

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 131
5405590

BETWEEN KESHNI MALA
 Applicant

AND ACCIDENT COMPENSATION
 CORPORATION
 Respondent

Member of Authority: P R Stapp

Representatives: Barbara Buckett, Counsel for Applicant
 Susan Hornsby-Geluk, Counsel for Respondent

Investigation Meeting: 21 and 22 February 2013 and 2 August 2013 at
 Wellington

Written Submissions
Received by: 20 September 2013 (including a copy of an affidavit
 dated 20 September 2013 from the applicant and
 received on 1 October 2013)

Date of Determination: 21 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Keshni Mala alleges that she was unjustifiably suspended and dismissed from her employment with the Accident Compensation Corporation (“ACC”) where the ACC delegations of authority may have not been applied properly. The suspension and dismissal relate to an incident involving a complaint from a Hawkes Bay client that Ms Mala (located in Wellington), disclosed by email ACC confidential client information, and that she deliberately chose not to declare the disclosure because of her fear of the consequences. Ms Mala denies any wrong doing.

[2] The ACC says:

- i. That its decision followed a fair and proper process in deciding to first suspend Ms Mala, and second to summarily dismiss her for being dishonest.
- ii. That it gave Ms Mala an adequate opportunity to respond to the allegations against her before a final decision was made.
- iii. That it considered that the allegations against Ms Mala were sufficiently supported by the evidence.
- iv. That it considered that the allegations against Ms Mala were sufficiently serious involving dishonesty to justify dismissal.

[3] Ms Mala is seeking reinstatement, compensation for hurt and humiliation and lost wages and lost benefits (including costs) and full costs for the Authority's investigation. These have been added to since the statement of problem, and in final submissions she has claimed future lost earnings and special damages for costs. ACC has denied all Ms Mala's claims.

[4] The application initially was made for interim reinstatement, but abandoned by the applicant when substantive investigation meeting dates were made available. This suited the parties because of their unavailability at the time and readiness for a full investigation meeting to be held later.

[5] This matter has been substantially delayed due to arrangements needed by the applicant for the attendance of Mr Daniel Richards, (the area leader) to be cross examined, and for submissions (including written submissions) that followed sometime later, and also included an affidavit being submitted from Ms Mala after the investigation meeting held on 2 August 2013.

Issues

[6] The following issues are to be determined:

- a. Could a fair and reasonable employer in all the circumstances have suspended and summarily dismissed Ms Mala from her employment with ACC? What was she dismissed for and what did ACC rely on?

- b. Would the outcomes have been any different if the appropriate delegations were properly applied?
- c. If Ms Mala has a personal grievance is it reasonable and practicable to reinstate her?

The facts

(i) The background

[7] Ms Mala was first employed by ACC in 2008. From that date she held a number of roles. Her most recent role at the time of her dismissal was that of a case coordinator.

[8] ACC has clear protocols in place requiring immediate notification of any potential privacy breaches. ACC operates an environment where privacy breaches need to be self-reported by employees. It treats privacy breaches seriously, but of equal importance it works with employees to ensure that they do not reoccur. In addition, delegations are required for suspension and dismissal.

[9] Ms Mala was employed at ACC's short term claims centre in Wellington. She was managed by a team manager at the centre, Ms Rebecca Reid. The manager of the centre was Mr Warwick Thorn. The reporting lines involved contact with the ACC's Peoples Services branch in Wellington, particularly Ms Dellvinia Clarke (Dell Clarke), senior Peoples Services Consultant. The General Manager Claims Management, Ms Denise Cosgrove, delegated authority for any suspension and dismissal to Mr Daniel Richards, the Central Area Leader Claims Management. Subsequently Ms Cosgrove delegated Mr Thorn to undertake the investigation/disciplinary process, and he was sub-delegated to have authority for any suspension and dismissal, if required, and subject to approval.

(ii) The Privacy Breach Incidents and Complaints

[10] On 28 August 2012 Ms Mala sent by email private information to one of ACC's clients ("J")¹ located in the Hawkes Bay (the first disclosure/the "J" disclosure). ACC did not know about the matter until a complaint was made by a person acting on behalf of "J" to the Minister's, and I will comment on this again shortly. The private information held details about other ACC clients. Ms Mala's action was made by taking a screenshot of her computer screen when she had more than one window open and attaching the screenshot to an email to "J". The screenshot included information about other clients in the windows. On receiving the email attaching the information that clearly did

¹ The names of ACC's clients have been withheld from publication because the clients have not been involved in the Authority's investigation.

not relate to her there was a telephone call between “J” and Ms Mala and that “J” informed her that she did not know what to do with the email and that it did not look like the email was for her. Ms Mala sent the same email to “J” a second time. The information that ACC later became aware of was that ‘J’ alleged that Ms Mala told “J” that the emails were not for her and that she should “*just delete them, dear*”. “J” sent the emails back to Ms Mala. Ms Mala denies saying “*just delete them, dear*” and that she knew then that she had sent the information.

[11] Ms Mala says that she did not know that there had been a privacy breach, involving other clients’ information, had occurred until it was brought to Ms Mala’s attention by ACC. Thus she relied upon the disclosure being an accident and/or mistake.

[12] Ms Mala did not at any point bring the privacy breach and/or the incident to the attention of her manager (or privacy champion). Ms Mala did not file any of the emails in ACC’s document management system. She did create a file note of the phone call with “J” as required by ACC. The file note is not complete about what occurred. This is a fault of Mala’s, I hold. Ms Mala accepted that ACC expected all correspondence to be filed and all phone calls to be fully documented in the system.

[13] Upon the matter being brought to the attention of ACC and an investigation getting underway ACC became aware of another incident of Ms Mala “*accidentally*”² sending information to the wrong email address (the second disclosure/the email disclosure). Ms Mala did not know of this incident until ACC brought it to her attention and which ACC says had been notified by the person who “*mistakenly*”³ received the email. (Emphasis added)

(iii) The investigation and disciplinary process

[14] On 10 September 2012 there was a meeting between Ms Mala and her Team Manager, Ms Reid, and the Centre Manager, Mr Thorn, to discuss the privacy breach in regard to the “J” disclosure.

[15] On 12 September 2012 there was a further meeting between Ms Mala, Ms Reid and another person who was the acting centre manager in regard to the second/email disclosure. The purpose of the meeting was to provide Ms Mala with a letter of expectations in relation to privacy and

² Statement in reply from ACC

³ Statement in reply from ACC

information security to dispose of that matter. The ACC's letter of expectations dated 12 September 2012 advised Ms Mala that any repeat could give rise to disciplinary action.

[16] The focus then went on the "J" disclosure. On 26 September 2012 the Minister's Office contacted the ACC Hawkes Bay Branch Manager, Mr Jerome Churchman, in relation to the complaint that had been received from a member of the public concerning a privacy breach. The complaint was made on behalf "J". Mr Churchman advised the appropriate person and he was requested to contact "J" to discuss the breach for more details. "J" expressed significant concern about the treatment of private information and orally provided ACC with detail of her involvement in regard to the matter. Notes of the discussion were made by Mr Churchman. The originals were thrown away, but the information from "J" was put in an email by Mr Churchman for Mr Thorn. Ms Mala has a different version of what she remembers happening with "J".

[17] On 27 September 2012 ACC undertook an initial email check to confirm whether or not there was any evidence of a privacy breach having occurred.

[18] On 3 October 2012 Ms Mala was asked to meet with Mr Thorn and Ms Reid about this matter. Ms Mala was offered the opportunity to have a support person present, but she declined that opportunity. At the meeting Mr Thorn advised Ms Mala of the alleged privacy breach and invited her to a disciplinary meeting to discuss the allegations on the "J" disclosure. Ms Mala was provided with a letter setting out the allegations in writing and the procedure.

[19] Ms Mala was advised at this meeting that, due to the seriousness of the issues, the ACC was considering suspending her from her employment pending a full investigation of the allegations. She was invited to provide a response to the proposal prior to a decision being made.

[20] On 5 October 2012 Mr Thorn, Ms Reid and Ms Clarke met with Ms Mala to discuss the allegations. Ms Mala stated that she was not aware that the privacy breach had occurred, however, she did remember the particular client due to the fact that home help had been declined and she did not often decline home help.

[21] Ms Mala stated that she had rung "J" to advise of an incorrect date in the first email and then tried to talk "J" through the emails as she didn't understand them. Ms Mala stated that she asked "J" to delete the first email and said she would send another one with enlarged font. Ms Mala said that she was on the phone with "J" when she sent the second email, and that this is when the privacy

breach would have occurred. Ms Mala stated that she had asked “J” to send the two emails back to her while they were on the telephone so that Ms Mala could see what “J” was looking at.

[22] Mr Churchman was asked to contact “J” again, and there was an exchange of emails between Mr Churchman and Mr Thorn. Mr Churchman made an evaluation of “J’s” reliability. He never met Ms Mala. He contacted “J” three times for information in response to the information Mr Thorn had obtained.

[23] Prior to and at the meeting (5 October 2012) Ms Mala did not raise any concerns in regard to the ACC’s proposal to suspend her from her employment pending the outcome of a disciplinary investigation. The meeting was adjourned to enable ACC to consider the information that Ms Mala had provided. ACC decided that it needed to seek further information in order to complete the disciplinary investigation. Ms Mala was suspended on full pay during the course of the investigation. This was confirmed in writing and the reasons provided. Ms Mala took the opportunity to amend the prepared minutes of the meeting of 5 October 2012 and she made handwritten amendments to the minutes before signing them and returning them to ACC.

[24] In his evidence before the Authority Mr Richards gave different reasons from Mr Thorn and Ms Clarke for the suspension. Mr Richard’s reasons were:

- i. That he had concerns about Ms Mala’s state of mind;
- ii. That he did not have any confidence in Ms Mala;
- iii. That Ms Mala would make disclosure again; and
- iv. That Ms Mala’s suspension would be better for ACC.

[25] These reasons differed to Mr Thorn’s reasons that related to alleged misconduct. Indeed the reasons from Mr Richards seem more to do with his job as he put it in his evidence, to manage the fallout for ACC.

[26] ACC considered Ms Mala’s response and set about to obtain phone records for Ms Mala’s extension number to determine who rang first, Ms Mala or “J”.

[27] On 10 October 2012 ACC wrote to Ms Mala setting out the information collected as part of the continuing process and invited Ms Mala to a further meeting to discuss the additional questions raised by the further information. The meeting was proposed to occur on 12 October 2012. Ms Mala

requested clarification from ACC of the concerns that it had and wished to discuss in the meeting scheduled for 12 October 2012. Consequently, on 11 October 2012 ACC wrote to Ms Mala further clarifying its concerns. The letter set out the apparent inconsistencies between Ms Mala's claims and the information that ACC had. Although the meeting was scheduled for 12 October 2012, it did not take place. Ms Mala requested to seek legal representation and asked for more time to do this. ACC agreed. The significance of the 12 October meeting is that it did not involve Mr Richards even though he was meant to be the delegated decision maker.

[28] Ms Mala had no knowledge of the delegations for any suspension. It had not become an issue at that time. Mr Thorn acted as the decision-maker incorrectly under the authority that had been given to Mr Richards by Ms Cosgrove. The delegation could not be sub-delegated and this is accepted by ACC. Mr Richards kept involved although Mr Thorn was exercising the responsibility for the process and decision making.

[29] On 15 October 2012 ACC received a letter from Ms Mala's representative setting out perceived process issues and requesting information from the respondent.

[30] On 25 October 2012 ACC replied to Ms Mala's representative and set out its views in relation to the claimed process breaches and concerns and attached the request documentation.

[31] On 7 November 2012 the ACC met with Ms Mala and her representative. Ms Mala's representative requested to be allowed to record the meeting and permission was granted on the basis that a copy of the recording was to be provided to ACC. ACC alleges that Ms Mala's representative was confrontational and aggressive. At the meeting (7 November) Ms Mala could not remember the detail of the events that she had previously spoken about, and what had happened.

[32] Ms Mala told the Authority that the meeting on 7 November 2012 was most unsatisfactory. She believed ACC was not producing anything to prove that she had been dishonest. She claims that ACC did not provide all the information that had been asked for. She did as much as she could to provide information on what she had done for ACC in regard to the two emails that she sent to the client on 28 September. She accepted that she included screenshots of both her screens. She says that if the client had in fact advised her that with her first email she had included a second screenshot (which had not resulted in a privacy breach), she would not have sent her second email with the same control screen print method of copy and paste. She acknowledged that there was a privacy breach on 28 August; however, she says she did not know about it until Mr Thorn brought it to her attention on

3 October. She denies being dishonest (that she allegedly deliberately tried to cover up her action) and says that ACC chose not to believe her without having any reason to do so.

[33] Ms Mala did not respond to any further questions and claimed that she could not recall the events in sufficient detail to provide further comment. During the meeting Ms Mala's representative tried to illicit further details and clarification of the complaint and the authenticity of Mr Churchman's details about "J's" information. Nevertheless, Ms Mala agreed to take questions away and consider whether a written response would be provided.

[34] On 8 November 2012 ACC wrote to Ms Mala setting out its understanding of the 7 November 2012 meeting. The difficulties about that meeting were not alluded to, but ACC did point out Ms Mala's opportunity to respond. ACC requested Ms Mala to provide a written response if she wanted to by 9 November 2012. In addition, ACC attached the additional questions that it had wanted to put to Ms Mala at the meeting. The ACC also requested a copy of the recording that had been made at the 7 November 2012 meeting. It provided the additional documentation that had been requested to complete expected actions and requests that had been made. There was no reply to the letter and in the absence of any further comments from Ms Mala, ACC made a preliminary decision in relation to the allegations.

[35] Mr Richards, Mr Thorn and Ms Clarke met on 13 November to review the matter and for Mr Richards to keep up to date on the progress.

(iv) The outcomes

[36] On 15 November 2012 ACC wrote to Ms Mala setting out its preliminary decision in relation to the allegations against her. That letter set out ACC's preliminary view that serious misconduct had occurred and that summary dismissal was the appropriate outcome. Ms Mala was requested to make any comments on the preliminary decision by 5pm on 20 November 2012.

[37] On 20 November 2012 Ms Mala's representative wrote to ACC stating that relevant information had not been provided; timeframes in which to respond were unreasonable; and the preliminary decision was *completely illogical, fundamentally flawed, lacks detail and generally is incoherent*. Ms Mala's representative also claimed that ACC's IT system was *antiquated* and proper training had not been provided to Ms Mala in regard to the processes that she was required to follow.

[38] On 22 November 2012 ACC replied to the letter (of 20 November) stating that Ms Mala had not previously referred to the IT systems as being an issue and requesting further detail on this point. ACC extended the timeframe for response from 20 November 2012 to 23 November 2012 in order to enable Ms Mala to provide any further comment. It explained that it believed that all requested documentation had been provided and asked for any outstanding documents to be specified and again requested the tape recording taken by Ms Mala's representative at the 7 November 2012 meeting to be provided.

[39] On 22 November 2012 Ms Mala's representative wrote again to ACC referring to serious good faith issues due to the alleged destruction of official information and the treatment of Ms Mala. Ms Mala's representative referred again to ACC's *antiquated IT system* but provided no further information as to how the IT system had led to the privacy breach or had let down Ms Mala. No further detail was provided in relation to what documents Ms Mala believed had not been provided and the ACC was simply told by her to refer to earlier correspondence.

[40] ACC was confident that all requested information had been provided by 22 November 2012. The tape recording was further requested because it had not been provided.

[41] On 23 November 2012 Ms Mala's representative provided a letter to ACC setting out its response to the preliminary decision.

[42] ACC claims that Ms Mala's account of the matter was not plausible. ACC has relied upon the following:

- i. That it was hard to accept that Ms Mala did not look at the emails and that she did not think to check what was confusing "J".
- ii. That the information Ms Mala acknowledged as something that she and "J" discussed was in the email trail.
- iii. That Ms Mala's explanation that she sent the second email to enlarge the font was not credible because there was nothing in the email to enlarge.
- iv. That "J" was more consistent in recollecting the events whereas Ms Mala ended up not being able to remember.

- v. That there was no issue about Ms Mala doing her job given her length of service and good employment record.
- vi. That if it was true that Ms Mala had read the emails she would have identified the personal information in the two emails that she had sent.
- vii. That as a case officer since January 2011 Ms Mala understood the use of Microsoft Outlook.
- viii. That Ms Mala's explanation of the discussion with "J" did not accord with her note on the computer.

[43] Thus, ACC did not accept Ms Mala's explanation and concluded that she had acted dishonestly.

[44] On 29 November 2012 ACC communicated its final decision that she could not remember the events and that it was unlikely that she would have forgotten the incident with "J" in the time between meetings. Mr Thorn says that "J's" version was more plausible of the events and detail of the incident based on the information and assessment of "J" made by Mr Churchman. The decision was that Ms Mala's conduct amounted to serious misconduct and that Ms Mala would be summarily dismissed from her employment for both the disclosure and not declaring it. ACC's preliminary decision of 15 November 2012 and the final decision of 29 November 2012 fully set out ACC's reasoning for the decision.

[45] The parties have not been able to settle the matter and it falls on the Authority to make a determination.

[46] In her last affidavit dated 20 September 2013 and filed in the Authority (that has not been tested under cross examination) Ms Mala provided more information on her mitigation of loss and outlined her attempts to get work with different employers. She has confirmed that she is employed but in a far lesser role and status. She provided some details to quantify her lost wages.

Determination

[47] The law in accordance with s 103A (1) and (2) of the Act requires the Authority to assess what a fair and reasonable employer could have done in all the circumstances at the time because the suspension and dismissal occurred after 1 April 2011. In this regard I hold:

- i. That ACC could rely on taking disciplinary action when there has been a disclosure of client confidential information.
- ii. That the two incidents were separate and ACC accepted that in regard to the email incident Ms Mala's actions were *accidental* and *a mistake*. The distinguishing issue about the information she sent to "J" was that the information was sent and conversations occurred that were not documented fully by Ms Mala on the computer management system. It is common ground that there were telephone calls and information was disclosed. This action led ACC to believe that Ms Mala knew about the disclosure and did not report it properly as a deliberate action because of her fear of the consequences of disciplinary action. ACC has relied upon a number of findings to reach the conclusion that Ms Mala was not plausible with her explanation.
- iii. That ACC came to a conclusion that Ms Mala's actions were serious. As such her defence was that she did not know that she had inadvertently disclosed information. ACC could rely on the information it had received from "J" because Ms Mala failed to tell her supervisor of the problem and indeed never made a proper and full record of her involvement of any problem on the computer management system, which she should have done, at least to prudently protect herself. However the fact that she did enter some information and had made a prior mistake that had been discovered during the investigation does not mean that a fair and reasonable employer could conclude that she was covering up the disclosure of information to "J", I hold. This is because there is doubt that she did not know about the matter until it was raised with her by ACC. Indeed Mr Churchman's notes record that "J" was also confused about what had happened.
- iv. That Ms Mala's defence that ACC did not have the full notes about Mr Churchman's conversations with "J" is not fatal, but does raise some concerns about the clarity of what happened between Ms Mala and "J". The notes have not been shown to be demonstrably wrong and Ms Mala had every opportunity to respond upon getting the information. Also, Ms Mala claimed that the IT computer system was inadequate and she had not received the right amount of training. ACC's denial of this at the time has not been further developed by Ms Mala for me to reach any conclusion on any other causative feature that might explain what happened and for me not to attribute the disclosure as Ms Mala's responsibility.

- v. That ACC gave Ms Mala notice of the complaints, involved her in an investigation and as such she had the opportunity for input and comment including a preliminary decision before making a decision. The meeting on 7 November did not assist Ms Mala, and more likely than not, has nothing to do with trying to deflect any responsibility for her alleged actions other than the meeting was an unfortunate approach to dealing with the matter by Ms Mala's representative.
- vi. That ACC failed to comply with the delegations that did not permit sub-delegating responsibility. This means that Mr Richards when required to make the decisions did not do so, and left it to someone else while pursuing damage control over the matter. It is not good enough to then say that he kept an overview to correct the omission when he had delegated responsibility, I hold.

[48] The investigation and disciplinary procedure followed must be in accordance with s 103A (3) (a)-(d) of the Act. Also, the Authority has to have regard to s 103A (4) and (5) of the Act. I hold:

- i. That ACC given its resources did inform Ms Mala of the allegations and concerns, and did enquire into the allegations and investigate them. Indeed the investigation was thorough having regard to whether or not Ms Mala looked at the email on her computer screen, the email trail, enlarging the font, the reliability of "J's" information, Ms Mala's length of service and good employment record, experience and her note.
- ii. That the concerns and allegations were raised with Ms Mala.
- iii. That ACC gave Ms Mala a reasonable opportunity to respond to the concerns, including a preliminary decision before making a decision.
- iv. That ACC's attempt to genuinely consider Ms Mala's explanation before making a decision to dismiss her is affected by the approach taken by ACC with the delegations.

[49] There was a disclosure of client information made by Ms Mala to "J". Ms Mala acknowledged that client information had been sent by her to "J". She provided an explanation and has adamantly claimed that she did not know there was an issue until it was raised with her by Mr Thorn. Ms Mala and "J" had different versions of their discussions over the telephone. ACC's investigators and decision makers had no direct contact with "J". They relied on Mr Churchman's information from "J" and his emails. There was nothing put in writing by "J" and her representative.

ACC's decision that Ms Mala had been dishonest has to be weighed against another accidental mistake when she disclosed client information and that ACC never received "J's" version of events in writing. "J's" focus was clearly on bringing the disclosure to ACC's attention for it not to happen again and she did not envisage any outcome in regard to Ms Mala. ACC has closely scrutinised Ms Mala's behaviour. As a fair and reasonable employer it could have given her the benefit of the doubt that she did not deliberately try to cover up the release of the information and treated her behaviour as a matter of performance. A serious allegation of dishonesty requires a serious degree of proof. The information that ACC relied upon has to be considered with Ms Mala's response and denial of any wrong doing and this means that the standard of proof has not been met, I hold.

[50] A fair and reasonable employer could have given Ms Mala the benefit of doubt given there was a difference between her and "J" about the detail of the events; the decision that Ms Mala was not plausible was not based on sufficient evidence that met the gravity of the allegations; and that there was evidence that Ms Mala had made a mistake and accidentally released information on another occasion to support her explanation in the "J" matter. I am not satisfied that ACC has drawn a linkage between the earlier disclosure and the alleged cover up on the "J" matter when there had been prior notice of disciplinary action. I am supported in this conclusion when ACC acknowledged (i) that Ms Mala said at the time that she was not feeling well when the "J" incident occurred and has not been challenged and (ii) that Ms Mala had a good employment record. These are relevant circumstances considering the incident, I hold.

[51] Next, the process was flawed when Mr Richards failed to properly exercise his delegated authority and the delegation was wrongly sub-delegated outside the requirements to Mr Thorn, who was the investigator. Ms Mala had the right for a decision to be made at arm's length from the investigator because of the delegations and because of the credibility issues associated with Ms Mala's denial of any wrong doing and the challenge she made to Mr Churchman's notes. ACC has defended the claims in the employment relationship problem filed by Ms Mala on the basis of attempting to justify the dismissal for serious misconduct. It claims that although the delegations were not properly made and applied the outcome would not have been any different. At the time Ms Mala did not challenge the delegated authorities, until the Authority's investigation. Now it emerges that the problem relates to the failure of ACC to comply with delegations and it is claimed that the dismissal is a nullity. I hold the breach in regard to the delegations is an underlying factor and properly should have been claimed much earlier than raising it in the Authority. In the current employment relationship problem the dismissal is not a nullity because it did not involve a statutory

breach by ACC for failing to have any delegations, but was a breach of the delegations in the manual, I hold. The employment relationship problem was brought as a personal grievance claim of unjustified dismissal and unjustified disadvantage action and remedies. As such the failure to comply with delegations was important to separate the investigation and enquiry from the decision maker involving different people I hold, but I am satisfied that the decision would more likely than not, not have been any different, because of the collective involvement of the managers concerned and the approvals that were required. Although Mr Richards gave different answers to the justification of the suspension which makes it more than likely he was not in line with the approach of the group on the matter, he simply got it wrong considering the other witnesses' evidence and the documents and his interpretation of the delegations where he was wrong also. Their evidence was consistent and in accordance with the documents.

[52] The first delegated authority for suspension was not used correctly. The wrong person used it; that is Mr Thorn applied it, and not Mr Richards as required. Despite Mr Richards' evidence of his understanding of the meaning of the delegation, I hold that his understanding was not correct. The delegation applied to him in his role, not Mr Thorn under the manual requirements. I accept the plain meaning of the words of the delegation and that it was clear and unambiguous.

[53] The application of the sub-delegation of the second delegation was wrongly applied too, I hold. The delegations manual did not permit sub-delegation. Next, Ms Mala had no information on who had the authority to suspend and dismiss her under the delegations, but I hold she presumably assumed that her managers had the correct authority and responsibility.

[54] The combination of ACC not having the information in writing directly from "J" and ACC's failure to properly apply the delegations means that there is some doubt that the information has been considered objectively given Ms Mala's denial of any wrongdoing, I hold. First the only information available about "J's" recollection of the details of the telephone conversations with Ms Mala has been Mr Churchman's emails and not his original notes, which he destroyed. Second Mr Churchman reached his own conclusions about "J's" reliability on the detail of the discussions and this could only have been relied upon by Mr Thorn, because he had no contact with "J" and/or her representative, and he was the investigator and decision maker. Third, no one else had any contact with "J". Given the seriousness of the dishonesty allegation I hold that Ms Mala was denied the opportunity for a separate investigation and decision-maker in the delegation process given the size and resources available to ACC. Also she was denied an objective consideration of "J's" response.

[55] I am supported in my conclusion by Mr Richards' different reasons for Ms Mala's suspension compared with the reasons provided in writing at the time. Mr Richards' evidence was contrary to and not supported by other ACC witnesses. It is more likely than not that the more reliable evidence came from Mr Thorn, Ms Reid and Ms Clarke as to the reasoning for the suspension, which I accept. This was that the privacy breach was a serious matter and required an investigation. They did not qualify their reasons as being underpinned by what Mr Richards now says. The circumstances are also affected by Mr Richards' role to manage the damage caused by such a complaint.

[56] Ms Mala never put ACC on notice of opposing the suspension and she did not respond when she had the opportunity to discuss the suspension before the decision was made. She did not raise any alternatives at the time, and a fair and reasonable employer could suspend under the agreement. The decision to suspend related to an issue involving Ms Mala in the disclosure of information issue that could have been very serious, and that concern was put to Ms Mala to respond to. It is more than likely that Ms Mala did not respond because she believed that she had done nothing wrong and ACC's investigation would vindicate her.

[57] I hold that the suspension was justified for good cause and that the process followed was sufficient and fair to Ms Mala notwithstanding the matter of the delegated authority. Ms Mala's seems to have accepted it at the time and had the further opportunity of the investigation and disciplinary process to be heard. I hold that she was not disadvantaged to that point.

[58] However, ACC acted outside the requirements of the delegated authorities on the dismissal. Ms Mala had a reasonable expectation that an employer the size of ACC with all its management and human resources experience and capability would get its delegations correct. The outcome more likely than not would not have been any different given the contact and involvement that Mr Richards had in the investigation, the disciplinary process and the decision-making, although it was Mr Thorn who made the decision with collective input and approval. However, I am not satisfied that ACC has been able to show that Ms Mala was fairly treated by the decision maker providing an objective consideration of her position in the matter.

[59] It follows that Ms Mala has a personal grievance.

[60] It must follow that Ms Mala has significantly contributed to the personal grievance through her own fault. She did release information. She failed to properly record information about her telephone calls with "J" given the information that Mr Churchman recorded and which I accept he recorded quickly after the telephone calls with "J". There were clearly issues about what Ms Mala

did at the time. These were significant issues about care and responsibility. Her lack of knowledge and omissions about what she was doing given her experience was careless, I hold. In particular her disclosure of information twice means that it is not reasonable and practicable to reinstate her having regard to ACC's requirements. Also, it is clear that there is a lack of trust and confidence in the relationship and a significant element of animosity that makes reinstatement not reasonable and practicable.

[61] I now turn to the remedy of lost wages. I am satisfied that Ms Mala has lost wages since the date of her dismissal (29 November 2012- bundle of documents 32), there is some indication that she has attempted to mitigate her lost wages by applying for a number of jobs, but without success, and that she was available for work although she has been sick for some of the time. Indeed Ms Mala revealed at the Authority's investigation meeting on 21 and 22 February 2013 that she had not been cleared for work at that time by her medical practitioner. Her affidavit (20 September 2013) filed after the Authority's investigation meeting held on 2 August 2013 has not been tested, although clearly some of the matters occurred after the Authority's investigation meeting and relate to her claims. I am satisfied that there is still a causal link between her attempts to mitigate her loss, her illness during the time after her dismissal and obtaining a job much later and remained linked to her dismissal. I have reduced Ms Mala's loss to three months lost wages. I have assessed her contribution at 25% having regard to her carelessness with ACC's information and that there has been a conflict between Ms Mala and the information relied upon by ACC concerning the account of the events between Ms Mala and "J", and given Mr Thorn's conclusions about the sequence of telephone calls, the font size and Ms Mala's experience. Ms Mala's approach to the employment relationship problem during the disciplinary meetings was not ideal to assist her. Therefore she is entitled to 3 months wages less 25% for contribution. I leave it to the parties to calculate the amount because the evidence is simply not satisfactory for me to accurately undertake any calculation. This is not an employment relationship problem for Ms Mala to be awarded future lost earnings because she has now obtained work and has not established an entitlement to future lost earnings on the basis that she will never get any comparable work, which I am not satisfied is the case. This because there has been no independent evaluation of the matter. Simply losing wages at the level she previously had and her claim of the loss of her career based on her own opinion because of her personal grievance is not enough to establish the claim, I hold.

[62] I am not satisfied that this is a case for damages for costs given the meetings were the standard type of meetings expected in any investigation and/or disciplinary process that parties have

to meet the costs for their own representation. Indeed ACC had matters that it was entitled to raise as part of the parties' relationship and where there is no obligation to meet the costs for the employee.

[63] Ms Mala is entitled to compensation for hurt and humiliation. I assess that in the amount of \$8,000 for the hurt she says has occurred and the impact on her feelings. She has given sufficient evidence of the emotional impact on her, the financial impact and the impact on her feelings. The sum is to be reduced by 25% for contribution and blameworthy conduct.

Orders of the Authority

[64] I order ACC to pay Ms Mala:

- (1) Three months lost wages to be calculated by ACC, less 25% reduction.
- (2) \$6,000 compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000. This sum includes the 25% reduction.

Costs

[65] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority