IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 207
3110072

	BETWEEN	SHONA KAY MCLAREN Applicant
	AND	LINCRAFT NZ LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Leo Wenborn, advocate for the Applicant Brian Swersky, counsel for the Respondent,
Investigation Meeting:	30 March 2021 in Christchurch
Submissions Received:	8, 15 and 30 April 2021
Date of Determination:	17 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shona McLaren was employed by Lincraft NZ Limited in Christchurch from 25 July 2019 until she was dismissed on 26 May 2020.

[2] Ms McLaren raised a personal grievance on 5 June 2020 alleging an unjustified dismissal claiming her employer had failed to carry out a fair and thorough investigation and had no substantive evidence to justify summarily dismissing her and had effected the dismissal in a procedurally unfair manner.

[3] Lincraft responded by email of the same day denying the grievance's validity.

[4] In a statement of problem filed in the Authority on 2 December 2020, Ms McLaren claimed the dismissal was unjustified on both procedural and substantive grounds.

[5] Lincraft filed a statement in reply, asserting that Ms McLaren's dismissal was carried out in a procedurally fair manner and that an investigation confirmed her conduct to be sufficiently serious to warrant summary dismissal.

[6] The parties subsequently attended mediation but the matter remained unresolved.

The Authority's investigation

[7] The investigation meeting took one day. I received written and oral evidence from Shona McLaren and for Lincraft: Jennifer Paddon, Area Manager based in Dunedin, Anthony Mizzi, National Operations Manager based in Melbourne (via Zoom), Jose Baquero, Asset Protection Manager based in Melbourne (via Zoom) and Brian Swersky, Chief Legal Officer based in Melbourne (via Zoom).

[8] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the submissions and information received from both parties and refer to them where appropriate and relevant.

Issues

[9] The issues to be decided are:

(a) Was Ms McLaren unjustifiably dismissed following a sufficiently fair and properly conduced investigation?

(b) If Lincraft's actions in dismissing Ms McLaren do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering Ms McLaren's claims for:

i. Lost wages; and

ii. Compensation under s 123(1)(c)(i) of the Act.

(c) If Ms McLaren is successful in all or any element of her personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?

(d) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[10] Ms McLaren commenced full-time employment for Lincraft in July 2019 at their Upper Riccarton store in a retail position and was promoted to supervisor in January 2020. A position arose of manager in Lincraft's Eastgate Mall store and Ms McLaren was selected on the basis that she was to be acting manager for a three month trial period commencing on 24 February 2020 pursuant to a new employment agreement on a salary of $49,000 per annum with the understanding that upon successfully completing the trial period she would be permanently appointed. Lincraft claimed the agreement was fixed term.

[11] On Thursday 5 March 2020, after returning to work from a five days' combination period of leave and not being rostered on, Ms McLaren had to attend to banking the shop's accumulated cash takings. This involved as directed after normal working hours, around 6:30 pm placing cash in six deposit bags and proceeding to a local after hours deposit banking facility. Ms McLaren described difficulties in completing the banking deposits that resulted in her banking five of the deposits and retaining one deposit bag that she says she took home overnight with the intention of placing it in the store safe the following day and banking it later. The option of immediately returning to the store and placing the money in the safe was not available as the shopping mall complex was inaccessible.

[12] Ms McLaren says that the following day, she recalled placing the money in the store safe but not banking it for a few days as the store was busy. Ms McLaren acknowledged that she failed to inform anyone of the situation at the time. Lincraft say that they have no record of the money being deposited.

[13] Mr Baquero says that as part of preparations for the Covid lockdown in early March 2020, he had to ensure that all stores banking was deposited and no cash was left on any of their premises. To this end, he emailed an employee responsible for banking reconciliations

on 26 March after he noticed a discrepancy in a banking report that there was an outstanding deposit of $746.20 not banked and he asked her to check this with the bank. The employee responded the next day indicating that after checking banking the said amount had not been banked and she suggested it be investigated. The employee contacted Ms Paddon and she approached Ms McLaren on 26 and 30 March and was assured the all accumulated banking had been completed but she could not find the deposit slip.

[14] As the Covid level 4 lockdown proceeded (25 March–27 April) Mr Baquero indicated no follow up was possible until mid-May when an email to Ms McLaren of 15 May sought clarity on the missing $746.20.

[15] Ms McLaren responded claiming all money had been banked. Mr Baquero called Ms McLaren on 19 May and asked her to go to the bank and initiate an investigation to ascertain if the money had possibly been deposited into the wrong account. Ms McLaren first said she did not follow up this request and did not get back to Mr Baquero but she did search her home and the office. In other oral evidence Ms McLaren claimed she did not have time to investigate with the bank and later asked Ms Paddon to do it believing she had no authority herself.

[16] Ms Paddon says she was then approached by the bank on 22 May and was told CCTV footage had been reviewed for the evening of 5 March that showed Ms McLaren depositing bags and walking away with one visible deposit bag. Ms Paddon then spoke to Ms McLaren and was advised by her that she now recalled leaving the bank with one deposit bag and taking it home intending to take it to the store the next day.

[17] Mr Bacquero also recalled a telephone call from Ms McLaren on 22 May in which she recounted taking the deposit bag home and then not recalling if she had left it in her car and that her daughter had taken car away so he asked her to contact her daughter and get back to him which she later did confirming the deposit bag was not in the car.

[18] Ms McLaren then emailed Mr Mizzi, Mr Baquero and Ms Paddon early on the morning of Saturday 23 May acknowledging that the bank was correct in that she had deposited the takings after hours rather than using a bank teller and that this was the first time she had done after hours banking. Ms McLaren explained that after getting flustered by

other customers whilst banking the deposits she decided to take one deposit home overnight "intending to put it in the safe" the next day. She then proceeded to state:

> I have obviously forgot about it and now it is missing, I have searched every where for it and cannot find it, I feel bad about this, In the past I have handled thousands of $$$ with out loosing one cent of it.
>
> At the time of this incident, I was under a lot of stress having had my partner pass way only weeks previous, new position at work among other things. I know there is no excuse for this and I am so sorry for my carelessness, I will repay every cent of this missing money and will be so very careful in the future.

[19] In her written evidence Ms McLaren claimed the email above was hastily written and said in oral evidence that she was confused and panicking and that "after I sent that email was when I remembered that I DID deposit that money" and that she searched for it in case she was wrong. When pressed where she thought the money was Ms McLaren responded "no idea, I thought I had banked it" and later in giving evidence Ms McLaren claimed she banked the money on 7 March.

Assessment

[20] I observe at this point, Ms McLaren did nothing immediately to clarify her email of 23 May. Objectively viewed, the email is an admission of at least, misplacing the money and it is not clear whether as she later maintained, that she returned it to the shop safe the next day by her use of the term "intending to put it in the safe".

[21] It is also clear by this point in time that Ms McLaren was fully aware of her employer's knowledge of the missing deposit and had been since 15 May and, she already had had a significant amount of time to reflect upon what she had done with the missing deposit bag. I found it less than credible that Ms McLaren could earlier suggest that she had deposited all the money in the bank after she recounted the difficulty of the evening of 5 March in some detail and how she had struggled to bank the other five deposit bags during an exercise that was her first experience of after-hours banking. It was evident by this point in time, that Ms McLaren had provided two irreconcilable explanations.

[22] Ms Paddon was then tasked with setting up a formal meeting that she did by calling Ms McLaren on the evening of 25 May indicating she would be coming up to Christchurch to attend the meeting that was to be conducted by Mr Mizzi via a telephone call from Melbourne as he could not travel due to Covid restrictions.

[23] Ms McLaren recalls that during the call from Ms Paddon, she was offered the opportunity to have a representative assist her at the meeting scheduled for the next day (Monday 26 May) and she inexplicably declined.

[24] On the meeting day, Ms McLaren went to work and Ms Paddon recalled asking her again if she wanted a support person and this offer was again declined. Ms McLaren at this point asked whether her job was in jeopardy and Ms Paddon responded by saying she did not think so, she thought it was just a formality meeting to discuss the missing money.

[25] The meeting proceeded at 9 am attended by Ms McLaren, Mr Mizzi and Ms Paddon who took notes that were not distributed and only disclosed after the matter was filed in the Authority.

[26] Ms Paddon provided both typewritten notes and her handwritten notes of the 26 May meeting (she took no notes of the earlier conversations with Ms McLaren). She acknowledged the notes were not verbatim as she had struggled to keep up with the pace of the conversation. The content of the two sets of notes was not contested apart from Ms McLaren suggesting Mr Mizzi "continually stated missing money was theft" (a point, Mr Mizzi denied saying and Ms Paddon supported his recollection of the conversation). The notes show initially Ms McLaren was asked about a support person and declined that opportunity.

[27] The handwritten notes show Ms McLaren's explanation for the missing money was in summary that she:

- didn't know what to do when she had failed to deposit the last money bag;
- had placed the cash in a calico bag she put in her handbag and taken it home;
- believed that she had put it in the safe the next day at around 7:30 -7:45 am;
- didn't notice it was missing;
- did not think to advise anyone in the company what she had done;
- was stressed in second week of the job;
- had experience of banking whilst working at Lincraft's Bush Inn store as the supervisor but not after hours banking.

[28] The typed notes were slightly more expansive and record that Mr Mizzi asked for an explanation of the contradiction between Ms McLaren's email of 23 May and her position at the meeting – Ms McLaren indicated that she remembered since writing the email that she

put the money back in the safe. It was also recorded that Mr Mizzi said that one of Lincraft's biggest concerns is the lack of communication about when Ms McLaren took the deposit bag home overnight and that he said: "Not knowing and not advising the business can be deemed as deception".

[29] A break is then recorded, with Ms Paddon noting that this was to "discuss findings" and "consider breach of policy and seriousness".

[30] Mr Mizzi's evidence is he discussed Ms McLaren's explanation briefly with Mr Swersky by telephone and communicated his belief that no satisfactory explanation had been proffered and that "the money remained missing and Lincraft policy had clearly been breached". Mr Mizzi's written evidence says "I was instructed to terminate the Applicant's employment". Mr Mizzi then recalled writing down what he was to convey (Mr Swersky said he contributed to the formulation of the message) and then calling Ms McLaren to say:

> I have spoken to the Directors of Lincraft and discussed the events. We deem this situation as serious misconduct. Unfortunately, your actions have breached the policies and trust of the business. Because it has undermined our trust and confidence in you, the business is dismissing you today.

[31] Ms Paddon's handwritten notes are in accord with the above and they record Mr Mizzi saying that he would email confirmation of the dismissal decision later that day. I find no specific reason was given for the dismissal during the meeting.

[32] Ms McLaren recalled the process of the two calls was no more than 20 minutes and that the deliberation took around 10 minutes (Mr Mizzi and Ms Paddon suggested it may have been 30 minutes in total – the notes do not record the duration of the meeting). I conclude it was a relatively brief meeting and the deliberation time given to Ms McLaren's fate was short.

[33] Mr Swersky said he was the decision-maker despite having no conversation with Ms McLaren and claimed that he had been briefed throughout the process by Mr Mizzi. Mr Swersky openly acknowledged that Lincraft could have undertaken a wider investigation but then went on to assert he did not believe anything would have changed his decision as he had hoped for a better explanation from Ms McLaren.

[34] Ms McLaren suggested that she was ambushed by Mr Mizzi. On the latter, Ms McLaren did not claim she was unaware of the purpose of the meeting or her employer's concerns but that she felt misled by Ms Paddon suggesting that she may not be dismissed – she thought she would be given a final warning and perhaps demoted which implies although not explicitly disclosed by Lincraft, that Ms McLaren was fully aware that it was a formal disciplinary meeting and prior to being told by Ms Paddon of her opinion she may not lose her job, she had the opportunity to say she wished to be represented at the meeting and could have sought a delay.

[35] I found that Ms Paddon who was not part of the decision-making process, had been generally supportive and trusting of Ms McLaren on a personal basis so she had not intended to mislead her and she was only expressing an uninformed opinion on what might happen. However, I find that this state of affairs could have been easily avoided by Lincraft setting up the meeting properly with a prior letter detailing their concerns and the findings of any investigative steps taken, what they saw as potential misconduct and why (including policies transgressed), reminding Ms McLaren of the need to obtain legal advice and crucially, warning Ms McLaren that dismissal was a potential outcome of a disciplinary meeting. I also found the timing of the meeting from indication to convening was rushed which robbed Ms McLaren of sufficient time to seek advice and reflect on her position she did not wish to be represented. However, looked at objectively, Ms McLaren presented as a mature and experienced person, capable of appreciating that she was in serious trouble if she could not account for the missing money.

[36] Mr Mizzi's dismissal letter of later the same day (2pm) was brief: "This letter confirms the termination of your employment as confirmed in our formal discussion today". Mr Mizzi had earlier instructed Ms Paddon to escort Ms McLaren off the premises in the presence of co-workers.

[37] Ms McLaren then raised a personal grievance of unjustified dismissal by letter of 5 June 2020.

[38] Although Ms McLaren's advocate did not request reasons for the dismissal pursuant to s 120 of the Act, Mr Swersky promptly responded on the same day contesting Ms McLaren's recollection of events leading up to her dismissal as set out in her grievance and he indicated the reasons for dismissal to include (in summary):

- His view that Ms McLaren had provided "5 separate and distinct explanations as to what became of the money" (without elaborating on what they were).

- That Ms McLaren offering to pay the missing money was clearly an "acknowledgment of liability".

- That due to an absence of "explanation" from Ms McLaren the matter had been referred to the Police and restitution would be sought (a position that ignored that Ms McLaren had offered restitution).

[39] Further robust correspondence ensued that I need not traverse in detail apart from noting that Mr Swersky refused to disclose the notes of the dismissal meeting claiming this was because Ms McLaren had had an "adequate opportunity to take her own notes". Mr Swersky also alluded to the dismissal being for Ms McLaren failing to understand "basic cash handling procedures and the need for accountability with respect to cash".

[40] I had to resolve disclosure issues prior to the investigation meeting by a direction notice indicating that all relevant documentation be disclosed which was not fully complied with by Lincraft until the investigation meeting and timetabled submissions.

[41] Lincraft subsequently referred the matter to the Police who did not proceed with a prosecution due to insufficient evidence being available.

Was the dismissal justified?

[42] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[43] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

(a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;

(b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;

(c) was the employee afforded a reasonable opportunity to respond to identified concerns;

(d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and

(e) any other contextual factor the Authority regards as appropriate to consider.

Resources

[44] I observe that Lincraft have no problem with resources and ongoing access to specialist HR and in-house legal advice. The company was founded in 2014 and it has over 60 stores with over 800 employees in Australia and New Zealand. [1]

[45] Given the size of the operation, Lincraft could easily have engaged a specialist investigator and sought legal assistance in New Zealand more familiar with contextual legislative requirements.

Sufficiency of investigation

[46] As observed above (at para [34]) an initial failure to properly detail concerns in writing to Ms McLaren is at issue. I however accept that at the initial stage when Ms McLaren was asked to clarify matters, a disciplinary matter was not abundantly apparent and that Covid matters were distracting the business. As such, Ms McLaren was alerted to the issue of concern that was objectively potentially serious at a reasonably early stage and she had time to obtain advice and prepare her response before it unfolded into a formal meeting. Ms McLaren acknowledged she was aware of Lincraft's cash handling policy and the importance of keeping cash secure.

[47] I however, saw no evidence that the internal investigation undertaken in the interim, such as it was, was well documented and shared with Ms McLaren. This was a significant failing as was not meeting with Ms McLaren as part of the investigation, seeking her explanation and documenting such. Lincraft suggested this was because of the trust they placed in Ms McLaren and Covid delays.

[48] Given that the issue involved later became a potential criminal matter involving "cash handling" one would have expected a very careful and well documented investigation

[1] www.Lincraft.co.nz.

to proceed and whilst I do not expect it to be "akin to a judicial inquiry" [2] I do have to consider if it was sufficient given the serious level of the allegation.

[49] I find that overall this was not the case and that the standard of the investigation was poor and stopped when Ms McLaren provided her explanation at the 26 May meeting. It fell short of procedural fairness and the defects were not minor. It was suggested by Ms McLaren's advocate that the deposited money could have been placed in the wrong account or in a bank "slush fund" but I was provided with no evidence to support either suggestion and neither scenario was advanced by Ms McLaren during the period she was being asked to explain the whereabouts of the missing deposit.

[50] Lincraft also in submissions, indicated they did a reconciliation of all Australia and New Zealand banking to ascertain if the deposit had been placed in the wrong Lincraft account but could find no evidence of such. Lincraft also provided documentary evidence that Ms McLaren was the only registered holder of the safe key at the relevant time (despite some suggestion in the investigation meeting that two others could access the safe – this should have been further explored).

[51] One initial issue is that it is important where potential serious misconduct is involved, to separate the investigator from the decision-maker. Whilst this did appear to occur initially, Ms McLaren was not apprised of who the decision-maker was and Mr Mizzi appears to have gathered evidence and then participated in the decision to dismiss. Crucially, Ms McLaren was not afforded an opportunity to address the decision maker.

[52] Then, once the decision to proceed to a disciplinary meeting was made, it was not well set up which led to Lincraft breaching s 103A(3)(c) and (d) of the Act that even if I was to hold that earlier identified breaches were not significant, these two statutory provisions, that are detailed in question form, go to the heart of procedural fairness, being:

> (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

[2] *A Limited v H* [2016] NZCA 419; [2017] at NZLR 295 at [25].

(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 … [3]

[53] Whilst not always being required, an appropriately fair approach is to conduct a 'two step' process to: first make a preliminary view known to the employee and set out the reasons for such in writing, then invite the employee to make a submission to the decision-maker on those preliminary findings and set out any mitigating factors. This type of considered approach may have remedied earlier procedural defects.

[54] I find in this situation that the eventual haste to dismiss Ms McLaren was not warranted as she was not suspended and had continued with her duties whilst being under investigation. I note from evidence that Ms McLaren suggested there may have been a medical explanation for her confusion and poor recall of events but because her employer moved hastily to dismiss this factor was not considered – although I do accept Ms McLaren only alluded to being under stress rather than provide medical reasons for such. Lincraft witnesses' confirmed that Ms McLaren was very distressed during the 26 May meeting.

[55] At best (applying s 103A (e)), one could say that the issues were clear cut and Ms McLaren was afforded more than one opportunity to explain her actions to her employer and that her email of 23 May was an admission of wrong doing and no further investigation was necessary as the actions in question had been established. Also the train of events that established Ms McLaren's poor cash handling actions were not contested at the disciplinary meeting. [4]

[55] It is correct to assert as Lincraft have done that it is not appropriate that I 're-run' the employer investigation or 'step into the employer's shoes' but I have to be satisfied objectively, that Lincraft acted reasonably in all the circumstances and fairly assessed the responses Ms McLaren provided – i.e. I have to determine what Lincraft did was "what a fair and reasonable employer could have done in all of the circumstances at the time the

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[3] Section 103A(3) Employment Relations Act 2000.

[4] It has been suggested that when serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter: *Murphy and Routhan t/as Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC). See also *Smith v Datamail Ltd* ERA Wellington WA125/09, 2 September 2009; *Reynolds v Mount Cook Airline Ltd* [2013] NZERA Christchurch 155 (where the Authority expressly referred to *Enzo's Pizza* and confirmed its continuing legal relevance under s 103A).

dismissal occurred ….". [5] In this context, balancing Ms McLaren's shifting explanations, her email of 23 May and the deficient investigation I would not go as far to say the dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I reject the suggestion advanced by Ms McLaren's advocate that having to effect after hours banking was an "extraordinary circumstance" or that a lack of training was at issue.

[56] I do find however, that a fair and reasonable employer could have approached this matter more fairly with greater diligence and paused to consider whether to conduct a more careful investigation and then considered wider factors before making the decision to dismiss. This could have included considering Ms McLaren's personal circumstances and any alternatives to dismissal given that one view could reasonably be that her offer to pay back the money 'missing' was an acceptance of the situation and Ms McLaren taking responsibility for the missing money. However, the assumption that serious misconduct was at issue is reasonably evident given Ms McLaren's role and lack of a coherent and consistent explanation.

Finding

[57] I find in the overall circumstances, that the summary dismissal of Ms McLaren was substantively justified on the grounds that she engaged in serious misconduct that destroyed the trust Lincraft placed in her by failing to properly ensure that the cash takings were securely banked but as above, significant procedural deficiencies render the dismissal unjustified.

[58] Whilst this concept may appear frankly odd to Lincraft, the notion of a dismissal being substantially justified but procedurally unfair and therefore overall being unjustified is well established having been identified by the Court of Appeal thirty five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* a judgment delivered by Woodhouse P. It held that a dismissal could be found to be a lawful exercise of an employer's right but "unjustifiable" by virtue of the way in which the matter was handled. Whilst the current approach to assessing dismissal is governed by the application of a statutory test set out in s 103A and s4(1A) of the Act, it is to be noted that the Court of

[5] Section 103(A)(2) Employment Relations Act 2000 and summarised in *Cowan v Idea Services Ltd* [2019] NZEmpC 172.

Appeal in the aforementioned case, was also dealing with a situation involving an impromptu and poorly set up disciplinary meeting. [6]

[59] An expression of how the Court approaches the importance of procedural fairness was expressed by then Chief Judge Goddard, in *Ruffell v Women's Refuge Sexual Assault Resource Centre Marlborough Inc* :

> It is well recognised that a personal grievance of unjustifiable dismissal or other action can be established where there has been a failure of procedure. As this Court has held many times, it is wrong to say that such a failure is merely procedural for procedure is power and, in some cases, a deprivation of procedural rights is effectively a deprivation of all rights. It is well to bear in mind that in a free and democratic society some of the most important rights that we possess are procedural in nature. Thus, it is not at all surprising to see that the *New Zealand Bill of Rights Act 1990* recognises and affirms electoral rights, and the right to minimum standards of criminal procedure and to justice, all of which are procedural in character. The minimum procedural requirements as laid down in the cases are not as rigorous as what is required of the State in conducting criminal prosecutions because it is recognised that an employer is entitled also to have regard to the employer's interests when conducting disciplinary processes. However, in doing so, the employer is required to observe elementary standards of fair process which include the right for the employee to know what the complaints are in an intelligible form, a reasonable time in which to prepare a response, the right to have that response listened to with an open mind, followed by a fair and reasonable decision free from predetermination. [7]

Good faith

[60] In addition to considerations contained in s 103A (Test of Justification) of the Act, I must consider whether Lincraft acted in good faith in effecting Ms McLaren's dismissal. In this context a duty owed includes but is not limited to, the sharing of information in an employer's possession relevant to the continuation of employment that should be disclosed before any decisions are made – this is a key provision to bolster procedural fairness to allow an employee to provide prior comment on any such information. [8] Here I have found that Lincraft was deficient in formally setting out their concerns and not disclosing the

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[6] *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IOUW* (1985) ERNZ Sel Cas 142; [1982] ACJ 663 (CA).
[7] *Ruffell v Women's Refuge Sexual Assault Resource Centre Marlborough* [2002] 1 ERNZ 409 at [63].
[8] Section 4(1A)(c) Employment Relations Act 2000.

documentation such was based upon. This led to a further breach of misleading Ms McLaren before the dismissal meeting into a belief that her ongoing employment was not in jeopardy

Finding

[61] I find that Lincraft breached good faith duties owed to Ms McLaren but no penalties were sought for such breaches in the statement of problem other than a claimed breach identified in submissions that Lincraft had not disclosed documentation post dismissal, which I do not have the ability to grant as good faith obligations do not survive the ending of an employment relationship.[9] Likewise, I do not have the statutory discretion to award compensation to Ms McLaren as sought in submissions under section 4 of the Act to deal with Lincraft's disclosure deficiencies during the course of the investigation.

Conclusion

[62] Having made a finding of unjustified dismissal Ms McLaren is entitled to remedies as a result of my findings.

Remedies

Lost wages

[63] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms McLaren should I find that she has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[64] Here I find Ms McLaren's lost remuneration was attributed to the personal grievance. Ms McLaren gave evidence that she did not secure alternative employment until 14 September 2020 that was initially casual and she received support from Work and Income. I accept that finding comparable alternative employment would have been difficult due to the nature of the dismissal and that Covid has limited job opportunities.

[65] Given the above and reflecting the circumstances of the dismissal, I consider overall justice is best served by awarding Ms McLaren three months lost wages in the amount of

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[9] *Balfour v The Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31].

$12,250 (gross) based on Ms McLaren's salary of $49,000 p.a. at the time of her dismissal. I do not consider it to be a case where interest should be awarded on the latter amount.

Compensation for hurt and Humiliation

[66] Ms McLaren gave evidence of the impact of the summary dismissal and the uncertainty it created at a difficult time to find immediate alternative employment and the upset it caused her including disruption to sleeping patterns and depression. However, it is evident that the upset was largely driven by a strong sense of outrage at the perceived unfairness of the decision and being subjected to a police investigation.

[67] Nevertheless, I am convinced that at the time, Ms McLaren suffered humiliation, loss of dignity and injury to feelings due to her former employer failing to carry out a full and fair investigation of the circumstances that led to her summary dismissal and not being clear in communicating their concerns including preventing Ms McLaren from being allowed to make a submission to the decision-maker before the dismissal was implemented.

[68] Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which Lincraft effected this dismissal, I consider Ms McLaren's evidence warrants a modest level of compensation in the sum of $8,000 under s 123(1)(c)(i) of the Act.

Contribution

[69] Section 124 of the Act states that I must consider the extent to what, if any, Ms McLaren's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced, I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*[10].

[70] Ms McLaren gave evidence that she was well used to cash handling procedures in previous jobs including running her own business where she ran a payroll and had done banking as well as retail employment experience over a significant period of time.

[10] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[71] I find that Ms McLaren's actions and omissions contributed to her dismissal and that they were not based upon inexperience or other contributing factors.

[72] I reasonably conclude that Ms McLaren was in a managerial position of responsibility and failed to follow simple cash handling procedures and that she was unclear both to her employer and the Authority on what steps she took to resolve her initial mistake of not banking the daily takings in a timely manner.

[73] Overall, I find Ms McLaren did significantly contribute to the situation giving rise to the personal grievance but I have balanced this up with my finding that Lincraft's approach was inexplicably, procedurally deficient. Ms McLaren cannot be blamed for the deficiencies in process that robbed her of the time for reflection and seeking of advice which may have led to her to adopting a different approach to the disciplinary meeting. The decision to dismiss was hasty but understandable from Lincraft's perspective.

[74] On balance, given the significant contribution to her own downfall, I find a 20% reduction in Ms McLaren's remedies (compensation and lost wages) is warranted and is in line with cases where a significant reduction is warranted.

Summary

[75] **I have found that:**

(a) Shona Kay McLaren was unjustifiably dismissed by the manner in which her employment with Lincraft NZ Limited ended.

(b) Lincraft NZ Limited failed to adhere to good faith obligations in effecting the dismissal.

(c) Lincraft NZ Limited must pay Shona Kay McLaren the sums below:

(a) $9,800 gross lost wages;

(b) $6,400 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

Costs

[74] Costs are at the discretion of the Authority. Ms McLaren was successful in her claim of unjustified dismissal and has obtained compensatory remedies in an investigation meeting that took one day. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that compelling circumstances exist to depart from the normal application of scale costs ($4,500 for a one day investigation meeting). If no agreement is achieved, Ms McLaren has fourteen days following the date of this determination to make a written submission on costs and Lincraft NZ Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate. Please note that only at this point, am I able to take into account the without prejudice correspondence submitted by Ms McLaren's advocate.

David G Beck
Member of the Employment Relations Authority