust exercise
- [two employees, one who made a brief statement provided to Mr Homisan] saw the sign
- [Mr Homisan] claimed still doesn’t trust his CEO
- Advised MDC that the reasons [for the above sentiment] were outlined in the PG that Mr Homisan had raised

[43] Mr Homisan then repeated that there was a lack of procedure and a difference between Mr Dickson’s understanding and that of Ms Kereikeepa. When Ms Kereikeepa asked Mr Homisan to clarify he is recorded as explaining that he was concerned because ‘this’ started as the other disciplinary procedure [the one about his pool car use that remained unresolved]; he asked ‘how do you know it was me’ in relation to the ‘sign’; he asked why if the ‘sign’ was

considered 'inappropriate' Mr Dickson did not take it down. Mr Dickson responded he did not think it appropriate to do that at the time. Mr Dickson gave oral evidence to me that he was on a break at an internal workshop when he looked from a door across at the sign which was then later removed when he next looked.

[44] Mr Homisan then is recorded as saying he felt the process was targeting him for a variety of reasons, including claims that he was being bullied and discriminated against. When Ms Oosthuizen asks why he felt that way he explained he was unhappy that she had no contact with him. She reminds him she spoke with him over a coffee on 'pink shirt day' to which he agrees. There is a further discussion based on Mr Homisan comparing the process of the other live disciplinary process against him and why his immediate manager was not able to be part of that, and why that took so long and this current process was so rapid. Answers were given that Mr Homisan's line manager was a witness in the other process and could not therefore be part of meetings, and that Mr Dickson was happy with the process for this disciplinary matter.

[45] Mr Homisan disagrees with the latter and refers to breaches of procedure and that he 'still [did] not understand the policy and what is happening here and why'. Mr Dickson's response is to say that 'we are comfortable with the procedure'. Mr Homisan says he is not and is still not clear. Mr Dickson simply repeats that he is comfortable.

[46] Mr Homisan then says he has taken advice from 'uncorrupted lawyers. Not Sth [sic] Island based. Which he says is a 'red flag' to what you are doing. He includes then 'you are well known in the public service and the way you operate.' Mr Homisan pauses to let Ms Kereikeepa 'catch up' with her note taking. Mr Homisan repeats concerns about procedure and said he 'tried best to explain' how the sign ended up on the board. Mr Homisan refers to only trusting Ms Kereikeepa.

[47] Mr Homisan is then recorded as saying to both Mr Dickson and Ms Oosthuizen that they were 'making a mockery of Public Service' and uses the phrase of 'White privileged red necks are everywhere.' Ms Oosthuizen asks for further clarification about who he says he has discussed this matter with. Mr Homisan responds by saying people 'walking with their feet'

and that he had ‘talked with external people about ... endemic issues with Council’. Mr Homisan then clarifies he is referring to discussing issues about economic development with external people and not about this particular disciplinary matter. When Ms Oosthuizen asks what Mr Homisan means when he refers to issues he has about economic development and her responses about this, Ms Kereikepa stops the discussion by saying it had got off track and refers back to Mr Dickson to lead again.

[48] Mr Dickson then simply says that they needed to adjourn the meeting to consider information and come back to Mr Homisan with a time for this. The meeting then ends at 4.05pm. Reconvening was to be the next day, after which Ms Oosthuizen gave evidence that she carefully considered the material overnight before her and decided to dismiss Mr Homisan the next day. The written reasons were his breaches of the code of conduct and the breach of a duty of loyalty bringing Ms Oosthuizen to no longer have trust and confidence in Mr Homisan to perform his role.

[49] My finding is that while MDC followed a process, the 9 June 2023 invitation to meet was for the stated purpose of giving Mr Homisan an opportunity to give feedback on whether his actions constituted serious misconduct and if so whether this warranted summary dismissal. The notes of the meeting show me that Mr Homisan did not disagree with the summary of ‘facts’ given at the start and eventually agreed that it was a fair summary. I find this consistent with his explanations in my investigation process. However, I find several problems with MDC’s process after this.

[50] Firstly, the meeting on Monday 12 June 2023 occurred the next working day after the 9 June 2023 meeting. Mr Homisan would have had little time to prepare or seek advice or support. There is considerable ambiguity about how his line manager’s support was regarded by MDC and or Mr Homisan.

[51] Secondly, nowhere in the notes of the 12 June 2023 is Mr Homisan given the opportunity to comment on whether the matter was serious misconduct and then whether the

sanction could be summary dismissal. After Ms Kereikeepa intervened in the conversation at the 12 June 2023 meeting between Ms Oosthuizen and Mr Homisan to get things 'back on track,' Mr Dickson simply closed off the meeting.

[52] Thirdly, by the time of the 12 June 2023 meeting MDC had Mr Hoimisan's feedback that the sentiment behind the 'sign' related to his view Ms Oosthuizen's way of making decisions about the work he wanted to do, and he reiterated it related to the grievance he had raised. I find a conflict here that in all the circumstances a fair and reasonable employer could have taken the step of considering the most appropriate decision maker and or investigator. It was known that Mr Homisan was unhappy and had raised a grievance about both managers albeit focused on Ms Oosthuizen. Mr Dickson had been at the mediation the day after the 'sign' appeared. Ms Oosthuizen says that she had to be at the 12 June 2023 meeting to make a decision to dismiss although had been advised she was best not to be at the mediation. While I am pointed to the policy requiring the CEO to make any decision to dismiss, it seems implausible that a public entity employer with resources could not have delegated this role in its comprehensive procedures. For example, human beings can become incapacitated suddenly. There will likely be provision if not implied to resolve such a situation by delegation.

[53] Standing back from the above I find that while MDC took steps to provide Mr Homisan the opportunity to explain his actions (relating to the 'sign') and the reasons behind them, it did not then find out what he wanted to say about MDC finding this was then a matter of serious misconduct because it related to the three breaches it had foreshadowed in its originating 1 June 2023 letter. These things were never again put to Mr Homisan either in writing or in the meeting itself on 12 June 2023. In particular this included the allegation of bringing the MDC into disrepute in the context of two employees seeing an A4 'sign' in a non-public workspace for a matter of at best a morning. Further, Mr Homisan had no opportunity to discuss sanction options. I note here that there is no record of him having any concluded disciplinary matters against him and that his live grievance against Ms Oosthuizen was unresolved at the time.

[54] I find that while I found Mr Homisan's evidence at times confusing, I find a likelihood of his genuine surprise that the matter escalated to him being dismissed within days of having the 'sign' issue raised formally with him. He explains nervousness and anxiety as an explanation for the things he said in the 12 June 2023 meeting. I will return to these things below. For now, I find a likelihood that Mr Homisan was not the recipient of a fair process by the time of the 12 June 2023 meeting and then the decision to dismiss him the next day without any further consultation about the finding of serious misconduct or the sanction taken. I find this was exacerbated by Mr Dickson and Ms Oosthuizen being involved and Mr Homisan's apparent suspicion about their motivation (even if not correct as I have found) is not an unexpected result of this. A more transparent and independent process may well have supported MDC to carry out a fair process that did not get derailed when Mr Homisan rallied against those in the room at the 12 June 2023 meeting. I do not find this failure of process minor. Mr Homisan's consistent evidence is that he did not and still does not understand the reason for his dismissal and I find this was a likely result of the process from the 12 June meeting onwards which simply did not address the core reasons (the breaches) for the dismissal with Mr Homisan. and despite considerations below about his contribution to the grievance. I find Mr Homisan was unfairly affected by this more than minor procedural defect.

[55] Based on the above I find that Mr Homisan was unjustifiably dismissed from his role. I will now consider remedies and contribution.

If Mr Homisan was unjustifiably dismissed, what if any compensation is he to receive under s 123(1)(c)(i) of the Act and for lost earnings under s 123 (1)(b) of the Act?

Compensation

[56] Mr Homisan says that the dismissal was humiliating. He describes being escorted from the work premises after having received a letter of dismissal to read in a meeting. The facts of this exit appear are not in dispute including Mr Homisan making funny winking gestures with the termination letter and throwing it down on the table. The reason given to me by MDC for having Mr Homisan leave immediately (his line manager was asked to collect his belongings

from his desk) appeared to be that there were concerns about Mr Homisan upsetting others in the workplace after he was dismissed. Certainly, Mr Homisan's loud vocalising of his views as he left the building may have supported that prediction, but the decision was made before this happened. His post dismissal behaviour could reasonably be seen as his way of reacting to the sudden dismissal. Ms Kereikeepa's evidence is that she was concerned about Mr Homisan's reactions after meeting him in the disciplinary process. Her evidence is that Mr Dickson dismissed these concerns with her because he had known Mr Homisan for some time in the workplace. Considering this, I find that I am not satisfied MDC had any good reason to have escorted Mr Homisan immediately from the workplace after getting him to read his termination letter. I accept Mr Homisan felt humiliated both on the day and likely professionally having lost a senior public facing job.

[57] Mr Homisan's claims of physical conditions caused by the dismissal include a serious issue with his eyesight deteriorating and a claim of trauma. These are serious medical descriptions and are not evidenced by medical evidence to link them to any stressful effects of the dismissal process. I accept Mr Homisan likely felt a degree of stress and anxiety following the dismissal however much of Mr Homisan's evidence here focuses on the effect of previous matters that I have found do not connect to this grievance.

[58] Based on the above, I find a fair compensation is \$8,000.00.

Lost earnings

[59] Mr Homisan claims he has been unable to work again since the dismissal. As I understand his evidence this has been primarily due to a serious eyesight condition that he explained to me in his oral evidence but (as I have already found above) I do not accept is shown to be a direct result of the dismissal. That said, I find that Mr Homisan was likely impaired from gaining further employment in the same type of senior role due to the unjustified dismissal. Accordingly, I find Mr Homisan is to be paid three months of wages from the date of his dismissal on 13th June 2023. Evidence before me is that at the time of his dismissal Mr Homisan was on a salary of \$95,917.00 gross. This equates to an award of \$23,979.25 gross of lost wages.

Are any remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?

[60] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance. If those actions require it, I must consider whether to reduce the remedies otherwise awarded.

[61] Mr Homisan participated in the disciplinary process. MDC acknowledged part of that cooperation in the 12 June 2023 meeting in that he had cooperated with providing a copy of the 'sign' that it did not have after it had been removed. However, the notes taken at the disciplinary meetings and Mr Homisan's decision to level highly personalised criticism at Mr Dickson and Ms Oosthuizen in that meeting was likely a contributory factor towards the grievance not resolving in a more positive way. I find this even with some consideration that Mr Homisan may have felt the process had got the better of him in that meeting and this may have been his own way of reacting to the situation. There was an element here of behaviour that went well beyond professional and may on a human level have caused managers in MDC to then proceed as they did. That does not justify the flaws in procedure I have found unjustified. It does however point to a reduction in remedies.

[62] The Employment Court⁵ has summarised an approach when considering this issue and made observations about past awards for contribution reducing a 50% contribution award made by the Authority to no more than 20%. In that case the employee's contribution was described by the Court as blameworthy particularly focusing on that employee's non communication with his employer about his situation. The Court noted however that he could not 'be blamed for other deficiencies in the process which worked significantly against him.'

[63] I consider Ms Homisan's contribution less serious and find that his contribution should result in a 15% reduction of the remedies that I have awarded.

Summary of outcome

⁵ *Maddigan v Director-General of Conservation* [2019] NZEmpC190 at [71] to [77].

[64] Mackenzie District Council is to pay Martin Homisan the following within 28 days from the date of this determination:

- a. Compensation of \$8,000.00 under s 123(1)(c)(i) of the Act reduced by 15% being \$6,800.00.
- b. Lost wages of \$23,979.25 gross under s 123(1)(b) of the Act reduced by 15% being \$20,382.36 gross.

Costs

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

[66] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Homisan may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MDC will then have 14 days to lodge any reply. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[67] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁶

Antoinette Baker
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1