

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 10
5342818

BETWEEN FRANCOIS EMMANUEL
 LEURQUIN
 Applicant

A N D DUNEDIN CITY COUNCIL
 Respondent

Member of Authority: David Appleton

Representatives: Jenny Beck, Counsel for Applicant
 Lesley Brook, Counsel for Respondent

Investigation Meeting 5 & 6 December 2011 at Dunedin

Submissions Received: 14 December 2011 from the Applicant
 19 December 2011 from the Respondent

Date of Determination: 16 January 2012

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed and so his personal grievance succeeds.**
- B. The Applicant's application for reinstatement fails.**
- C. The respondent must pay Mr Leurquin \$21,946 pursuant to s 123 (1) (b) of the Employment Relations Act 2000 and \$7,500 pursuant to s 123 (1) (c) of the Act.**
- D. Mr Leurquin's disadvantage claim in respect of his suspension succeeds and he is awarded \$5,000 in respect thereof.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Leurquin was employed by the respondent as a senior conservator working at the Otago Settlers' Museum ("the Museum"). Mr Leurquin was employed pursuant to an individual employment agreement.

[2] Mr Leurquin was dismissed from the employment of the respondent on 8 April 2011 after the respondent determined that he had committed serious misconduct. In particular, he was found to have breached a clause of his employment agreement relating to conflicts of interest and to have contravened several sections of the respondent's Standards for Staff Conduct.

[3] Mr Leurquin raises a personal grievance that he had been unjustifiably dismissed and that he had been unlawfully suspended on 31 March 2011 in respect of which he claims that he had suffered an unjustified disadvantage.

[4] Mr Leurquin claims the following remedies:

- (a) Reinstatement to his former position;
- (b) Payment of actual lost wages;
- (c) Compensation for stress, inconvenience, humiliation and distress in the sum of \$15,000; and
- (d) Payment of legal costs.

The facts

[5] Clause 24 of Mr Leurquin's individual employment agreement stated as follows:

24. *CONFLICT OF INTEREST*

Outside working hours the employee is at liberty to use their time as they please, provided that any out of work activity (paid/unpaid) should not injure the Council either by competing directly with the Council or by bringing the Council into disrepute.

The employee and/or their Manager are responsible for raising any situation or matter where they have a conflict of interest or have a foreseeable potential for a conflict of interest.

Where a conflict exists the employee and the Council shall discuss how the conflict of interest shall be overcome.

[6] Relevant sections of the Standards for Staff Conduct, to which Mr Leurquin was subject pursuant to his employment agreement, states that the following were non exhaustive examples of serious misconduct:

- 1 *Fraudulent activity, which includes any dishonest or misleading statement made by an employee and/or conduct or omission which the employee knows, or ought to know, to be dishonest, false or misleading or likely to result in loss to the Council, its employees or any other person or corporation dealing with or through the Council and which also includes (without limitation and by way of example only):*
 - ...
 - (h) *Using the position of employment, or knowledge gained from that position, to obtain a benefit (whether financial or otherwise) for oneself or some third party other than the Council;*
 - (i) *Accepting without authorisation (other than remuneration by way of normal salary) any personal fee, reward, gift, gratuity or subsidy, of any description, including any holiday which is paid for or subsidised by a customer, or attempting to extract same whether on account of any services provided in the normal course of duty or otherwise. However, unsolicited gifts of \$50 value or less may be accepted, provided that such gifts are not accepted from any customer on a regular basis.*
8. *Possession of a customer's property without proper authorisation or possession of another employee's, or contractor's property, without the employee's, or contractor's consent.*
12. *Acts threatening the quality of the Council's services and/or efficiency or acts considered detrimental to the safety of customers, visitors or contractors.*
- 16 *Using the employee's position of influence over a customer to cause the customer to enter into any relationship with the employee, or do any other thing which may result in any benefit (financial or otherwise) to the employee, or any relative of an employee, or which might cause a customer to suffer any loss or detriment.*

[7] On Monday, 14 February 2011, Mr Leurquin received a telephone call at his home from a member of the public, Ms F, asking if he could look at a ceramic that she had recently purchased and assess it for restoration. He arranged for Ms F to visit him at the Museum with the ceramic so that he could inspect it.

[8] On Tuesday, 15 February, Ms F met with Mr Leurquin at the Museum and he took her to the conservation laboratory with the item. The item in question was a jardinière which consisted of two pieces: a pedestal and a vase. It was the pedestal that needed repairing, having a small chip. Mr Leurquin agreed with Ms F that he could restore the pedestal, and refresh the gilding on the vase, in his own time as a private job at a cost of \$200. Both parts of the ceramic were left with the agreement of Ms F in Mr Leurquin's possession in the laboratory.

[9] Mr Leurquin's evidence to the Authority was that, when Ms F had arrived at the Museum, the pedestal had been wrapped in a blanket belonging to Ms F, and had been placed by her in a plastic laundry basket, and that the vase had been wrapped separately in newspaper and put in a cardboard box. (He had originally stated to his employer during the disciplinary investigation, and in his first brief of evidence, that the pedestal had been wrapped in newspaper).

[10] Mr Leurquin told the Authority that once he had accompanied Ms F out of the Museum, he had come back to the laboratory, had substituted Ms F's blanket for a thick blanket belonging to the Museum, and had put the pedestal back in the laundry basket and placed it in the middle of a large table at the entrance of the laboratory. He said he had then transferred the vase into a corrugated waxed box belonging to the Museum. He had then discarded the original packaging brought by Ms F (the newspaper and cardboard box) into the recycling bins in the loading bay of the Museum and had left her blanket in the loading bay until he had taken it home that evening.

[11] Mr Leurquin stated that he had originally intended to take the pedestal and vase home with him on the night of 15 February but, because of a prior commitment, had decided that that was no longer convenient and so had left it in the laboratory overnight. His evidence was that he regarded it as safer to leave the ceramic pieces in the conservation laboratory of the Museum than to leave it in his station wagon in Dunedin.

[12] When Mr Leurquin went to work the following morning, on Wednesday, 16 February, he had checked the pedestal and had done so again at 10.15am but when he returned to the laboratory at 5pm to collect it, he had found the pedestal shattered into many pieces on the floor, still wrapped in its blanket, underneath the upturned basket between the table and the shelf.

[13] At the time when Ms F had left the ceramic in Mr Leurquin's care, she had given him her contact details which Mr Leurquin had written on a sticky note attached to the pedestal. However, upon finding the pedestal broken on Wednesday afternoon, that piece of paper had gone missing.

[14] Mr Leurquin, over the following 24 hours or so, informed his manager, Linda Wigley (the Director of the Museum) of what had occurred; made inquiries of his colleagues as to how the accident may have happened and managed to trace Ms F and tell her the bad news.

[15] Ms Wigley examined the broken pedestal on the morning of Thursday, 17 February and took photographs of it on her cellphone. Ms Wigley's evidence to the Authority is that she had not been told by Mr Leurquin at that point that the vase was in a separate box. Ms Wigley states that she had had two major concerns about the situation, apart from the fact of the breakage; first, that Mr Leurquin may have put himself in a conflict of interest position by taking into the Museum's premises a piece which he had intended to restore in a private capacity and, secondly, that the ceramic had been wrapped in a blanket that did not belong to the Museum in her opinion and which therefore may have risked contaminating items in the laboratory, by way of the introduction of insects.

[16] It is worth stating at this point that the evidence was hotly contested between the parties as to whether there had been one or two blankets. Mr Leurquin's evidence is that he had wrapped the ceramic in a blanket that, like Ms F's blanket in which the ceramic had originally arrived, was also a red tartan blanket with tassels. The respondent's evidence (repeated by several witnesses) was that the Museum did not own a red tartan blanket with tassels and that the blanket in which Ms Wigley had seen the item wrapped on the morning of 17 February was therefore the original blanket belonging to Ms F.

[17] The concern of contamination was amplified in the respondent's mind when Ms Wigley had later found out that the second piece of the ceramic had apparently been stored in a box made of cardboard belonging to Ms F and which had been kept in the laboratory overnight. Ms Wigley believed that this represented a further serious risk of contamination, especially through the possible introduction of silverfish which could have infested other items in the laboratory. Mr Leurquin's evidence was, as stated, that the box had been a Museum box.

[18] Ms Wigley concluded that Mr Leurquin had apparently committed acts that could amount to serious misconduct and accordingly wrote a letter to him dated 21 February 2011 stating that Mr Leurquin had:

- a. used his position of employment and/or knowledge gained from that position to accept a private commission of conservation work from a member of the public without Dunedin City Council authorisation;
- b. taken possession of a customer's property, again without Dunedin City Council authorisation;
- c. stored the item on Dunedin City Council property in a manner potentially harmful to Dunedin City Council-owned items stored in this facility;
- d. acted in a manner that conflicted with the interests of the Dunedin City Council and which was potentially detrimental to the best interests of the organisation whilst in the employ of the Council.

[19] The letter then went on to refer to the sections of the Standards for Staff Conduct which Mr Leurquin appeared to be in breach of (1 (h), 8, and 12), and to s.41 of the DCC Officers' Collective Employment Agreement. (It was subsequently realised that Mr Leurquin was not employed under that agreement, although the terms of this section are substantially the same as the terms of clause 24 of Mr Leurquin's individual employment agreement.)

[20] Mr Leurquin was invited to an investigatory meeting to take place on 1 March 2011. Mr Leurquin was warned in the letter of 21 February that the seriousness of the allegations meant that he could be dismissed without warning.

[21] The investigation meeting was subsequently moved to 24 March, at which Mr Leurquin produced a reasonably comprehensive written statement setting out what had happened and his view of the allegations, denying each one. Key points that Mr Leurquin says he raised at that disciplinary investigation meeting (orally or in his written statement) were that:

- a. he had been led to believe that it was acceptable for him to carry out private work, as previous managers had allowed it when he had first been recruited;
- b. the risk of contamination posed by his actions was negligible;
- c. he believed that the provisions of the Staff Conduct document the respondent was referring to did not apply to this situation; and
- d. he did not believe there was a conflict of interest as he had never hidden the fact that he had been operating outside of his working hours on private work.

[22] The respondent's evidence is that Mr Leurquin had not stated in the disciplinary investigation meeting that the risk of contamination was negligible.

[23] Following the meeting on 24 March, Ms Wigley and Ms Wallace, the HR adviser, briefed Mr Graeme Hall, the General Manager for City Life for the Council, who decided to interview Ms F on the following day. Having then carried out the interview of Ms F, Mr Hall discussed the contents of it with Ms Wallace and Ms Wigley, who concluded that Ms F's statement to Mr Hall, as reported by him, showed several inconsistencies with the version of events that had been presented by Mr Leurquin.

[24] In the meantime, a further possible act of misconduct by Mr Leurquin had been reported to Ms Wigley by a colleague of his. These events led Ms Wigley to send a letter to Mr Leurquin dated 31 March. This letter contained a number of elements. These were as follows:

- (a) That Ms Wigley had contacted the two individuals to whom Mr Leurquin had reported in the past, during his employment in what had been the Dunedin City Museum's Unit of the City Council, to ask what their understanding was of the arrangements that had been in place with respect to Mr Leurquin's carrying out of private work. Ms Wigley summarised her understanding of the responses from these two former managers as confirming that *private commissions for conservation work were allowable under the terms and conditions of [the applicant's] employment but **only** when all aspects of this*

commission were conducted outside work hours and with the full knowledge and consent of the employer. [Emphasis included as in the original].

- (b) That a number of *significant inconsistencies* between what Mr Leurquin had told her and what Ms F had told Mr Hall had emerged;
- (c) That a separate but related matter had been brought to her attention by the exhibits team leader involving the conservation/restoration of an exhibit known as *Pixie Town*. The letter stated the following passages in respect of this matter:

...
I have included it here to demonstrate a pattern of behaviour constituting serious misconduct.

...
The evidence obtained during this investigation has revealed a significant breach of the trust and confidence between you as the employee, and your employer. Serious misconduct, deliberate withholding of information, and dishonest and misleading statements made by you have placed the reputation of the Otago Settlers Museum and the wider Council at serious risk. Your conduct has been found to be detrimental to the best interests of the organisation and to contravene the following sections of Dunedin City Council Standards for Staff Conduct.

The letter then went on to list the sections of the Standards for Staff Conduct that Mr Leurquin's conduct was said to have breached, namely ss.1, 1(h), 1(i), 12 and 16. Ms Wigley also stated in the letter that *these matters constitute a breach of the specific terms and conditions of your Individual Employment Agreement with DCC (Clause 24, Conflict of Interest).*

- (d) The letter went on to say that, if Mr Leurquin had anything further he wished to bring to her attention in relation to the allegations, he would be provided with an opportunity to do so by attending the HR department on 6 April 2011.
- (e) The letter concluded by suspending Mr Leurquin for seven days *to allow you time to find a suitable representative and attend this meeting.*

[25] Mr Leurquin's evidence is that the receipt of this letter had led him and his union adviser to conclude that a decision had already been made that Mr Leurquin had committed serious misconduct, and that the purpose of the meeting on 6 April was merely to discuss whether he should be dismissed or not. This meeting was, for an unexplained reason, postponed to Thursday 7 April 2011, and Mr Leurquin wrote a letter to Ms Wigley dated 7 April which stated in brief terms that he strongly disagreed with her conclusions of serious misconduct, deliberate withholding of information, dishonest and misleading statements; that the suspension was unjustified, and that there was no justification for dismissal in these circumstances.

[26] When he attended the meeting on 7 April, Mr Leurquin refused to elaborate on his brief letter as he believed that, on the basis of the contents of the letter of 31 March, *any argument was useless*.

[27] Ms Wigley subsequently wrote a letter to Mr Leurquin advising him that she had found him to have committed serious misconduct in the form of deliberate withholding of information and dishonest and misleading statements. He was found to have breached sections 1, 1(h), 1(i), 12 and 16 of the Standards for Staff Conduct examples of serious misconduct as well as clause 24 of his individual employment agreement. The dismissal was effective immediately. The dismissal letter did not explain how the findings had been reached, and so it was necessary in the Authority's investigation meeting to question Ms Wigley in some detail to ascertain her rationale in concluding that Mr Leurquin had committed serious misconduct by his actions.

Findings

[28] The respondent concluded that Mr Leurquin's misconduct had fallen into three categories:

- (a) Serious misconduct in respect of Mr Leurquin taking on a private commission, and actions associated with that;
- (b) Serious misconduct in respect of Mr Leurquin bringing items into the conservation laboratory which could have introduced pests, thereby risking the contamination of existing artefacts; and
- (c) Dishonesty, in respect of certain statements made by Mr Leurquin in the course of the disciplinary investigation.

Did Mr Leurquin taking on a private commission, and his associated actions, constitute serious misconduct?

[29] The respondent's finding with respect to Mr Leurquin taking on private work contained three sub-categories of misconduct. These were as follows:

- (a) That Mr Leurquin had used his position of employment to obtain a benefit for himself. (Section 1 (h) of the serious misconduct examples set out in the Standards for Staff Conduct);
- (b) That Mr Leurquin had accepted without authorisation a personal fee, reward, gift, gratuity or subsidy of any description in the course of duty. (Section 1 (i) of the serious misconduct examples set out in the Standards for Staff Conduct);
- (c) That Mr Leurquin had used his position of influence over a customer to cause a customer to enter into a relationship with him or to do any other thing which may result in any benefit to the employee. (Section 16 of the serious misconduct examples set out in the Standards for Staff Conduct);

[30] Mr Leurquin had given evidence that he had never received a formal explanation of the terms of the Standards for Staff Conduct prior to him meeting with Ms F. In addition, there appeared to be no explanation of the meaning of the sections relating to serious misconduct in the Standards for Staff Conduct, or elsewhere. For the reasons I give below, it is my view that it was not reasonable for the respondent to have concluded that Mr Leurquin's actions in taking on a private commission constituted breaches of the sections relating to serious misconduct in the Standards for Staff Conduct and clause 24 of his individual employment agreement.

Section 1 (h) of the serious misconduct examples set out in the Standards for Staff Conduct

[31] With respect to the first allegation, that Mr Leurquin had used his position of employment to obtain a benefit, Mr Leurquin had submitted in his written statement produced at the 24 March disciplinary investigation meeting that he had not been in breach of section 1 (h) because:

- a. he had not gained any knowledge of conservation by working at the Museum,
- b. he had not been using his position to attract external work;
- c. there had been no real financial benefit in the operation that was going to cost Ms F \$200; and
- d. he had not been running a business but had been providing a service to the community which had brought kudos to the Museum, not the other way round.

[32] Whilst Ms Wigley appeared to accept that Ms F had contacted Mr Leurquin at his home, and had obtained his name from a pottery shop in Dunedin rather than through the Museum, it was Ms Wigley's view that it was Mr Leurquin's act of taking the ceramic onto Museum premises and entering into an agreement with Ms F on those premises to carry out paid work that put him in breach of section 1(h) of the serious misconduct examples set out in the Standards for Staff Conduct.

[33] However, taking into account the plain words of section 1(h), the mischief it appears to address is the prevention of an employee of the respondent misusing his or her position, *qua* employee of the council, to gain a benefit. An example might be if Mr Leurquin had advertised himself as a conservator of the Museum in order to enhance his reputation and thereby attract private work, or had known of a need for some conservation work to be done through his position, and had usurped the council's position by taking the work for himself. There was no evidence, however, that the respondent had concluded that either of these examples had been the case.

[34] Whilst Ms Wigley had indicated that Mr Leurquin had tried to enhance his reputation by arranging to meet Ms F on Museum premises and by taking her into the Museum laboratory, this is not the conclusion that a fair and reasonable employer could have reached. Ms F already knew of Mr Leurquin when she had called him at his home and his position at the Museum was already public knowledge. I am also satisfied that Mr Leurquin could not have reasonably understood section 1(h) to extend to the situation in question, and so could not have been aware that his actions would put him in breach of section 1 (h).

[35] I therefore find that it was not reasonable for the respondent to have concluded that Mr Leurquin had been in breach of s.1(h) of the Standards for Staff Conduct.

Section 1 (i) of the serious misconduct examples set out in the Standards for Staff Conduct

[36] With respect to s.1(i) of the Standards for Staff Conduct, (*accepting without authorisation any personal fee, reward, gift, gratuity or subsidy, of any description, including any holiday which is paid for or subsidised by a customer, or attempting to extract same whether on account of any services provided in the normal course of duty or otherwise*) Mr Leurquin had not made any written or oral submission during the 24 March meeting about him being in breach of this section, presumably because it had not been identified as a potential breach at that point by Ms Wigley in her letter of 21 February 2011.

[37] Ms Wigley explained in her evidence that she had regarded Mr Leurquin as having been in breach of this section by his making of an agreement with Ms F to carry out private work whilst he had been physically on Museum premises. However, I do not accept that it was reasonable to interpret the wording of the section as prohibiting that act or to have expected Mr Leurquin to have understood that his action would put him in breach of that section. On a plain reading of the section, it appears to be directed at preventing employees from accepting bribes.

[38] I therefore find that it was unreasonable for the respondent to have concluded that Mr Leurquin had been in breach of section 1(i) of the Standards for Staff Conduct.

Section 12 of the examples of serious misconduct

[39] Ms Wigley explained that her conclusion in relation to this section related to Mr Leurquin's risking contamination of the Museum artefacts, and so I shall deal with this below.

Section 16 of the examples of serious misconduct

[40] The respondent also found that Mr Leurquin had been in breach of section 16 of the examples of serious misconduct; namely, using the employee's position of

influence over a customer to cause the customer to enter into any relationship with the employee, or to do anything which may result in any benefit to the employee.

[41] Whilst the meaning of section 16 is relatively clear on its face, as I have already found, a fair and reasonable employer could not have concluded that Mr Leurquin in any way used his position of influence as a member of the respondent's staff to obtain a benefit from Ms F. Therefore, I do not find that it was reasonable for the respondent to have found that Mr Leurquin had been breach in this section of the serious misconduct examples set out the Standards for Staff Conduct.

Conflict of interest – clause 24 of the individual employment agreement

[42] The respondent had also found that Mr Leurquin had been in breach of s.24 of his individual employment agreement, relating to conflicts of interest. Paragraph 24 prevents an employee from carrying out any work activity which may injure the Council by competing directly with it or by bringing it into disrepute, and states that *the employee and/or their Manager are responsible for raising any situation or matter where they have a conflict of interest or have a foreseeable potential for a conflict of interest.*

[43] Mr Leurquin had made representations to the respondent in his written statement on 24 March that he did not consider himself to have been in breach of the equivalent of this clause in the collective agreement because:

- a. The amount of work activity had been limited and had not put him in competition with the respondent;
- b. He had never hidden the fact that he had been operating privately outside of his working hours;
- c. He was registered on the respondent's contractor's database and had performed (private) conservation work for the respondent in the past; and
- d. The respondent's reputation had not been brought into disrepute as the incident had not been made public and the breakage had highlighted the need for a security review in relation to the laboratory. He disclaimed responsibility for the destruction of the vase.

[44] In deciding whether it had been reasonable for the respondent to have concluded that Mr Leurquin's action has created a conflict of interest, it is necessary to examine what is meant by the clause relied upon by the respondent. Counsel for the respondent has submitted that the meaning of conflict of interest is not difficult to understand and that Mr Leurquin's duty to act in the best interests of the Museum as its Senior Conservator conflicted with his interest in securing and performing private restoration work. However, clause 24 of the individual employment agreement, upon which the respondent relied, allows an employee *to use their time as they please*, subject to the express provisos of not competing directly or bringing the council into disrepute.

[45] Counsel for the respondent also provides me with a definition of conflict of interest from the Employment Relations Authority decision in *Dodds v Secretary for Justice* (ERA Wellington, 17 December 2009, WA201/09). However, it is the meaning of clause 24 that is important, and I note that the requirement in that clause on the employee to raise *any situation or matter where they have a conflict of interest or have a foreseeable potential for a conflict of interest* comes in the second subpart of clause 24, after reference in the first subclause to not competing directly or bringing the council into disrepute. In the absence of an express definition of *conflict of interest*, it is my view that the meaning of *conflict of interest* in this clause of the individual employment agreement is properly to be read in the context of the overall clause; namely, to prevent the employee *competing directly or bringing the council into disrepute*. This is certainly what Mr Leurquin understood the clause to mean, as was evident from his written statement to the respondent on 24 March.

[46] Given this, it is then necessary to examine whether it was reasonable for the respondent to have concluded that Mr Leurquin had been in a conflict of interest situation, as defined by this clause. As the respondent obviously knew at the time of the dismissal, the Museum did not provide the same service as Mr Leurquin had intended to provide to Ms F, and therefore he could not have been reasonably regarded as having been in breach of the prohibition on directly competing.

[47] The respondent gave evidence that Mr Leurquin's actions in bringing contaminated items into the Museum could have placed the Museum in disrepute if infestation had occurred. I shall deal with this further below. However, I do not find that it was reasonable for the respondent to have concluded that Mr Leurquin's action

in accepting a commission from Ms F on the premises of the Museum, which he had intended to carry out in his own time, using his own materials outside of the respondent's premises, could in any way have brought the respondent into disrepute.

[48] The respondent gave evidence that the fact of the breakage had risked putting the respondent's reputation at risk. I find that it was not reasonable to have blamed Mr Leurquin for the breakage and believe that the respondent should have placed more weight on Mr Leurquin's representation that the risk arose from the standards of security in the laboratory at the time of the breakage. The role played by Mr Leurquin's action in bringing Ms F's item into the laboratory and storing it there was to (unwillingly) highlight those standards of security.

[49] Therefore, I do not find that it was reasonable for the respondent to have concluded that Mr Leurquin's actions in accepting a commission from Ms F on the premises of the Museum brought or risked bringing the respondent into disrepute.

[50] Once again, it is not reasonable to have expected Mr Leurquin to have understood a wider definition of conflict of interest than that which can be plainly read in the terms of clause 24 of his individual employment agreement without that having been previously explained to him. I therefore find that it was not reasonable for the respondent to have concluded that Mr Leurquin had been in breach of this clause.

A further factor

[51] Another factor to take into account in the overall fairness of the decision to dismiss Mr Leurquin arises from a report which had been prepared for the Museum by a customer advocate after Mr Leurquin's dismissal. This report made recommendations in relation to the circumstances under which staff can undertake private work and allow members of the public into work laboratories. This convinces me that, at the time of Mr Leurquin's dismissal, rules dealing with these issues had not been clearly established by the respondent, nor communicated to the staff.

[52] Therefore, as far as the allegation that Mr Leurquin's accepting of a private commission from Ms F on Museum premises is concerned, the respondent's conclusion that this action put Mr Leurquin in breach of the various aspects of the Standards for Staff Conduct and his employment agreement, and that it constituted

serious misconduct justifying dismissal is not one that a fair and reasonable employer could have reached in all the circumstances.

Was the introduction of the blanket and cardboard box into the laboratory serious misconduct?

[53] I now turn to the second major element of the respondent's finding of serious misconduct; namely, that Mr Leurquin had brought into the conservation laboratory materials from outside (a blanket and a cardboard box) which could have introduced pests into the sterile environment of the laboratory, thereby risking infestation of some of the artefacts belonging to the Museum.

[54] In Mr Leurquin's written statement to the respondent prepared for the 24 March meeting he had stated that the pedestal had been wrapped in a newspaper (which he had discarded) and that he had rewrapped it in a thick blanket used for the Museum relocation programme. When Mr Hall had spoken to Ms F, she had told him that she had brought the pedestal into the Museum wrapped in her own blanket and the vase in a separate cardboard box. Mr Leurquin had never explained his version of events about having swapped Ms F's blanket for a museum one before the respondent had dismissed him, and this only emerged in Mr Leurquin's second brief of evidence. As the respondent had not known about Mr Leurquin's assertion that he had swapped the blankets at the time of the dismissal, it is not material to my determination as to the justifiability of the dismissal to decide whether there had been one or two blankets. However, it is relevant to the issue of contribution, and I prefer the respondent's evidence that the Museum did not own a red tasselled tartan blanket similar or identical to Ms F's and so I find that Mr Leurquin had not, in fact swapped Ms F's blanket for a Museum one.

[55] As far as the cardboard box containing the vase is concerned, Ms Wigley's evidence was that she had only become aware of it (and the second piece of the ceramic) when a colleague, Claire Nodder, the collections team leader for the Museum, had told her about it on 28 February. This colleague gave evidence to the Authority that the box she had seen was a corrugated cardboard box which was not used by the Museum because it could harbour pests. I am satisfied that Ms Nodder's evidence was accurate.

[56] I believe that it had been reasonable for the respondent to have concluded at the time of the dismissal that Mr Leurquin had introduced into the sterile environment of the conservation laboratory, and retained there for over 24 hours, materials which could have contained pests, which could in turn have infested certain items in the laboratory. The question to consider next is whether this act constitutes serious misconduct justifying Mr Leurquin's dismissal.

[57] The respondent relies on section 12 of the examples of serious misconduct in the Standards for Staff Conduct in its conclusion that Mr Leurquin had committed serious misconduct. (*Acts threatening the quality of the Council's services and/or efficiency or acts considered detrimental to the safety of customers, visitors or contractors*).

[58] Applying *Angus v Ports of Auckland Limited*, [2011] NZEmpC 160 at [45] I am obliged, when deciding whether the respondent's dismissal of Mr Leurquin was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, to take into account the particular nature of the employing enterprise. The respondent ran a museum which had a serious reputation to maintain, which could have been damaged if its precious and fragile items had become infested with insects as a result of poor housekeeping by Mr Leurquin.

[59] Evidence from a conservator from the Museum, Mr Le Ber, who had 30 years experience of working as a conservator, was that, whilst Mr Leurquin introducing the blanket and box into the laboratory did present a risk in his view, different conservators had different views of these risks. He also stated that, at the time when Mr Leurquin had done this, the standards in the Museum were not as stringent as they have now become.

[60] Evidence from Ms Nodder was that Mr Leurquin had been insistent that the Museum staff were not to store things in ordinary corrugated cardboard boxes because of the risk of silverfish. She referred the Authority to the minutes of a meeting in May 2010 in which it is recorded that Mr Leurquin had referred to his concern about silverfish, moths, carpet beetles and borer being introduced through packaging.

[61] In view of this, it was reasonable for the respondent to have concluded that Mr Leurquin had an obvious appreciation of the risks and yet had knowingly introduced into the sterile environment of the conservation laboratory, and retained

there for over 24 hours, materials which could have contained pests, which could in turn have infested certain items in the laboratory. Therefore, I believe that it had been reasonable for the respondent to have concluded that Mr Leurquin had *threatened the quality of the Council's service* (section 12 of the serious misconduct examples of the Standards for Staff Conduct) and so had committed serious misconduct.

Dishonesty

[62] The final category of serious misconduct that had been found was that Mr Leurquin had been dishonest in statements that he had made to the respondent during the disciplinary investigation. The statements relied upon are as follows:

- a. Mr Leurquin had omitted to explain that he had arranged to meet Ms F at the museum, creating an impression that she had turned up without prior arrangement;
- b. Mr Leurquin had stated that Ms F had attended during his lunch time, whereas Ms F stated that she had come at a pre-arranged time of 10.30 am;
- c. Mr Leurquin had stated that Ms F had brought the pedestal wrapped in newspaper rather than a blanket;

[63] I agree that the words used by Mr Leurquin in his written statement to the respondent dated 22 March 2011 create the impression that there had been an unsolicited and unarranged visit from Ms F. If this had been a deliberate attempt to mislead his employer, Mr Leurquin would have done so, according to counsel for the respondent, in order to cause his employer to think that he had not had an opportunity to meet Ms F elsewhere. However, this would have been a clumsy attempt to mislead given that he need not have taken Ms F into the laboratory (a fact that Mr Leurquin never hid) even if her visit had been unsolicited or unarranged. On balance, therefore, I believe that the respondent's conclusion that there had been a deliberate attempt on the part of Mr Leurquin to mislead it in this respect was not a reasonable conclusion to have reached.

[64] I turn next to the issue of whether Ms F attended the Museum at 10.30 (as asserted by Ms F) or 12.30, during Mr Leurquin's lunch time, and whether Mr Leurquin's assertion that she did so at 12.30 was dishonesty. The respondent gave

the benefit of the doubt to Ms F on this issue, and having heard her evidence I do prefer her account on this point. This suggests that Mr Leurquin deliberately lied to his employer to make it believe that he had not met Ms F during working hours. However, I do not consider that he necessarily lied (as he could have been mistaken as to the time) and I take into account the fact that the timing of the meeting was not something upon which the respondent placed significant weight. Therefore, I do not believe that it was reasonable to have treated this as constituting serious misconduct.

[65] With respect to the respondent's conclusion that Mr Leurquin misled it about the pedestal being wrapped in newspaper or a blanket, I believe this to have been a genuine mistake on the part of Mr Leurquin. Whether he had introduced a blanket or newspaper from outside made little difference to the risk of contamination, and Mr Leurquin would have gained nothing from lying about this.

[66] The respondent also asserts that Mr Leurquin attempted to influence Ms F before Mr Hall could talk to her. Mr Leurquin admitted talking to Ms F but I do not consider the evidence on this point to have been sufficiently cogent to enable me to reach a conclusion that he attempted to unduly influence her.

Was dismissal justified?

[67] The dismissal having taken place after 1 April 2011, it is necessary to consider whether the respondent's dismissal of Mr Leurquin was what a fair and reasonable employer could have done at the time the dismissal occurred, pursuant to the s.103A test as amended. This provides:

(1) 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).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

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

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

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

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

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

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

(a) minor; and

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

[68] The Employment Court in *Angus* holds that the new test allows for more than one possible justifiable outcome and more than one possible justifiable methodology. *Ibid.*, at [35]. Applying the new test, I find that, as far as the substantive reasoning of the respondent was concerned, a fair and reasonable employer could have concluded that Mr Leurquin's action in introducing the blanket and box into the laboratory justified his dismissal. However, I am also obliged to consider the procedural fairness of the dismissal (paragraph 26 of *Angus*).

[69] As far as procedural fairness is concerned, Ms Wigley's letter of 31 March to Mr Leurquin left much to be desired in two respects:

- (a) The summary of the advice that Ms Wigley had received from the two previous managers of Mr Leurquin with respect to the work that he could carry out was materially misrepresented by Ms Wigley in her letter to Mr Leurquin dated 31 March 2011. The two emails from those managers put before the Authority did not state, as claimed by Ms Wigley in her letter, that primary commissions for conservation work were allowable *only when all aspects of this commission were conducted outside of work hours and with the full knowledge and consent of the employer*. Neither email stated that *all aspects* of the

commission had to be conducted outside work hours, and neither said anything about the *full knowledge and consent of the employer* having to be obtained. The emphasis that had been placed on these statements by Ms Wigley (by way of emboldened text) was strongly misleading.

- (b) The second aspect of the letter that caused me concern was its presentation of the findings with respect to the Pixie Town exhibit as having been proven before the disciplinary meeting had taken place. This was despite the fact that this letter had been the very first occasion that the allegation relating to Pixie Town had ever been put to Mr Leurquin. Therefore, it is not in the least surprising that Mr Leurquin and his Trade Union adviser had concluded prior to the meeting on 7 April that decisions had already been made that Mr Leurquin had committed serious misconduct. This is especially so when they would have been aware that Ms Wigley was in receipt of advice from the council's own professional HR Adviser (who, according to evidence put before the Authority, drafted the letter signed by Ms Wigley).

[70] Ideally, Mr Leurquin would have used that meeting of 7 April to have defended himself and explained his position in greater detail. Ms Wigley gave evidence that, if he had, it may have persuaded her not to have dismissed him. However, I find that the letter of 31 March was written so as to reasonably convince Mr Leurquin and his adviser that a decision had already been made that he had committed serious conduct and, therefore, that there was little to be gained from him explaining himself. On Ms Wigley's evidence, therefore, Mr Leurquin was deprived of a chance to possibly persuade her that he should not have been dismissed because of the effect of the 31 March letter.

[71] In summary, the letter of 31 March 2011 had been written in such a way as to cause Mr Leurquin reasonably to believe that a decision had already been reached, so that he had been discouraged from participating fully in the process. Therefore, taking into account the Authority's power to *consider any other factors it thinks appropriate* under s. 103A (4), I believe that the letter actively caused procedural unfairness, and was not a letter that a fair and reasonable employer could have

written. I am satisfied that this defect was more than just a minor one and that it did result in the employee being treated unfairly.

[72] Therefore, taking this factor into account, I believe in all the circumstances that Mr Leurquin's dismissal was unjustified.

The suspension

[73] Mr Leurquin has claimed a disadvantage for having been suspended. Section 103(1)(b) of the Employment Relations Act 2000 provides that a personal grievance includes a grievance that *the employee's employment, or 1 or more conditions of 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.*

[74] Mr Leurquin was suspended prior to the amendments to the Act that took effect on 1 April 2011. Therefore, Section 103A of the Act as it was enacted prior to 1 April 2011, is relevant. This provided that *for the purposes of section 103(1)(a) and (b), the question of whether an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time theaction occurred.*

[75] The rationale for the suspension stated in Ms Wigley's letter of 31 March 2011 referred to above was that the suspension was to give time to Mr Leurquin to enable him to prepare for the forthcoming disciplinary meeting. Evidence given at the Authority's investigation meeting was that the respondent also wanted Mr Leurquin to take the matter seriously and that the respondent had been concerned how Mr Leurquin would react to a named employee who had alerted the respondent to the Pixie Town concerns. Neither of these reasons had been stated in the suspension letter.

[76] I have a number of concerns about the process of suspension. First, Mr Leurquin had not been afforded the opportunity to have representation present when he had been told he was to be suspended. Secondly, despite the respondent's evidence to the contrary, I find that Mr Leurquin had not been given any real opportunity to comment on the suspension.

[77] Finally, I find the rationale for the suspension unconvincing. No cogent evidence was provided to support the respondent's assertion that Mr Leurquin had not been taking the allegations seriously, and even if he had not been, suspension was not the appropriate step to take to instil in him a sense of the significance of the situation he was facing. Nor was it an appropriate method of allowing him time to prepare. It was up to Mr Leurquin to seek time off if that had been a concern. In addition, no evidence was provided to support the fear that Mr Leurquin would have reacted inappropriately towards the staff member whom the respondent sought to protect. I do not believe that suspension was a necessary or reasonable step for the respondent to have taken.

[78] Suspension has been long been held to be an unjustifiable disadvantage in employment – see *Canterbury Rubber Workers IUW v Dunlop (NZ) Ltd* [1983] ACJ 367. In *Sefo v Sealord Shellfish Ltd* (2008) 5 NZELR 407 the Court held that the obligation of good faith required an employer contemplating possible suspension to be active and constructive, responsive and communicative and to provide relevant information and an opportunity to comment where a decision is likely to have an adverse effect on the continuation of employment.

[79] In summary, I find that Mr Leurquin suffered an unjustified disadvantage in his employment by being subjected to an enforced suspension, and by the way that it had been imposed.

Remedies

[80] Having found that Mr Leurquin's dismissal was unjustified, I must now turn to the appropriate remedies.

Reinstatement

[81] Mr Leurquin seeks reinstatement to his position as senior conservator with the Museum. Reinstatement is no longer the primary remedy available to a successful grievant. S 125 (2) of the Employment Relations Act 2000 provides that the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[82] Ms Wigley, on behalf of the respondent, gave evidence that reinstatement was not practicable and reasonable because the Museum was in the process of redevelopment, they had two conservators well ensconced, and that the issue of the

breakage of Ms F's ceramic still caused tension, as it remained unresolved, and suspicion had been put on staff members. Whilst I do not believe that the latter point carries much weight after such a passage of time, as no evidence was proffered that Mr Leurquin had accused any staff member, I do accept that it would not be practicable or reasonable for the Museum to reinstate Mr Leurquin to his present position in view of the redevelopment programme that is in train, in which the two conservators have been playing an important role. I believe it would be unduly disruptive to dislodge one of those conservators in order to reinstate Mr Leurquin.

Lost remuneration

[83] I now turn to the question of sections 123 (b) and 128 of the Act. Mr Leurquin gave evidence that he had suffered loss of remuneration as a result of his dismissal. I am satisfied that he has made reasonable efforts to find a replacement position, including applying for jobs overseas, and that such work is very hard to come by given its specialist nature. Mr Leurquin gave evidence that he had found fixed term and small jobs, but that he was substantially out of pocket.

[84] S 128 (3) provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that provided in subsection 128 (2), namely the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[85] Mr Leurquin was dismissed on 8 April 2011, and had not found a permanent job of equivalent status as his job with the respondent by the date of the investigation meeting. It is likely that he will not do so for some time, if ever, given his age and the scarcity of such posts. Bearing in mind the principles set out in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, as applied in a string of cases, the latest of note being the Court of Appeal case of *Sam's Fukuyama Food Services Ltd v Jian Zhang* [2011] NZCA 608, the discretionary nature of the remedy under s 128 is inconsistent with any principle requiring *full* compensation to be awarded. Amongst the factors to be considered features the consideration of whether other contingencies may have resulted in termination of the employee's employment, but for the unjustifiable dismissal.

[86] Mr Leurquin was not under any warnings prior to his dismissal and no evidence was given that his performance had been giving cause for concern, or that his position would have been disestablished. Therefore, I think it reasonable to conclude that Mr Leurquin would have remained in employment, but for his dismissal, for at least another six months. Six months' gross loss of earnings is therefore the starting point for an award of compensation for lost remuneration under s 123, bringing s. 128 (3) into the equation.

Compensation for unjustifiable dismissal

[87] Mr Leurquin gave evidence of the effect upon him of being dismissed. Whilst a part of his stress had no doubt been caused by the mysterious breakage of the ceramic in the laboratory, for which the employer cannot be blamed, I am satisfied that Mr Leurquin suffered humiliation, loss of dignity, and injury to feelings which were of a reasonably significant nature directly as a result of his unjustified dismissal.

[88] Taking these factors into account, I find that compensation under S123 (1) (c) in the sum of \$15,000 is an appropriate sum.

Contribution

[89] S 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[90] I have found that Mr Leurquin kept in the Museum Ms F's blanket and cardboard box risking contamination of the Museum's artefacts, despite his own advice to his staff of the risks of infestation by pests, which the respondent was entitled to find amounted to serious misconduct. I have also found that Mr Leurquin misled his employer with respect of the time when he met Ms F. These factors carry a reasonable element of blameworthiness.

[91] Taking these factors into account, I believe that it is appropriate to reduce the awards under s 123 (1) (b) and (c) by 50%.

Compensation for the unjustified suspension

[92] I believe that Mr Leurquin suffered an unjustified disadvantage arising both out of the fact of his suspension, and also the way it was effected, that justifies a separate award under s 123 (1) (c) of the Act. I set this at \$5,000. I do not believe that this sum should be reduced pursuant to s 124 of the Act as Mr Leurquin did not contribute in any way to the unjustified suspension.

Summary

[93] I find that:

- a. Mr Leurquin was unjustifiably dismissed;
- b. Mr Leurquin was unjustifiably disadvantaged by being suspended;
- c. Mr Leurquin should not be reinstated;
- d. The respondent should pay Mr Leurquin the sum of \$21,946, comprising 6 months' lost salary less 50%;
- e. The respondent should pay Mr Leurquin the sum of \$7,500 pursuant to s 123 (1) (c) of the Act in respect of the unjustifiable dismissal;
- f. The respondent should pay Mr Leurquin the sum of \$5,000 pursuant to s 123 (1) (c) of the Act in respect of the unjustifiable suspension.

Costs

[94] Mr Leurquin has applied for legal aid, and costs are reserved pending notification to Mr Leurquin whether his application has been successful. Once he has been so notified, his counsel is to advise counsel for the respondent and the Authority without delay of the outcome of his application. Any claim for costs by Mr Leurquin should be made by lodging and serving a memorandum within 28 days of the date of this determination. The respondent will have a further 14 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority