IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 78
5607937

	BETWEEN	Mr X Applicant
	A N D	Y LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Phil Butler, Advocate for Applicant Linda Ryder, Counsel for Respondent
Investigation Meeting:	16 March 2017 at Christchurch
Submissions Received:	16 March and 1 May 2017, from the Applicant 16 March and 5 April 2017, from the Respondent Further evidence received on 20 March 2017.
Date of Determination:	17th May 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The Applicant was unjustifiably dismissed and is awarded the remedies set out in this determination.

B. The Authority does not have the jurisdiction to investigate the Respondent's counterclaim.

C. Costs are reserved.

Prohibition from publication order

[1] The background events leading to the termination of the Applicant's employment concern him injuring his baby in September 2015. That led to his conviction and sentencing to home detention. During sentencing, the District Court

judge granted the Applicant final name suppression as, otherwise, there would have been an impact on his partner, the victim and her family.

[2] If the Authority were not to grant a prohibition from publication order which prevented the publication of the Applicant's name, the District Court judge's final name suppression order would be fundamentally undermined. Accordingly, I prohibit from publication any information that will lead to the identification of the Applicant, his children, his partner or the family.

[3] As it would identify the Applicant to disclose the name of his former employer, the respondent, I also prohibit publication of its name, its directors' names and the full name of the witness it called. The Applicant shall be called Mr X, and the respondent company Y Limited.

Employment relationship problem

[4] Mr X claims that he was unjustifiably dismissed on or around 10 November 2015, or that, in the alternative, he was unjustifiably constructively dismissed by way of the actions of the respondent company.

[5] The respondent denies dismissing Mr X and asserts that he resigned of his own accord.

[6] The respondent counterclaims against Mr X for payment of the sum of $2,000 which it asserts was the value of a loan given to Mr X to enable him to buy a vehicle. Mr X asserts that the Authority has no jurisdiction to consider such a claim, but if it does, he denies that this is owed, saying that the agreement was that the loan would be forgiven once Mr X had worked for the company for a year.

Brief account of events leading to the termination of employment

[7] The respondent operates a business involved in the construction industry in Christchurch. Mr X was earning $30 per hour when his employment ended.

[8] In early 2014, Mr X took a loan of $2,000 from the respondent company so that Mr X could buy himself a car. Mr X says that the arrangement was that the loan would be through deductions from his wages, but that this did not happen. When Mr X questioned the director of the company about this, he said that if Mr X stayed for a year, then he did not need to worry about paying the money back.

[9] The car he purchased with the loan was his own car, which he used to get to and from work, but which he did not use for the purposes of his work.

[10] In September 2014 Mr X's partner became pregnant, and at the beginning of 2015 he and she decided that they would need a bigger vehicle. At his partner's insistence, according to Mr X, he asked the director of the respondent if he would need to pay back the $2,000 if he sold the car which he had purchased with that loan. Mr X says that the director stated that he would not need to, as he had "already done the time" and that he could do what he liked with the car.

[11] Mr X's partner gave evidence to the Authority about this conversation, as she was present during it, and her evidence accords with that of Mr X. She said that the bank needed to know if they had to repay the loan, as they were borrowing money to buy the larger car. Mr X then sold the Toyota car that he had purchased with the $2,000 and bought a new, bigger, car just before Valentine's Day 2015.

[12] The director of the respondent denies that he ever said that the loan did not need to be paid back once Mr X had been employed for a year. The director says that deductions had not been taken out of Mr X's pay due to an administrative oversight, and that it had only been discovered a few days before the employment coming to an end that no payments of the loan had ever been made.

[13] In October 2015 Mr X had to have an operation, and was off work for around six weeks. By this time, his baby had been born and was around 4 to 6 months old. According to Mr X, he was looking after the baby one day in September 2015 when she was crying and wriggling and Mr X smacked her on the bottom. He says that she cried some more and he put her down in the cot with force.

[14] It turns out that this action caused injury to the baby (although it was not picked up as an injury by the hospital for some time) and it seems that the hospital subsequently informed the Police, which resulted in Mr X's arrest on 6 November 2015. He was granted bail on the condition that he did not communicate with, or have contact with, his partner, the baby or his partner's mother. He moved out of the home and stayed with his stepmother.

[15] Mr X had a conversation with one of his co-workers, J, on either Saturday 7 November (according to J) or Sunday 8 November (according to Mr X) in which Mr X told J what had happened regarding the baby and his arrest. Mr X says he did this

thinking that the conversation was confidential, although he did not specifically tell J that he was not to tell anyone. He had viewed J as a brother figure he says.

[16] At some point around this time, Mr X's partner told the wife of the director about the situation, as she was concerned that he would not have the courage to do so. Either after his conversation with J (according to Mr X) or before it (according to the director) Mr X and the director had a conversation in which the director advised Mr X not to tell the other men about the matter, as the director was concerned about what they might say. Mr X did not tell the director that he had already told J (according to his evidence).

[17] J gave evidence to the Authority, saying that he had not told anyone about Mr X's arrest, but that when he got to work on the Monday, the men at work already knew about the matter, and that it had been posted on Facebook (although Mr X's partner says this is not true). Many of the men did not want to work with Mr X as a result. The director says in evidence that four out of the six leading hands said they would not work with Mr X.

[18] Mr X says that he received a call from the director a little while afterwards (on 9 or 10 November 2015) and was asked to attend the office. Mr X says that, when he got into the office on 10 November he told the director that he needed some more time off because he was still not fully recovered. He said that the director invited him into an upstairs office and said that "we have had a meeting, and the boys have had a unanimous vote, and no-one wanted to work with you". He then said "I am going to have to let you go".

[19] Mr X says that he did not say anything, and walked down the stairs as he was angry. He says that, because he had lost his job, he could not financially support his family (which included a son from a previous relationship). Mr X says that, as it was a period leading up to Christmas, he had trouble finding a new job. He managed to get some casual work with his friend's company, earning around $1,200 in cash, and then got some work with another company in the same trade in which he had been working with the respondent company.

[20] According to the director, he found out on Monday 9 November that Mr X had disregarded his advice not to tell his co-workers, had then told members of staff about the incident, which had then spread throughout the company. He said that he decided

to call Mr X in to discuss the situation. In his written brief of evidence, he says that Mr X came into the office on Tuesday 10 November and that the first thing he said to Mr X was "what have you done telling the boys?". He said that he told Mr X that some of the staff members had said that they would not work with him, but did not name those staff members.

[21] According to the director's brief, Mr X said "I already know I can't come back to work, so I am resigning, it's probably the best thing". According to the director, Mr X said that he could not return to work with the prosecution hanging over him and because he had admitted the offence to other staff members. According to the director, he then asked Mr X when he was going to start paying back the loan of $2,000 and Mr X replied that he would start paying it back once he got a job.

[22] In his oral evidence, however, the director agreed that Mr X had asked for an extra week off to recuperate just before Mr X resigned, and he had said that Mr X could have it.

[23] According to the director, Mr X's right to work on sites subcontracted by Fletchers Construction would have been cancelled immediately. The director said that this equated to 70% of the company's work. He also says that they also do work at schools, and he would not have been able to have worked at any school with a conviction of harming a child.

The issues

[24] The Authority must determine:

a. whether Mr X was dismissed, or constructively dismissed by the actions of the respondent, or whether he resigned of his own volition;

b. If he was dismissed, whether that dismissal was justified;

c. Whether the Authority has the jurisdiction to investigate the counter claim; and

d. If it does have the jurisdiction, whether the loan was forgiven by the director on behalf of the respondent company.

Was Mr X dismissed?

[25] In *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*[1] the Employment Court examined the concept of a dismissal, and reviewed a number of authorities. The following, overlapping principles can be extracted:

a. Dismissal occurs at the initiative of the employer;

b. Dismissal involves an act of the employer which results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employment relationship;

c. It may not be necessary for the employer to intend the employment to end, but a termination at the initiative of the employer occurs if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[26] There is a direct conflict of evidence between the parties as to whether Mr X was dismissed or resigned. On a balance of probabilities, I find that he was dismissed. I say this primarily because the director stated in his oral evidence to the Authority that he agreed to Mr X's request for an additional week's leave when he came into the office on 10 November. He said it would give him more time to work out what to do. However, it is inherently unlikely that Mr X would have asked for an extra week's leave if he had already decided to resign. According to the words attributed to Mr X by the director, Mr X had already made that decision.

[27] In addition, it is also inherently unlikely that Mr X would have voluntarily quit his job when he had already been off work without pay due to sickness for several weeks, and was in financial need, having to support his 5 year old son and his new baby.

[28] Furthermore, Mr X had only been told the day before that his co-workers knew about his arrest. On the respondent's evidence, not all of the men were refusing to work with him. Again, it is unlikely that Mr X would have decided to resign when he did not know the full extent of the men's discontent and nothing had been done to explore how adamant they were.

[1] [2015] NZEmpC89

[29] On a slightly less persuasive, but still noteworthy point, during cross examination Mr X asked for the meaning of several, what one might call slightly "erudite" or formal words which Ms Ryder used when questioning him. It is therefore questionable whether Mr X would have come up with the word "unanimous" if the director had not used it himself.

[30] I accept, on the evidence, that it is not likely that there was an actual vote of the men, and that they had voted unanimously. However, it is not unlikely that this was a tale told to Mr X by the director to sugar the pill of his dismissal, and to detract attention away from the fact that the dismissal was the director's own decision, or that of him and his wife jointly (the wife also being a director).

[31] Other factors which persuade me that Mr X was dismissed, is that the director said in his brief of evidence that they did 70 % of their work for Fletcher Construction and that "the applicant knew that with his pending prosecution, his Fletchers card would have been cancelled immediately" and that Mr X's arrest "could have had a negative effect on the company'. Whilst it turns out, after research carried out in preparation for the Authority's investigation meeting, that the director was wrong that Fletcher Construction would have definitely cancelled Mr X's card for a pending prosecution, as it depends on the circumstances, this is likely to be what the director felt at the time, and so is likely to have motivated his dismissal of Mr X.

[32] I have considered the eight reasons asserted by Ms Ryder why Mr X's evidence was not credible. I do not accept that all of the assertions of fact on which she has based her arguments are true, although some undoubtedly are. Some of the inconsistencies she points to are almost certainly due to memory lapses and inadvertent confabulation. No witness is immune to these phenomena.

[33] When assessing questions of credibility it is necessary to do a weighing up of the various relevant pieces of evidence. However, a minute examination of each and every possible inconsistency does not always produce the correct answer. It is often helpful to stand back and to look at the overall likelihood of one scenario against another. When I do this, I am satisfied that the most likely scenario is the one presented in evidence by Mr X.

[34] I consider it more likely than not that the director dismissed Mr X because:

a. Several workers were refusing to work with Mr X;

b. The director believed that Fletcher Construction would not allow him to work on their sites;

c. He also believed that he would have trouble obtaining permission for Mr X to work at school sites, and

d. He also believed that the arrest could affect the company's reputation.

Was the dismissal unjustified?

[35] Section 103A of the Employment Relations Act 2000 (the Act) provides as follows:

> **103A Test of justification**
>
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider-
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
>
> (4) In addition the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
>
> (5) The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-
>
> (a) minor; and

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

[36] Having established that Mr X was dismissed during the conversation on 10 November 2015, I am able to conclude that it was procedurally unjustified. This is because:

a. Mr X was not told in advance that his dismissal was going to be discussed;

b. He was not given an opportunity to make representations about that proposed dismissal;

c. The respondent did not take into account any representations that Mr X could have made; and

d. Mr X was not given the opportunity to have a support person with him during the meeting.

[37] Furthermore, I am unable to safely conclude that the dismissal was substantially justified because, for example, no attempt was made by the director to:

a. explore ways of reassuring the co-workers about Mr X,

b. find ways of enabling Mr X to work with co-workers who felt less strongly about the matter; or

c. discuss with Fletcher Construction whether he could have carried out work for them given the nature of the offence (which did not involve drugs or dishonesty).

[38] I conclude that no fair and reasonable employer could have dismissed Mr X in the way that it did in all the circumstances. Accordingly, the dismissal was unjustified.

Does the Authority have the jurisdiction to investigate the counter claim?

[39] In considering the counterclaim, the Authority is bound by *JP Morgan Chase Bank NA v Robert Lewis*[2]. In *Lewis*, the Court of Appeal, at [94] to [97], stated the

[2] CA587/2013, [2015] NZCA 255. Case citations omitted.

following, when considering the jurisdiction of the Authority by reference to the meaning of "employment relationship problem" as defined in s. 5 of the Act[3]:

> [94] …Since the Authority had jurisdiction, the High Court did not. In a passage relied on by Mr O'Brien, the Judge said:
>
> > …a claim that one party to an employment relationship should pay a sum to another party to the relationship on account of a liability incurred in the context of that relationship comes comfortably within the meaning of employment relationship problem under s 5 and is therefore within the jurisdiction of the authority under s 161.
>
> [95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 an "employee relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship.
>
> [96] At [19], Associate Judge Bell quoted and purported to apply what was said by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum*:
>
> > [22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-matter of the claim some right or interest which is not directly employment related at all? …
>
> [97] We accept that statement of the law as sufficient for present purposes, but consider its application to the facts in *Hibernian Catholic Benefit Society* should have led to a different conclusion. While Ms Hagai was clearly in breach of her employment contract, the essence of the Society's claim was her dishonest theft of the money. This was not an employment-related problem, although it would undoubtedly have justified her dismissal. While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such as would have made her liable to the plaintiff *without* any such relationship. In other words, the existence of the employment relationship was not a necessary component of many of the causes of action that could have been asserted against her. That indicates that the essence of the claim was not

[3] "**Employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment".

> employment related, and should not have been regarded as within the Authority's jurisdiction.

[40] Was the employment relationship between Mr X and the respondent a necessary component of the agreement that was reached between them regarding the loan to buy the Toyota car? The evidence is that the car was used to enable Mr X to get to and from work, but not used by him at work, for work purposes. The car was his own car, which he used for private purposes. The director said that the company often lent money to the workers in order to assist them.

[41] In my view, whist the employment relationship created the opportunity for the loan, it was not a necessary component of that loan. One cannot say, but for the employment relationship, the loan would not have happened. Had Mr X and the director known each other by different means other than the employment, the director could still have made a loan to Mr X to help him buy the car.

[42] Accordingly, the Authority does not have the jurisdiction to consider this counter claim, and I dismiss it.

Remedies

[43] Section 123 of the Act provides as follows:

> **123 Remedies**
>
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
>
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
>
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
>
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
>
> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[44] Section 128 of the Act provides as follows:

> **128 Reimbursement**
>
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.
>
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[45] Mr X asks that the Authority exercise its discretion under s 128(3) of the Act and award Mr X a sum that exceeds that which would otherwise be granted under s 128(2). Mr X is now earning $5 less an hour than he earned at the respondent company.

[46] I agree with Ms Ryder that it is more likely than not that Mr X would not have remained employed by the respondent company until this year. This is because there was a number of co-workers who objected to working with him. Whilst the respondent may have been able to have worked around that problem, had it tried to in good faith, there is at least an equal chance that it would not have succeeded, and that Mr X's employment would have become untenable. The Authority cannot know what would have happened had he not been dismissed, but it can apply a counter factual analysis, and foresee that continued employment until 28 February 2017 would have been unlikely under the circumstances. I therefore decline to exercise the discretion under s 128(3).

[47] The Authority must therefore order the employer to pay to the employee the lesser of a sum equal to his lost remuneration, or to three months' ordinary time remuneration. Three months' ordinary time remuneration would be the gross sum of $15,600. Actual loss is what could reasonably have been expected to have been paid if there had been no unjustified dismissal[4]. This is not limited to actual loss during the first three months after dismissal. A counter-factual approach is not permitted when assessing actual loss under s 128(2).

[4] *Rack v Salters Garage Limited;* EmpC Auckland AC7/02.

[48] In the 13 weeks that followed from his dismissal, Mr X was paid $1,297.50 ($15 an hour x 86.5) in cash doing casual work. I agree with Ms Ryder that this sum needs to be grossed up. Adopting the tax rate of 30%[5], this results in a gross sum of $1,686.75. According to data supplied by Mr X, up to 28 February 2017 Mr X earned an additional $60,457 gross in his new employment. This makes total gross earnings of $62,143.75 from his dismissal until 28 February 2017.

[49] Ms Ryder submits that it is possible that the applicant has not fully disclosed the amount of time he worked for GE Decorators, the business with which he earned the $1,297.50, or the pay he received from that company. On balance, I do not believe that Mr X has deliberately misled the Authority in this respect.

[50] In the same period of assessment, Mr X would have earned a gross sum of $74,400 if he had stayed with the respondent, assuming he worked 40 hours a week at $30 an hour, and reducing the potential earnings by 2 weeks, to take into account the Christmas and New Year shut down and one week's sick leave.

[51] This results in a loss of earnings of $12,256.25 gross. This is less than three months' ordinary time remuneration, and is the sum to be awarded, subject to any reduction for failure to mitigate and contribution.

[52] Mr X is entitled to an award of holiday pay on this sum. This amounts to the gross sum of $980.50. Mr X also seeks a contribution towards his Kiwisaver account. The respondent has not argued that he was not a member of Kiwisaver, and so I accept that this is an appropriate head of loss. Therefore, the respondent is to make a contribution towards Mr X's Kiwisaver account in the sum of $367.69.

[53] Mr X asks for interest on the award of lost wages and holiday pay. Clause 11 of Schedule 2 of the Act provides that, in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[5] As it appears that Mr X earned over $48,000 in the tax year in question.

[54] In *Salt v Fell, Governor for Pitcairn*[6] the Court held that it had jurisdiction to order interest on sums awarded under s 123(1)(b) and s 123(1)(c)(ii) of the Act but not on compensation awards under s 123(1)(c)(i) or for non-monetary benefits under s 123(1)(c)(ii) of the Act.

[55] In fixing the award for lost remuneration in the present case, I have settled on a figure which I consider does justice between the parties without the additional need for an award of interest. For that reason, the claim for interest is declined.

[56] The respondent argues that Mr X could not satisfy the Authority that he took reasonable steps to mitigate his losses and find new employment. However, there is evidence that satisfies me that he did approach at least one temping agency and completed an expression of interest form. It is inherently unlikely that he would have not sought work given that he worked in a trade which would have enabled him to have earned more than he could receive on benefit, and he is a fit young man working in an industry for which he said he had a passion.

[57] I am also satisfied that it would have been hard to find new employment in his trade with Christmas approaching, given that the director said that some of the bigger firms shut down for a month over the 2015 Christmas/New Year period. Given the circumstances of his dismissal, he would have had to have answered some awkward questions about why he was seeking work, which is also likely to have presented difficulties for him in picking up new work immediately.

[58] Overall, I do not accept that Mr X failed unreasonably to seek work after his dismissal.

[59] With respect to compensation under s 123(1)(c)(i) of the Act, Mr X says he was pretty hurt by his dismissal, and that it felt like a kick in the teeth. He felt he had had a good relationship with the respondent and he had had a passion for the work. He also said that he could not eat or sleep.

[60] Whilst the Authority must be careful to ensure that Mr X's evidence does not encompass feelings relating to the anxiety and guilt he was feeling in relation to the injury to his baby, and the various consequences he was facing in relation to that, I am satisfied that his dismissal on 10 November did cause Mr X a moderate level of

[6] [2006] ERNZ 449

humiliation, loss of dignity and injury to his feelings. I set the compensation at $7,000.

[61] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s 124 of the Act).

[62] Ms Ryder argues that Mr X has contributed to the situation that gave rise to the personal grievance because he told J about his arrest despite having been warned by the director not to tell anyone in the workforce. However, the evidence of J (who was called by the respondent) was that he had the conversation with Mr X on a Saturday, and the director's evidence is that he told Mr X not to speak to the others on the following Sunday. Therefore, on the evidence of the respondent's witnesses, it does not follow that Mr X disobeyed a direction from his employer.

[63] I also do not disagree with Mr Butler's assertion that the workforce were likely to have found out about the injury to the baby and Mr X's arrest in any event, given the number of people involved in the situation (Mr X, Mr X's partner, Mr X's step mother, the director and the director's wife together, no doubt, with family members of Mr X and his partner).

[64] Should the assault on the baby itself be a factor that should reduce the award? There is little doubt that Mr X's actions towards his baby were the starting point in a chain of events which led to his dismissal. That assault on the baby was also, clearly, highly blameworthy, which Mr X readily admitted. However, the situation that gave rise to the personal grievance was the director's failure to address the concerns of the workforce. This is the intervening event that led directly to the dismissal, rather than the assault and arrest. I therefore decline to reduce the awards.

Orders

[65] I order the respondent to pay to Mr X the following:

a. The gross sum of $12,256.25 by way of lost wages;

b. The gross sum of $980.50 by way of final holiday pay; and

c. $7,000 pursuant to s 123(1)(c)(i) of the Act.

[66] I also order the respondent to make a payment towards Mr X's Kiwisaver account in the gross sum of $367.69.

Costs

[67] I reserve costs. The parties are to seek to agree between themselves as to how costs are to be disposed of. If they are unable to reach agreement within 21 days of the date of this determination, Mr X may, within a further 14 days, seek a contribution towards his legal costs by having Mr Butler serve and lodge a memorandum which sets out what costs are sought, and the basis of such an application. The respondent will then have a further 14 days within which to have Ms Ryder serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority