

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 4
5432060

BETWEEN CHRISTOPHER MENEAR-GIST
Applicant
AND FOODSTUFFS NORTH ISLAND
LIMITED t/a TOOPS
Respondent

Member of Authority: P R Stapp
Representatives: Jeremy McGuire, Counsel for the Applicant
Darren Mitchell, Advocate for the Respondent
Investigation Meeting: 6 November 2013 and 18 November 2013 at Palmerston
North
Further Information and Submissions: 18 November 2013 and by 25 November 2013
Determination: 10 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about Mr Menear-Gist's suspension and summary dismissal from his employment with Foodstuffs North Island Limited ("Foodstuffs" and/or "Toops") on 11 September 2013. Mr Menear-Gist was dismissed from his role as the branch manager at Toops, Palmerston North, which is fully owned by Foodstuffs North Island Limited, for allegedly misappropriating company funds. The parties are in dispute over what terms and conditions of employment apply to Mr Menear-Gist. Foodstuffs/Toops has relied on serious misconduct for the suspension and dismissal, and it contends that it followed a proper procedure in coming to a decision to suspend and dismiss Mr Menear-Gist.

[2] Mr Menear-Gist is seeking reinstatement, lost wages (including future lost wages) and compensation for hurt and humiliation and costs.

[3] Foodstuffs/Toops denies all Mr Menear-Gist's claims including reinstatement.

Issues

[4] The issues in this matter are:

- (a) What are Mr Menear-Gist's terms and conditions of employment?
- (b) How did the employer reach its findings?
- (c) What were the employer's findings?
- (d) Was there an investigation?
- (e) Was Mr Menear-Gist informed of the employer's concerns?
- (f) What were Mr Menear-Gist's explanations in mitigation?
- (g) Did the employer genuinely consider Mr Menear-Gist's explanations?
- (h) Did the employer come to an honestly held belief that Mr Menear-Gist misappropriated company funds for serious misconduct? This relates to issues raised by Mr Menear-Gist about Foodstuffs/Toops motivation and the operations manager's alleged ulterior motives.
- (i) Are there any procedural faults, minor and/or technical?
- (j) If there is a personal grievance, is it reasonable and practicable to reinstate Mr Menear-Gist?
- (k) If there is a personal grievance what remedies is Mr Menear-Gist entitled to? This particularly relates to his claim for future lost earnings.
- (l) Did Mr Menear-Gist contribute to the situation giving rise to any personal grievance to make deductions from any remedies?

The facts

[5] Mr Menear-Gist was first employed by Toops Wholesale Limited (“Toops”) at Palmerston North, in January 2010, in the position of floor manager/assistant store manager. The parties signed off an employment agreement for that role. Mr Menear-Gist was redeployed as the branch manager in May 2010. There is no written employment agreement available applying to Mr Menear-Gist in the branch manager role. Foodstuffs otherwise says that Mr Menear-Gist’s terms and conditions of employment remain subject to the terms of the former employment agreement because they say it is a generic agreement for all salaried employees. Apparently there was a covering letter of an offer of appointment for the branch manager position provided at the time, but Foodstuffs has been unable to locate a copy.

[6] Toops was amalgamated with Foodstuffs North Island Limited on 1 September 2012. There was no formalisation of the amalgamation in any employment documents, and none has been produced to support that there was any change in regard to Mr Menear-Gist’s employment. It is common ground that Mr Menear-Gist’s employer is Foodstuffs North Island Limited trading as Toops, and which has been cited by Mr Menear-Gist as his employer, and the respondent.

[7] In October 2012, a person in the workplace at the Palmerston North branch, where Mr Menear-Gist was located, informed another manager, who told Mr Derek Tunui, operations manager at Foodstuffs, of their concerns about Mr Menear-Gist’s reimbursements and spending during his employment. At first the identities of the informants and whether it involved one or two people was not clear. During the evidence it became clear that there were at least two people involved. The first informant told the manager that there were issues and anomalies with the imprest account and this was passed on by the manager to Mr Tunui. The details of the complaint involved Mr Menear-Gist purchasing different lines of product, meals and coffee and using valet services to clean his vehicle and claiming the reimbursement of expenses. These concerns were never taken up by Mr Tunui with Mr Menear-Gist at any stage, until 26 July 2013. On 24 July 2013 Mr Tunui was informed by manager A¹ of concerns about Mr Menear-Gist’s spending of petty cash and reimbursements from the imprest account. The person gave documents to Mr Tunui as to a number of discrepancies. At the time, Mr Tunui and Mr Menear-Gist were both on annual leave.

¹ I have withheld the person’s name and will refer to the person as “A”, when required, because the person did not give evidence at the Authority’s investigation meeting.

Mr Tunui acted speedily and called Mr Menear-Gist into work for a meeting that was also attended by Ms Rose Johnson, from Human Resources, at the Foodstuffs Palmerston North centre.

[8] On 26 July 2013, Mr Tunui and Ms Johnson met with Mr Menear-Gist to advise him that it was intended to commence an investigation and audit into the use of petty cash and that the outcome may amount to an allegation of serious misconduct if there were discrepancies found. The meeting lasted about twenty minutes. During the meeting, the matter of suspending Mr Menear-Gist must have been raised and put to him, which is supported by a subsequent letter that I will refer to shortly. Mr Menear-Gist has not challenged that the suspension was raised, but says that there was no discussion for his input before the decision. Mr Menear-Gist says that he was not told in advance of the meeting that there would be any discussion on the possibility of suspension, and he was not informed of any right to have a representative with him, which is in dispute. I hold that the important matter raised at this meeting related to the allegation of misappropriation/discrepancies and serious misconduct and that an audit was being set up. Mr Menear-Gist did not provide any considered response to the proposal to suspend him during the meeting. Mr Tunui and Ms Johnson gave evidence that they formed the view that as Mr Menear-Gist had nothing to say about the suspension that they would invoke it. It was decided that he would be paid during the course of the investigation. There is a provision in Mr Menear-Gist's assistant branch manager employment agreement that provides for suspension and this provision reads as follows:

16. *Termination of Employment*

...

- (c) *The employee's employment can also be terminated immediately (but only after a full and fair investigation/disciplinary process), for serious misconduct. In that situation, termination of employment will be immediate and no notice will be given or paid. The employee may be suspended with or without pay pending any disciplinary investigation into an allegation of serious misconduct.*

[9] Foodstuffs' disciplinary procedures are found in a document the Authority asked for during the investigation meeting. This is a document relating to Foodstuffs (Wellington) Co-operative Society Limited (dated June 2010). It provides for types of misconduct and serious misconduct and provides examples of both. It also provides for a procedure to be followed and what the employer was required to put in writing

and keep a paper trail. It is common ground that the document was not referred to during Mr Tunui's process with Mr Menear-Gist.

[10] On 26 July 2013, Mr Tunui signed off a letter that was sent to Mr Menear-Gist to advise him of the investigation and confirming that he had been suspended on pay. The letter advised Mr Menear-Gist that the investigation was to commence on 29 July 2013, and a report was expected to be completed by 2 August 2013 and Mr Menear-Gist would have the opportunity to comment on the contents. The trouble is whether or not the decision was made before any investigation and whether or not Mr Menear-Gist had the opportunity to comment before the decision to suspend was made by Mr Tunui. It did not meet Foodstuffs written guideline for an investigation to take place before the decision.

[11] The independent audit was initially set up by Foodstuffs before the letter of 26 July 2013. Mr Menear-Gist was informed that it would be commenced on 26 July 2013. The audit encompassed the imprest account activity at its Toops Palmerston North branch for the nine months prior to July 2013. It was not an audit designed to investigate Mr Menear-Gist personally in regard to any of his behaviour in the matter.

[12] On 23 August 2013, Foodstuffs through Ms Johnson and Mr Tunui contacted and wrote to Mr Menear-Gist and advised him that it considered there was a basis to invoke its disciplinary procedure upon receipt of the independent audit that had been undertaken and concluded by then. There is no explanation for the delay of the auditor's report dated 6 August 2013 and the next meeting held on 28 August 2013, except that Ms Johnson tries to explain that it involved a draft in the first instance and that the unreleased portion of the report related to the business as a whole. Only a copy of the list of transactions and a copy of the relevant receipts of concern to Foodstuffs were provided to Mr Menear-Gist from the report, despite him and his representative subsequently asking Foodstuffs for the full document. The need for disclosure of the audit report and the timing of Mr Menear-Gist's request for the document are in dispute. Mr Menear-Gist was advised that he had the opportunity to respond to the transactions identified as areas of concern from the audit report. There were 178 of them. He was also advised of an allegation of misappropriation of company funds, that the allegation may amount to serious misconduct, and if substantiated, could result in summary dismissal from employment with Foodstuffs.

[13] In addition, the unreleased part of the audit report had some important comments from the auditor that concerned Foodstuffs' lack of organisation of its policies and procedures. For example the report said:

"...For most of the transactions, we are not able to report definitively on whether any of these transactions constitutes any breach of company policies or procedures or any breach by an employee of their employment contract, as we do not have sufficient information to reach those conclusions."

And

"...Management is responsible for implementing an internal control structure to maintain the reliability of the financial statements and to reduce the risk of errors, fraud and misappropriation of company assets. Whilst we have not been able to report on specific internal controls of the company, we have reported on any expected internal controls and procedures relating to the potential breaches identified above which may have been caused by systemic deficiencies, for example as a result of inadequate policies or procedures, or lack of communication of them to employees, or lack of accountability in their adherence to them, or lack of record keeping."

[14] There were a number of recommendations made requiring management to address its procedures and communication.

[15] On 28 August 2013, a disciplinary meeting was held that included Mr Tunui and Ms Johnson for Foodstuffs, and Mr Menear-Gist and his legal representative, Mr McGuire. Mr Menear-Gist provided a written response regarding the transactions of concern and there was a detailed discussion on each of them. He disclosed the names of people involved.

[16] Next, Foodstuffs wrote to Mr Menear-Gist on 3 September 2013 and advised him of its preliminary findings with regard to the allegation. Its findings were provided under various heads as follows:

- (i) *Expenditure relating to procurement*
- (ii) *Expenditure relating to business development*
- (iii) *Chamber of Commerce activities*
- (iv) *Dinner meetings with a member of the New Zealand Army*
- (v) *Expenditure relating to store maintenance and equipment*
- (vi) *Requesting reimbursement for the same item more than once*
- (vii) *Donations*

[17] There was inadequate detail in regard to any findings on the items relating to each of the heads above in the letter, I hold. There was no reference to the potential for serious misconduct.

[18] Without relying prescriptively on each item of detail of the particular matters relating to each of these heads above, Mr Tunui, on advice, determined that the allegation of misappropriation of funds by Mr Menear-Gist was substantiated. This was referred to by Ms Johnson as a holistic approach to the detail that had been considered from the transaction list and Mr Menear-Gist's responses (in writing and orally at the meeting that was held on 28 August 2013). They never interviewed the army person named by Mr Menear-Gist in his response and reply and any interview with the Chamber of Commerce was not adequately detailed and put to Mr Menear-Gist, and Foodstuffs never interviewed anyone else involved in the reimbursement process at Foodstuffs and/or made any wider enquiry given the outcome of the auditor's report.

[19] Mr Menear-Gist was given the opportunity of a preliminary decision that included that as a result of the allegation of misappropriation of funds being substantiated Mr Tunui had lost trust and confidence in Mr Menear-Gist as a senior manager in the operation. Mr Menear-Gist and his representative were given an opportunity to comment before the decision was finalised. As such the lack of any reference to serious misconduct was sufficiently covered by the reference to the loss of trust and confidence.

[20] Mr Menear-Gist's explanation was that upon taking up the appointment he was told to run the branch as if it was his own. He says that Mr Tunui was aware of his practice of using his own EFTPOS card for spending and claiming expenses including meals and coffee and car cleaning and valet services. Mr Menear-Gist claimed his expenses were business/work related and while he accepted that there had been double reimbursements on a number of items this was explained by him as a mistake due to claiming with the receipts first and by mistake later putting in his EFTPOS docketts "upon cleaning out his wallet". He says that at no time did anyone raise any discrepancies with him, and his claims had been paid by the cashier without going back to him with any problems. Mr Tunui denies being aware of what Mr Menear-Gist was doing and what Mr Menear-Gist thought he was allowed to do, because if he had known he would not have allowed it. Foodstuffs says that Mr

Menear-Gist was acting outside the Foodstuffs policies, but has not been able to support this with any documented policies and that Mr Menear-Gist even had them or had seen them. The expectation was that Mr Menear-Gist was a senior manager and should have known the policies and what was acceptable or not.

[21] On 6 September 2013, Mr Menear-Gist's representative wrote to Foodstuffs and outlined Mr Menear-Gist's employment history, personal details and that *"arguably some sort of sanction might be appropriate against Chris in the circumstances. He would accept that. ..."*

[22] Upon considering all of the information, Mr Tunui decided to continue with dismissal, and on 11 September 2013, Mr Menear-Gist was summarily terminated from his employment with Foodstuffs. Subsequently, and after the proceedings in the Employment Relations Authority had been commenced, which included Mr Menear-Gist's representative raising a personal grievance and seeking interim reinstatement on the grounds that the dismissal was unjustified, a claim for unjustified disadvantage in regard to the suspension and increased monetary remedies was filed in a memorandum dated 14 October 2013.

[23] The claim for interim reinstatement was "by consent... set aside" for an early substantive investigation meeting as agreed by both parties. The parties have been unable to settle the employment relationship problem and it falls to the Authority to determine the matter.

Determination

[24] First, identifying Mr Menear-Gist's actual terms and conditions of employment is affected by the unavailability of a written employment agreement for the branch manager position, there being no job description and inadequate practice and procedure guidelines.

[25] I hold that it is sufficient that the terms of the employment agreement applying to the assistant branch manager position would have underpinned Mr Menear-Gist's new role as the branch manager. I accept that the roles of assistant branch manager and branch manager were different at least in status, and that Mr Menear-Gist was appointed to a senior role as the branch manager. As such it would have been more likely than not Foodstuffs had a covering letter of appointment (as it did for his earlier position), although it did not renew the employment agreement. I hold that Mr

Menear-Gists' senior role meant that the terms would not have varied that much as regards the implied term of trust and confidence.

[26] My reasons are:

- (i) That although Mr Menear-Gist challenged Foodstuffs on the basis of not having an employment agreement for his role he could not prove for sure that the covering letter of appointment did not exist when Foodstuffs said that it did exist.
- (ii) That the terms have the appearance of being generic terms, except for his salary.
- (iii) That Mr Menear-Gist's role was the most senior in the branch at Palmerston North. It is implausible to think that the same terms generally did not apply to him that applied to others and at the very least applied to him in the earlier role, despite Foodstuffs absence of any document management of the personnel records between Palmerston North and its head office.
- (iv) That Mr Tunui was at least supported by the local human resources advisor, Ms Johnson who corroborated orally the evidence about a covering letter and generic terms of appointment.
- (v) That the written policy produced during the Authority's investigation is consistent with the terms applying such as "suspension".

[27] Further, I am satisfied that Mr Menear-Gist was required to report to Mr Tunui as the operations manager in his role, despite Mr Menear-Gist claiming that Mr Tunui was not his supervisor and he named another person in line. Mr Menear-Gist says that he was told by Mr Tunui to run things as if they were his own. Also, Mr Menear-Gist has claimed that Mr Tunui always knew what he (Mr Menear-Gist) was doing. Mr Menear-Gist's claims are consistent with line management and that there was a management relationship with their roles. Mr Tunui consistently asserted that his role included supervision of Mr Menear-Gist. I am not satisfied that Mr Menear-Gist satisfactorily supported his claim that Mr Tunui was not his supervisor, because he had no other witnesses, notwithstanding that there was no job description outlining the parameters of any authority and that Foodstuffs did not call the person Mr Menear-

Gist says was his supervisor. It is more likely than not given Mr Tunui's role that he was at least one of Mr Menear-Gists' supervisor(s).

Second, the suspension was procedurally unfair. This is because the meeting that Mr Menear-Gist was called to on 26 July involved the decision already being made and an investigation had not been conducted, I hold. I hold that notice of the details as to what the meeting was for did not have to be provided if the meeting was to inform Mr Menear-Gist of the allegations and their details and for him to respond to later. However, that was not the case because Mr Tunui had set his mind on suspending Mr Menear-Gist by the time they met. As such Mr Menear-Gist could not have had a fair opportunity to reply and have any input on the suspension and/or decide to take a representative. Mr Tunui's and Ms Johnson's evidence has not been convincing that they gave Mr Menear-Gist an opportunity to comment on suspension to have an impact on the decision because of the urgently arranged meeting with them coming from leave to attend, the substantive issues had been raised and these were primarily the matters discussed. There was no record of any arrangement in regard to the possibility of a suspension being raised for consultation. However, the meeting to inform Mr Menear-Gist of the allegations was entirely justified given the complaint and the issues involved and that Foodstuffs/Toops was entitled to put the allegations to him. As such if Foodstuffs had acted as a fair and reasonable employer the suspension could have been entirely justified, but was procedurally defective. The absence of an employment agreement is not enough proof to support Mr Menear-Gist's claim that he could not be suspended I hold, because Mr Menear-Gist's employment was continuous, he previously had an employment agreement with a suspension provision and the right to suspend applied to all other employees given Foodstuffs' disciplinary policy. Moreover Mr Menear-Gist was in a very senior position and accorded with that goes considerable trust and confidence. On the procedure however, there was the omission that I conclude did not enable Mr Menear-Gist to properly respond before the decision was made about suspending him. This is consistent with Mr Tunui's and Ms Johnson's evidence that they proceeded with suspension when Mr Menear-Gist had nothing to say on the suspension when the real issues raised were related to the allegations, and the decision to conduct an investigation and that it had been put in place. Also their evidence is equivocal on the matter, including the notes of the meeting and statements of evidence from them. It is not surprising that the substantive matters assumed importance at the meeting because

of the seriousness of them. In conclusion I hold that Foodstuffs/Toops action on suspension was unjustified in regard to the procedure and that Mr Menear-Gist was disadvantaged because of its impact on his employment.

[28] Mr Menear-Gist's next criticism is that he was not told the names of the informants at the time. I hold that not being given their names would not have disadvantaged him because of the details he was provided with and the notice of an investigation to take place, particularly as the allegations related to separate items. Indeed since the names have become available there is no evidence from Mr Menear-Gist that the informants had any ulterior motives against him, including an absence of sufficient details that would have required them to appear before the Authority and give evidence.

[29] Third, I turn to the dismissal.

[30] I hold that the sequence of events between the timing of the investigation and disciplinary process that have been criticised as to involve the decision being premature and unfair are not fatal. This is because the final decision (except for the suspension) was not made until Mr Menear-Gist had an opportunity to comment and he was given a preliminary decision to comment on before it was implemented. There could be any number of reasons for the time lapse, but at least the concession made by Foodstuffs that it could accept a few of the items for reimbursement indicates an absence of bias.

[31] The respondent did investigate the allegations by bringing in an outsider to provide a report, even although it was not finished by the time of the first meeting held on 26 July. The auditor's investigation was inconclusive about any offending by Mr Menear-Gist, because of the absence of company procedures and practices and guidelines on behaviour in regard to the use of money, expenditure and valeting cars. Instead the auditor's investigation involved Mr Tunui using the details and the items that had been discovered to make his own decision on them. In other words he was not relying on the investigator's report. He disclosed the information to enable Mr Menear-Gist an opportunity to comment. Mr Menear-Gist was sent a complete list of the transactions, some 178 transactions, to assist him prepare a response and/or provide some explanation. It was confirmed by letter. Mr Menear-Gist did comment and I hold would have been under no illusion as to the employer's allegations and notice of a possible outcome given the correspondence and his representative's reply

in mitigation, and that they all met to discuss them. Also, he provided a written response. It was entirely open to Mr Tunui to rely on each of the items, and a fair and reasonable employer could reject Mr Menear-Gist's explanation and attempt to mitigate, given the involvement of Ms Johnson. However, a fair and reasonable employer could be expected to provide to the employee findings that involved details in regard to each of the items relied upon. That has not happened sufficiently, I hold. Ms Johnson's independence has not been challenged for me to believe that she is unreliable. I also accept that before conveying his decision Mr Tunui genuinely considered Mr Menear-Gist's explanation given Ms Johnson's role and participation. As the decision maker, however, a problem arises for Mr Tunui because Mr Menear-Gist made some very serious allegations about Mr Tunui's motives in regard to some matters arising in the workplace that possibly would have affected his impartiality. This is one of Mr Menear-Gist's major planks against Mr Tunui, and the decision to dismiss him. There is insufficient evidence, given the conflicts between Mr Tunui and Mr Menear-Gist that Mr Tunui was covering up and or diverting attention away from any personal involvement in the matters that Mr Menear-Gist was accusing him of in the workplace, and I have heard nothing that would suggest that there was anything reliably wrong. Mr Tunui and Ms Johnson were focused on the itemised activities that a fair and reasonable employer could raise and in the absence of any adequate explanation make a decision to dismiss for a breach of misappropriating company money and a breach of trust and confidence as serious misconduct, but for the following.

[32] However, a fair and reasonable employer could not dismiss for the following reasons:

- i That Foodstuffs did not interview anyone else named by Mr Menear-Gist that may have been helpful including the assistant branch manager and at least one person Mr Menear-Gist involved in a meal and/or coffee.
- ii That the decision that there has been "misappropriation" has not been explained in the absence of any written practices and procedures guidelines.

- iii That underpinning Mr Menear-Gist's behaviour there was inadequate guidelines and practice and procedure on claiming expenses without any adequate checks in place.
- iv That Mr Menear-Gist was entitled to be given the whole audit report and the failure by Foodstuffs to do so has been prejudicial, because it provided a further explanation on Foodstuffs' role that Mr Menear-Gist could have used to mitigate.
- v That none of the correspondence from Foodstuffs refers to and makes any findings on any of the queried transactions in the list of items given to Mr Menear-Gist to explain on 28 August.
- vi That there has not been an explanation about what constituted misappropriation of company money. However, Foodstuffs accepted that it "could possibly accept" one or two duplicate payments, but that "it was difficult to believe that it could occur up to ten times over a three month period", and still it failed to say which payments were relied on and involved in any wrong doing, given it possibly could accept some of them.
- vii That Mr Menear-Gist was entitled to rely on the management of the imprest account by the people responsible.
- viii That Mr Menear-Gist produced receipts for the items he claimed. He was not hiding his claims.
- ix That Mr Menear-Gist had an explanation that he mistakenly submitted GST and till receipts for the same reimbursement and this was not referred to by Foodstuffs in any correspondence, whereas a fair and reasonable employer should have accepted there had been genuine mistakes that could have been detected by the employees responsible for the management and the administration of claims from the imprest account. This is especially so when Foodstuffs has not been able to support the allegation of misappropriation of company money, presumably involving Mr Menear-Gist's personal advantage that would have to have had some findings of deliberate and wilful misconduct.

- xi That at no time did anyone raise any discrepancies with Mr Menear-Gist first, and his claims had been paid by the cashier without going back to him with any problems. Indeed there has been no explanation (if any) of any reason why they could not have done this and give him a chance first.
- xii That Mr Menear-Gist's explanation was primarily that he had been told by Mr Tunui to run the business as if he owned it. He says Mr Tunui knew what he was doing and that he (Mr Menear-Gist) paid for expenses personally and then claimed them from the branch's petty cash account. He says he provided receipts and that they would be checked to ensure no duplicate payments were accidentally made and counter signed off by the assistant branch manager. The duplicates that were found Mr Menear-Gist says happened because he handed in his EFTPOS receipts without realising that he had handed in the transaction receipts earlier. The possibility of a mistake could not have been excluded.

[33] I hold that Mr Tunui decided to make his own decision based on the details of the list of transactions provided from the audit report and that he was not relying on the report. It is open to a fair and reasonable employer to follow this course of action, but needed to do so with clear and particularised findings at the time, which I hold are absent.

[34] In summary Foodstuff/Toops' failure to have any written documentation and in light of the explanations from Mr Menear-Gist, a fair and reasonable employer could not conclude that there was a "misappropriation of company money".

[35] As such the substantive grounds could instead involve performance issues relating to Mr Menear-Gist's conduct in his employment. The threshold for serious misconduct is a high one indeed and the level of proof required must be as great as the allegation is serious.

[36] I accept that Foodstuffs had an investigation at least on the evidence of the auditor's report and information from the informants and meetings with Mr Menear-Gist and his representative. A number of transactions had been identified that Foodstuffs was entitled to take up with Mr Menear-Gist. Foodstuffs did inform him

of the allegations and provided him with the list of transactions for a response (correspondence and meeting on 28 August). However, it failed to investigate further the involvement of the informants as to their role and responsibilities given the information disclosed in the auditor's report on the business's failings and omissions. The omissions in regard to having written guidelines and practice and procedure mean that a fair and reasonable employer could have also determined that the matter involved performance related issues.

[37] I hold that Mr Menear-Gist has a personal grievance.

[38] I now turn to the remedies. I am dealing with the claims from the statement of problem as it applies to remedies globally. Dealing first with reinstatement I hold that it is impracticable to reinstate Mr Menear-Gist. His conduct (mistakenly or not) is a matter of grave concern in regard to his judgement in such a senior position. I hold that Mr Menear-Gist took advantage of his right to make claims for reimbursements for business expenses in the absence of Foodstuffs/Toops having no written procedures and guidelines, because (i) he acknowledged the double transactions, (ii) he accepted he had been careless, and (iii) I hold that his explanations on some of the claims he made were implausible as to claim that they were business related expenses including some meals, coffee and valeting and other claims that have come to light since the dismissal. Next I hold that there is clearly a strained and difficult relationship between Mr Menear-Gist and Mr Tunui that would make reinstatement impracticable. The views they hold about each other mean that there will not be a positive employment relationship given that Mr Menear-Gist has to work at least through Mr Tunui for part of the time. I accept that without proper guidelines practices and procedures Mr Tunui holds an opinion that he has no confidence in Mr Menear-Gist to act responsibly. This view is not assisted by Mr Menear-Gist's genuinely held belief about Mr Tunui's credibility and role and their relationship in the workplace. Therefore I hold that reinstatement will not be practicable and it is reasonable to decline the remedy.

[39] Mr Menear-Gist is entitled to lost wages under s 123 (1) (b) and s 128 of the Act discounted by any contributory conduct and taking into account mitigation to cover the loss. I accept that Mr Menear-Gist's current salary was \$89,000 per annum as claimed in his brief of evidence in reply dated 22 October 2013 (paragraph 32) (unchallenged by the respondent with any other details). I hold that Mr Menear-Gist

has contributed to the situation of his own making by exploiting the situation. His accidental claims and implausible explanations on some of his business related expenses have involved an unacceptable level of opportunism given the seniority of his position and failure to at least check and redress any of his reimbursements. This accounts for 30% blameworthy conduct, I hold. He has lost 17 weeks wages from the date of dismissal (11 September 2013) until the date of the Authority's determination (10 January 2014).

[40] I am satisfied that Mr Menear-Gist has attempted to mitigate his lost wages by getting some short term casual work, but in a much lesser position with much less pay. No details of his earnings since the dismissal have been provided and limited details to get any better work arrangements. His total lost remuneration is \$29,096.15 over seventeen weeks. Given the lack of any details on his earnings since the dismissal I award him 13 weeks lost wages (quarter of a year) and less the contribution factor, Mr Menear-Gist is entitled to \$15,574.99. He is not entitled to any bonus because the evidence does not substantiate any payment being due at the time of his dismissal, despite receiving bonuses in previous years, and that does not prove an entitlement. There are no other details for any other entitlements in his remuneration and no specific claims have been made, and certainly not quantified.

[41] Mr Menear-Gist is entitled to compensation under s 123 (1) (c) (i) of the Act. I accept he has been humiliated, has hurt feelings and his dignity injured in the matter. However his evidence has to be treated with some caution because it comprises many assertions without being independently corroborated, and that I have to be cautious of any exaggeration. He produced some medical letters to try and establish his dismissal caused him to have a breakdown, but they only establish that he did meet with his doctor and that there appear to be some issues of a medical nature involving him. Otherwise the assertions and evidence are untested. I accept his dismissal has caused him worry and anxiety upset and that he has been humiliated and his feelings hurt, and that there has been a financial impact on him with the loss of his earnings that will have contributed to the stress and worry. He is entitled to compensation of \$10,000 less contribution. This amounts to \$7,000.

[42] This is not a matter for future lost earnings because I am not convinced the dismissal means that he will never work again. Also, there has been no independent evidence of any actuarial assessment made for such lost earnings and for the length of

time involved and an independent assessment of future employment and work opportunities. I cannot place any certainty on Mr Menear-Gist's claim.

Orders of the Authority

[43] Foodstuffs North Island Limited is to pay Mr Menear-Gist:

- i \$15,574.99 gross lost wages; and
- ii \$7,000 net compensation.

Costs

[44] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority