IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 160
5331639

	BETWEEN	WILLIAM MARKS Applicant
	AND	UNIVERSITY OF AUCKLAND Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Philip Howard-Smith, Counsel for Applicant David France, Counsel for Respondent
Investigation Meeting:	1 March 2011 at Auckland
Submissions received:	10 March 2011 from Applicant and Respondent
Determination:	19 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr William Marks, claims that he has a personal grievance under s103(1)(a) of the Employment Relations Act ("the Act") in that he was unjustifiably dismissed by the Respondent, the University of Auckland ("the University"), on 17 December 2010.

[2] Mr Marks claims that the University decision to dismiss him was substantively and procedurally unfair and unjustifiable.

[3] Mr Marks further claims that his conduct did not justify dismissal.

[4] The University denies that Mr Marks was unjustifiably dismissed and claim that the dismissal of Mr Marks on the grounds of serious misconduct was

substantively and procedurally justifiable, and that the dismissal decision was a decision which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

Issues

[5] The issues for determination are:

a. Was the decision to dismiss Mr Marks a justifiable decision in accordance with the test as set out in s103A of the Employment Relations Act 2000 ("the Act").

b. If there was serious misconduct, would a fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

Background Facts

[6] Mr Marks commenced employment as a Facilities Administrator at the University in July 2007. In this capacity his role was to provide administrative support services to maintenance operations within the University, Mr Marks had primary responsibility for administering the building compliance process.

[7] Mr Marks's duties included corrective planned maintenance of the University assets and creating an asset based data base system. He was also responsible for ensuring that building warrants of fitness and codes of compliance were up to date.

[8] Mr Marks was required to enter data on the Maximo work order system ("the Maximo system"). The Maximo system is the University's recording system for all building compliance and maintenance matters and is therefore a record of the University's building and infrastructure assets. It records the University's statutory obligations and associated compliance requirements related to buildings, plant and infrastructure.

[9] In the event of a serious incident related to maintenance building compliance the Maximo system is accessible and available to third parties such as the Department of Labour, OSH, the Ministry of Health and Auckland City Council. It is the sole database by which the University maintains its asset records.

[10] On 12 November 2010 between 9.14.20 a.m. and 9.17.17 a.m. Mr Marks, instead of correctly recording remedial work undertaken into the Maximo system, entered a letter against each corresponding column on the relevant page, which letters when taken together spelt out the words: "*FUCK YOU"*. The work undertaken which should have been entered in the relevant columns to which the objectionable letters had been assigned was unplanned corrective maintenance in the nature of the unblocking of toilets and sinks, tap repairs and similar work.

[11] At 9.34 a.m. on 12 November 2010 Mr Mackle, the Facilities Manager at Property Services, emailed a number of people of whom Mr Marks was one, to the effect that he (Mr Mackle) had discovered a large number of completed corrective work orders without any remarks being entered. This email was followed up by an email from Mr Stuart Wallace, Maintenance Service Manager Property Services, stating:"*From now on, ALL work orders MUST HAVE comments on them."* Mr Marks was one of the recipients of this email.

[12] On 29 November 2010 Mr Marks returned to work after having been at a conference in Nelson the previous week. Mr Marks's manager, Mr Paul Mealing, the Building and Plant Manager at Property Services which is part of the University, approached him during the morning and requested that Mr Marks accompany him to his office. At Mr Mealing's office Mr Marks was provided with a letter outlining the allegations against him and asking that he attend a meeting to consider whether suspending him was an appropriate action during the investigation process, and also with a printout of the entries containing the letters "*FUCK YOU",* and the guidelines for Information and Communications Technology ("ICT") Acceptable Policy. Mr Mealing informed Mr Marks he was able to take the rest of the day off work.

[13] The allegations as stated in the letter were:

> *On 12th November 2010 you were given a reasonable directive regarding the correct entering of comments or failure reports for work orders that have been completed in the Maximo system. This was following previous reminders to Facilities Administrators. A report from the Maximo system has shown a number of failure reports that were not correctly entered by yourself on 12th November following this directive. It is alleged that you failed to comply with departmental procedures and that you failed to comply with a reasonable directive as you did not add comments to these work orders.*
>
> *Letters that were entered in the Maximo system by yourself on 12th November against these work orders appear to purposefully spell out a phrase that is considered objectionable. It is further alleged that this behaviour constitutes a failure to meet the ICT Acceptable Use Policy.*

[14] On 30 November 2010 Mr Marks attended a meeting with Mr Mealing, Mr Mackle, Facilities Manager at Property Services, and Ms Kate Hayes, a Human Resources Advisor at the University. Mr Marks did not have representation at the meeting although he had been advised in the letter of 29 November 2010 that he could do so. The purpose of the meeting was to address the issue of whether suspension was an appropriate action during the investigation process.

[15] After consideration had been given to Mr Marks's response, the University decided that Mr Marks be suspended on full pay pending an investigation.

[16] The next day Mr Marks received a letter dated 30 November 2010. The letter repeated the allegations which had been outlined in the letter dated 29 November 2010, and invited Mr Marks to a preliminary investigation meeting to be held on 1 December 2010. Mr Marks was advised that he was entitled to have representation at the meeting.

[17] The preliminary investigation meeting was in fact held on 2 December 2010. Present at the meeting were Mr Mealing, Mr Mackle and Ms Hayes. Mr Marks was again unrepresented. At the meeting Mr Marks acknowledged that he was responsible for the entries, apologised, offered to correct them and gave his assurance that he would not make such entries again.

[18] After consideration of Mr Marks's response, the University decided to proceed with the disciplinary investigation. Mr Marks was notified of this decision by letter dated 3 December 2010, which requested that he attend a disciplinary meeting on 7 December 2010.

[19] Attached to the letter was a copy of Mr Marks's employment agreement, and further copies of the relevant Maximo entries and the ICT Acceptable Use Policy. The letter advised that the University regarded the matter as very serious, was treating it as serious misconduct, and advised Mr Marks that termination of his employment was a possible outcome of the disciplinary hearing.

[20] The disciplinary meeting was held on 7 December 2010. Present at the meeting were Mr Mealing, Mr Mackle and Ms Hayes. Mr Marks was again unrepresented and confirmed that he was happy to proceed with the meeting without representation.

[21] At the disciplinary meeting on 7 December 2010 Mr Marks was shown an email dated 24 November 2010 which had been sent to Mr Mealing by Mr Kevin Wood, another employee at the University. The email made reference to the letter 'C' having been entered by Mr Marks in the Maximo system, but also made adverse references to Mr Marks's: "*general negative and offensive attitude*".

[22] Mr Marks objected to not having been provided with a copy of the email earlier and Mr Mealing, Mr Mackle and Ms Hayes therefore adjourned the meeting to allow Mr Marks an opportunity to consider the contents of the email and to make a response.

[23] Mr Marks's response following the adjournment was that he regarded the email as being in the nature of "*an ambush*" in that it constituted further allegations of misconduct by him which had not been raised at the earlier meeting.

[24] Mr Marks was requested to make a response to the allegations previously advised to him. Mr Marks again apologised and offered to amend the relevant entries. The meeting concluded with Mr Mackle advising Mr Marks that his response would be considered and that he should go home in the interim.

[25] Later that same day Mr Marks was telephoned by Mr Mackle who advised Mr Marks that he wanted a fuller response about Mr Wood's email and that he would be receiving a letter confirming this. Mr Marks received an email with an attached letter later that day.

[26] The letter assured Mr Marks that the University wanted to: "*ensure that you have a reasonable opportunity to provide a considered response to this documentation before any decision regarding the outcome of the disciplinary meeting is made*". Mr Mackle requested in his email that Mr Marks respond by the following day.

[27] On 7 December 2010 Mr Marks emailed Mr Mackle and requested a copy of his last performance review.

[28] The next day, 8 December 2010, Mr Marks emailed Mr Mackle, acknowledged that Mr Mackle had wanted a prompt response in relation to Mr Wood's email, but advised that as he had had no prior knowledge of the allegations contained in Mr Wood's email, he wanted to seek legal advice.

[29] Mr Mackle's emailed response dated 8 December 2010 stated: "*…I want to stress that we have referred Kevin's email to you because it refers to the letter "C" being entered by you in a completed work order. This is the focus of the disciplinary process*". Attached to the email was Mr Marks's last Evolve performance and Development Review Form ("the Performance Review Form").

[30] On 9 December 2010 Mr Marks wrote to the University setting out his response to the allegations in detail. In the letter Mr Marks pointed out that:

- his performance had been rated as '3' on his last Performance Review Form;
- he did not believe his conduct was so serious as to constitute serious misconduct as it: "*was not directed at anyone personally and would not have been available to the general public in the normal run of events.";*

- at the time, he had been under stress;

- he had at the investigation meeting on 2 December 2010 acknowledged his actions, offered an apology and to rectify the records, and assured the University it would not happen again;

- by raising the email from Mr Woods at the disciplinary meeting, the University was in breach of the principles of Natural Justice outlined in the University Disciplinary Procedures by: "*not explaining to me from the beginning the origins of the allegations against me and giving me an opportunity to defend myself I believe that you have not behaved in a fair manner towards me. It appears to me that these allegations may have had some influence or bearing on the decision to summarily suspend me.";*

- he accepted fault for his initial conduct; and

- he refuted the allegations in Mr Wood's email concerning his attitude.

[31] On 13 December 2010 Mr Mackle emailed Mr Marks with an attached letter. In the letter the University refuted a number of the statements made by Mr Marks in his letter of 9 December 2010 as being inaccurate and set out the steps which had been followed in the investigation process in some detail. In relation to the email from Mr Woods, the University repeated that it still sought Mr Marks response to the comments in the email pertaining to the entry of the letter 'C', but agreed that the behavioural issues raised in Mr Wood's email should be addressed in an informal context by Mr Mealing and dealt with separately to the investigation into the data entry allegations. The letter concluded by asking Mr Marks to provide a response in writing by 15 December 2010.

[32] Mr Marks sent his second letter on 14 December 2010. In the letter Mr Marks reiterated that he did not attempt to justify his entries into the system and that he had already accepted his wrong-doing. Mr Marks then proceeded to outline matters the University ought to take into consideration when considering the appropriate

outcome. These were firstly pressure at work due to a colleague being absent which had lead to what was a one-off incident which would not be repeated; and that dismissal was not the appropriate penalty.

[33] In support of this latter contention Mr Marks made two observations:

- First: that while he had not completed the remarks column correctly to identify if the problems had been dealt with, it was obvious that they had been as the next column on the Maximo system identified the time and date when the work had been completed;

- Second: that the entry Mr Marks had made into the Maximo system was 'in house' and not available for the general public to read, not directed at any specific person, the entries were not often read and if they were, this was by property service staff, generally supervisors.

[34] The letter concluded with Mr Marks's statement that he was going to enrol in an anger management course, and since the University disciplinary procedures provided for appropriate training and support for improving conduct or performance, that these might be an appropriate accompaniment to the anger management course.

[35] On 16 December 2010 Mr Marks attended a reconvened disciplinary meeting. Present at the meeting were Mr Mealing, Mr Mackle and Ms Hayes. It was confirmed that the University regarded Mr Marks's behaviour as serious misconduct and in breach of the ITC Acceptable Use policy, and Mr Marks was given a further opportunity to offer an explanation.

[36] Later that day Mr Mackle emailed Mr Marks a letter which stated that, having considered Mr Marks's explanation, termination of his employment was the appropriate outcome. Prior to confirming this as a final decision, Mr Mackle offered Mr Marks the opportunity to provide a response on the proposed penalty.

[37] The following day Mr Marks received a letter terminating his employment. In the letter Mr Mackle referred to the entries on the Maximo system as having been made by Mr Marks following a number of reminders to Facilities Administrators

about the need to add comments to work orders and [was] a failure to follow a reasonable directive. Mr Mackle referred to the objectionable nature of the words the letter spelt out, adding: *"I was concerned about the compliance issues from a failure to add full comments on work orders in the Maximo system and that the information added was not acceptable"*.

[38] Mr Mackle's conclusion as outlined in the letter was that Mr Marks had not offered an explanation which had been sufficient to warrant reducing the allegations from serious misconduct, there had been a serious breach of trust and confidence, and instant dismissal was warranted.

Determination

Was the decision to dismiss Mr Marks a justifiable decision?

[39] Section 103A Employment Relations Act 2000 sets out the test of justification:

> *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 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 the dismissal or action occurred"*

[40] The decisions must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*[1] stated:

> *"That is not to say that the employer's conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny…"*

[1] [1990] 1 NZILR 35

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[41] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

Substantive Justification

[42] The dismissal letter of 17 December 2010 stated:

> *ON 12th November a number of failure reports were not correctly entered by you into the Maximo system. This was following a number of previous reminders to Facilities Administrators about the need to add comments to these work orders and a failure to follow a reasonable directive. The letters that were entered in the Maximo system by yourself against these work orders on 12th November appeared to purposefully spell out a phrase that is considered objectionable "FUCK YOU". I was concerned about compliance issues from a failure to add full comments to work orders and that the information added was not acceptable. This behaviour was also viewed as a failure to meet the ICT Acceptable Policy use.*

Mr Mackle concluded that these actions had resulted in a serious breach of trust and confidence such that a decision to summarily dismiss had been reached.

[43] As it is a record of the University's building and infrastructure assets, the Maximo system was important to the University. The fact that Mr Marks made inappropriate entries into the Maximo system is not in dispute. The nature of the entries when viewed in their entirety was offensive and consequently breached the University's ICT Acceptable Policy which states: *"…the use of ICT must not be illegal and must be of the highest ethical standards"*. The issue is whether the University acted as a fair and reasonable employer in the circumstances by summarily dismissing Mr Marks.

[44] Mr Marks was primarily responsible for the corrective planned maintenance of the University assets. Mr Mackle's evidence was that the assets within Mr Mark's area of responsibility totalled some 5,000. The data entry Mr Marks usually made on

the Maximo system was in connection with compliance issues related to the corrective planned maintenance of these assets.

[45] At the time the inappropriate letters were entered into the Maximo system Mr Marks was providing cover for a colleague, whose data entry primary responsibility was in connection with unplanned maintenance. The entries against which the letters were entered were all related to basic plumbing jobs.

[46] Mr Marks said he was feeling stressed and had mentioned this to Mr Mealing. While Mr Mealing had agreed that Mr Marks had mentioned his feeling stressed to him, he regarded it as a casual remark as it was made when he was passing Mr Mark's desk, and in his opinion if Mr Marks had been under serious pressure, he believed Mr Marks would have made an appointment to see him in his office.

[47] Mr Mealing agreed when questioned by the Authority that Mr Marks had a lot of work to do, and that his response to Mr Marks when the matter was raised was that Mr Marks needed to prioritise his work. Mr Mealing did not accept that pressure of work was sufficient to lead to Mr Marks feeling stressed.

[48] Mr Marks said that at the time he was making the entries he was feeling stressed and frustrated because he was engaged on what he regarded as data entry of a trivial nature when he had more important work connected with building compliance matters to undertake. Mr Marks described his actions to the Authority as "*a flash of anger at the time"*.

[49] The University view of the situation was that Mr Marks held a position of some responsibility; he was responsible for building compliance matters and as such acted as a 'gatekeeper' for the University in entering date on the Maximo system. .Mr Mackle stated several times at the Investigation Meeting that he believed there had been "*a deliberate corruption of the Maximo system"* and agreed when questioned that he regarded Mr Marks's actions as an intentional action intended to undermine the integrity of the Maximo system.

[50] The entries were made intentionally. The entries were made in connection with unplanned corrective maintenance work. Although these were accessible to third

parties, they did not relate to building compliance matters directly and would not have compromised the University's ability to obtain a Building Warrant of Fitness or have breached compliance with various statutory bodies. All parties accepted that it was extremely unlikely that a third party would have accessed the entries at any time, although there was always a possibility, albeit remote, that this may occur.

[51] Mr Mackle agreed at the investigation meeting that the failure to add a comment to a work order, whilst it would be a disciplinary matter, would not be serious misconduct meriting summary dismissal. The letters entered made an objectionable phrase and the use of such language in the workplace is to be regretted, but unfortunately is not unusual in what are euphemistically described as 'robust' working environments. I note that Mr Marks's working environment has been described as being of such a nature; moreover I consider it significant that the phrase was not directed at any specific person.

[52] I accept that Mr Marks's actions were wrong. However I do not accept that they were of such magnitude that a fair and reasonable employer would have regarded them as serious misconduct as going to the root of the employment agreement and rendering it impossible to continue the employment relationship, thus meriting summary dismissal.

[53] My view is reinforced by the fact that at the investigation meeting Mr Mackle agreed that the failure to add a comment to a work order, whilst it would be a disciplinary matter, would not be serious misconduct meriting summary dismissal. I find that the fair and reasonable employer would have taken into consideration the following factors:

- That the entries related to unplanned maintenance work thus that there was only a remote likelihood that the entries would be seen by a third party;
- That the entries were not permanent and could be amended;
- That evidence that the work to which the entries related had been completed was contained on the Maximo system;

- That although the nature of the entries was offensive it was:

- Not aimed at a particular person
- Accessible by a limited number of people
- The work place was robust and the use of expletives not uncommon

- That Mr Marks when taxed with the offence:
  - had immediately admitted the offence,
  - apologised, and
  - gave his assurance that it would not be repeated.

[54] Mr Mackle differentiated between acts of 'omission' and acts of 'commission' viewing Mr Marks's acts as falling into the second category, and being intended to deliberately corrupt the Maximo system. Whilst Mr Marks's actions were deliberate, I do not accept that Mr Marks set out to deliberately corrupt the integrity of the Maximo system.

[55] Mr Marks's evidence was that he was feeling stressed and that when he had mentioned this to Mr Mealing, Mr Mealing's response had been dismissive. Mr Mark's regarded the nature of the entries he was making as '*trivial*' and I believe he felt frustrated by this when he believed he had more responsible work accumulating related to building compliance matters. The entries had been made over a short 3 minute period. They appeared inconsistent with his normal work performance, on the basis of Mr Marks's performance review 2 months earlier which had described Mr Marks's performance as at level 3, defined as: "*Competent: Demonstrates consistently good performance"*. Moreover there was no evidence that Mr Marks had disciplinary warnings against him.

[56] The University said that Mr Marks had not appeared to appreciate the serious nature of his actions, and that he had explained his actions as 'a joke'. Mr Marks said that the reason he had not altered the entries when he received the emails from Mr Mackle and Mr Wallace on 12 November 2010 was because he had forgotten about the entries.

[57] In *X v Auckland District Health Board*[2] Chief Judge Colgan referring to what appeared to be an aberrant act on the part of the plaintiff observed:

> *But, as I have already found, the plaintiff's photographic conduct probably falls into that category of human behaviour that defies rational explanation, the occasional and spectacular Zidane*[3]*' "brain explosions" of human existence."*

[58] While Mr Marks's behaviour might not quite have qualified as a "brain explosion", the fair and reasonable employer would, I find, have regarded it as not being consistent with Mr Marks's previous performance standards and taken this into consideration, rather than regarding it as a deliberate act of refusal to obey reasonable instructions and as having been entered upon as an intentional act aimed at sabotaging the Maximo system.

[59] Mr Mackle gave evidence that he had not accepted Mr Marks's apology and assurances that he would not repeat the action as genuine. I have not found any evidence that supports this conclusion, or of anything in Mr Marks's work performance or conduct, other than the unsubstantiated adverse email comments of Mr Wood's, which could have given rise to the University's concerns about trust and confidence. Mr Marks had apologised on more than one occasion, and I find the assurances that he would not repeat his actions to have been underpinned by his offer to undertake an anger management course at his own expense.

Procedural Fairness

[60] One of the three major principles applicable to the disciplinary process is a duty to inform the employee of the allegations against him or her. There were two areas in which Mr Marks appeared not to have been fully informed of the allegations against him.

[61] The first was the allegation that Mr Marks had deliberated corrupted the Maximo system through an intentional act intended to undermine the integrity of the system. The initial letter from Mr Mealing on 30 November 2010 makes reference to the failure to follow a reasonable directive regarding the correct entering of data and

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[2] [2007] ERNZ 66
[3] Italy v France, FIFA World Cup Final, Germany July 2006

to purposefully entering the objectionable phrase, but there is no reference to a deliberate act of corruption.

[62] I find that the allegations as advised to Mr Marks did not address the specific allegation of deliberate corruption of the Maximo system, an act of sabotage. I find that had Mr Marks been made aware that deliberate corruption of the Maximo system, in effect sabotage, was the nature of the allegation against him, his explanation may have addressed that area and he may have availed himself of the opportunity to have representation throughout the process, and the conclusion reached by the University may have been different. However I find that he was not made aware of the real nature of the allegation against him and that this was a major flaw in the process.

[63] The second area was the introduction of the email from Mr Woods at the disciplinary meeting on 7 December 2010. The email was dated 24 November 2010 and thus pre-dated Mr Marks's suspension on 2 December 2010. The comments in the email were not restricted to the entering of the letter 'C' in the Maximo system but to other areas of Mr Marks's performance, alleging that Mr Marks had a *"general negative and offensive attitude"*.

[64] I find that this late introduction of the email into the proceedings was unfair to Mr Marks who should have been made aware of it from the outset, and to have been given the opportunity to provide a response prior to the decision to suspend him having been made.

[65] Although allowed time following the 7 December 2010 meeting to provide a response, this later action could not erase either the initial flaw in the process or the inference that the University had been unduly influenced by the contents when making the decision to suspend Mr Marks on 2 December 2010.

If there was serious misconduct, would the fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

[66] The University disciplinary procedures make reference to disciplinary action or dismissal decisions being made in a procedurally fair manner, citing the principles

of natural justice as a basis. Outcomes of a disciplinary meeting are stated to encompass training, counselling and an instruction to improve conduct or performance in addition to a formal warning, a final written warning or dismissal.

[67] Notwithstanding that I have found flaws in the disciplinary process, and that a fair and reasonable employer would not have regarded Mr Marks's actions as of such a magnitude that there was serious misconduct meriting summary dismissal, I have nonetheless found fault on the part of Mr Marks.

[68] Mr Marks failed to follow reasonable and lawful instructions regarding the entering of data into the Maximo system. The entries Mr Marks made were offensive in nature and whilst it was extremely unlikely that they would have been accessed by an external third party, I accept that had they been accessed, the outcome for the University would have been embarrassing, and possibly to have had serious outcomes.

[69] Further Mr Marks, although in receipt of the emails from Mr Mackle and Mr Wallace which were sent only a short time following his making of the offensive entries, failed to rectify them.

[70] A fair and reasonable employer may have, like the University, have assessed Mr Marks's actions as serious misconduct. However a fair and reasonable employer I find would have considered alternatives to dismissal as set in the University disciplinary procedures. Mr Marks had repeatedly apologised for his behaviour, offered to remedy the mischief and assured the university that there would be no repetition of his actions.

[71] Moreover Mr Marks had offered to attend an anger management course at his own expense. When questioned, Mr Marks had conceded that this might not be appropriate, but the University could have viewed the offer as underpinning Mr Marks's assurances as to his future behaviour.

[72] At the Investigation Meeting Mr Mealing had pointed out that Mr Marks was unsupervised in his position. I note that the University disciplinary processes allow in certain circumstances for demotion, redeployment or other alternatives. Mr Marks had previously performed well as indicated by his most recent performance appraisal,

demotion or redeployment to a position in which Mr Marks's work could be supervised and his skills continued to be utilised, might have been an option open to the fair and reasonable employer in what was a large department.

[73] However I find that there is no evidence that any of these alternatives to dismissal were seriously considered by the University.

[74] I determine that Mr Marks was unjustifiably dismissed from his employment with the University.

Remedies

[75] I have found that the decision by the University to dismiss Mr Marks was not a decision an employer acting fairly and reasonably would have made in all the circumstances. Mr Marks has been unjustifiably dismissed and is entitled to remedies.

Remedies

[76] Mr Marks is seeking reinstatement to his former position. The primary remedy is reinstatement. Section 125 of the Act provides for reinstatement to be ordered, wherever practicable.

[77] I do not accept that the University cannot have trust and confidence in Mr Marks on the basis that I believe it to be extremely unlikely, given his apologies and assurances as to future behaviour, that Mr Marks will reoffend.

[78] Further I believe reinstatement to be practicable given the comment in Mr Marks's performance review that Mr Marks: "*has a very good relationship with internal service divisions and external contractors and trade staff*".

[79] Mr Marks is to be reinstated to his position as Facilities Manager. This to take effect from the date of this determination.

Reimbursement of Lost Wages

[80] Mr Marks says that he tried to mitigate the effects of the loss of his employment by registering with WINZ and by applying online for temporary work, but has not supplied evidence of this. In *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*[4] Chief Judge Colgan commented that the obligations of a dismissed employee making a loss of earnings claim are as follows:

> *…dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.*

[81] In *Radius Residential Care Limited v McLeay*[5] the Employment Court observed in relation to the employee's obligation to mitigate loss that: *"The Court should not be left to speculate or guess."*

[82] Without evidence that he has done so, I am not convinced that Mr Marks made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment.

[83] In these circumstances I determine that Mr Marks receive the appropriate payment in respect of his notice period as set out in General Staff Collective Agreement currently in place in respect of Mr Marks's employment.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[84] Mr Marks is not seeking compensation.

Contribution

[85] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[86] Mr Marks contributed to the situation in which he found himself by his unacceptable actions. However Mr Marks has not sought compensation and has not been awarded lost wages.

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[4] (2009) 6 NZELR 530

[5] Unreported [2010] NZEMPC 149

[87] In these circumstances I make no order for a reduction in the remedies awarded on the basis of contributory fault.

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority