

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 41
3128456

BETWEEN

MARCELLA MUMM
Applicant

AND

STEVENS AUTOMOTIVE (1998)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Simon England, counsel for the Respondent

Investigation Meeting: 19 October 2021 at Nelson

Submissions and further Information Received: 2 November and 17 November 2021 from the Applicant
26 October and 12 November 2021 from the Respondent

Date of Determination: 16 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Marcella Mumm was employed by Stevens Automotive (1998) Limited as the manager of a service station from on or about 4 August 2018 until she was summarily dismissed from her employment on 26 June 2020. Stevens Automotive (1998) Limited is a duly incorporated company with its registered office in Nelson. It carries on the business of operating a service station in Motueka which currently trades as BP Motueka. I shall refer to the company from hereon as Stevens Automotive or the company.

[2] The events that led to Ms Mumm's dismissal took place on 22 June 2020 and followed a meeting held with staff and the sole director of Stevens Automotive, Brett Stevens, and the company accountant, Robin Whalley. The events involved communications from Ms Mumm

on 22 June 2020 with other staff who were not present at the meeting, Westpac bank and with the company's main supplier BP.

[3] Ms Mumm says that her dismissal was unjustified substantively and procedurally. In the statement of problem Ms Mumm sought the following remedies:

- (a) A payment of \$12,500 under s 123(1)(b) of the Employment Relations Act 2000 (the Act) for three months lost wages;
- (b) Under s 123(1)(c)(ii) of the Act compensation of \$15,000 through lost benefits as a result of the personal grievance;
- (c) Under s 123(1)(c)(i) of the Act the sum of \$25,000 for compensation.

[4] On the morning of the investigation meeting Ms Mumm sought to amend the amounts claimed to \$66,666 under s 123(1)(b) of the Act and \$80,000 for compensation under s 123(1)(c)(i) of the Act. In final submissions she sought leave to withdraw the request for compensation under s 123(1)(c)(ii) of the Act. Mr England opposes the application for amendment of remedies.

[5] Stevens Automotive says that the dismissal was procedurally fair and justified because of the disclosures made by Ms Mumm and that they were made intentionally and maliciously to damage the reputation and trading ability of the company in breach of her duty of confidentiality and good faith.

Test of justification

[6] The Authority is asked in this matter to determine whether Ms Mumm was justifiably dismissed. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test the Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Stevens Automotive, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[7] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Ms Mumm were sufficiently investigated, concerns raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by Stevens Automotive before

dismissal. The Authority may take into account other factors as appropriate and must not determine the dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Mumm being treated unfairly.

[8] Stevens Automotive could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

The issues

[9] The issues for determination by the Authority are as follows:

- (a) Was there a written employment agreement and if so what are the material clauses?
- (b) What was the reason for dismissal?
- (c) Was there a full and fair investigation as required in s 103A (3) of the Act?
- (d) Could a fair and reasonable employer have concluded serious misconduct on the part of Ms Mumm and reached the decision to dismiss?
- (e) If Ms Mumm was unjustifiably dismissed, what remedies is she entitled to?
- (f) Should the Authority grant the application for leave to amend and increase the remedies claimed for lost wages and compensation?
- (g) Are there issues of mitigation and contribution?

Background upon which these issues are to be assessed

Financial situation deteriorating

[10] Mr Stevens said in his written and oral evidence that in the period 2019 through to 2020 the company's financial situation was deteriorating. Competition and pricing pressure had resulted from the opening of an unmanned fuel site by a third party company a short distance from BP Motueka. The supply of fuel from the unmanned fuel site was able to take place at a significantly lower price to the customer than that which Stevens Automotive could offer.

BP involvement

[11] Discussions took place with the company's main supplier BP in Wellington regarding pricing but Mr Stevens said the service station was not receiving any meaningful assistance. His evidence was that the situation was then made worse by the Covid 19 situation in early 2020.

[12] Mr Whalley became concerned that the company was in significant danger of trading whilst insolvent.

Decision to advise staff of the situation

[13] In May and June 2020 Mr Whalley had several discussions with Mr Stevens. Mr Whalley said in evidence that BP made a few offers however in his view none of the offers would assist Stevens Automotive to any large degree. It was decided that a meeting should be held with staff to let them know of the company's financial situation.

[14] Ms Mumm was advised on Friday 19 June that there was to be a meeting by Mr Stevens.

Pre meeting discussion

[15] The meeting was held on the morning of 22 June 2020. There were disputes in the evidence about what was discussed with Ms Mumm before the meeting. Ms Mumm said that Mr Stevens advised her that the business was closing down. Mr Stevens denied that and said that he spoke briefly to Ms Mumm before the meeting as he wanted to have a more in depth meeting with her following the staff meeting but she was not responsive to that suggestion. In his evidence Mr Stevens said that he asked Ms Mumm before the meeting to talk to Mr Whalley and they had a brief discussion. It is likely at this discussion Ms Mumm became aware of a level of indebtedness that the company had with its bank for the first time. Ms Mumm said that Mr Whalley told her that the company was insolvent and would cease trading on 31 July 2020. In his evidence Mr Whalley did not accept that he stated that the business would close.

Staff meeting 22 June 2020

[16] Mr Whalley attended the meeting with Mr Stevens. Ms Mumm attended the meeting with three other employees. The Authority heard evidence from two of those employees who I shall refer to as Sara and Tracey.

[17] Mr Whalley has been involved in the fuel supply industry for over 40 years as a chartered accountant. He had spent the Sunday prior to the meeting sourcing price comparisons for fuel from various service stations around the Motueka/Nelson area for presentation at the meeting. He also took with him to the meeting a copy of the letter that he had sent to BP dated 19 June 2020 and referred to a newspaper article about the impact of Covid 19 on small businesses. Mr Whalley did most of the talking at the meeting and he read the letter to BP to those present at the meeting in full.

[18] It is likely that Mr Whalley focussed on the obligations the company had to not operate whilst insolvent and the financial situation. Ms Mumm asked questions about employment related obligations and duties, requested financial information about bank matters and some contractual information with the main fuel supplier BP. This was not provided on the basis that it was confidential information.

[19] Mr Whalley and Mr Stevens said in their evidence that Ms Mumm did not appear to be interested in listening to what was being said and her interjections became argumentative and disruptive even abusive. Ms Mumm denied in evidence that her questions could be categorised in that way and said that she was entitled to ask for information. Mr Whalley said in his evidence that because of the interruptions he advised Mr Stevens that they were wasting their time and they both left the meeting. Mr Whalley put the meeting time at about 15 minutes but Ms Mumm and Sara at 30 minutes. It is common ground that the meeting started about 11.00am and was over by 11.30am and that suffices for present circumstances.

[20] The main dispute in the evidence about the meeting was whether Mr Whalley and Mr Stevens advised those present that the business was insolvent and closing. Mr Stevens and Mr Whalley's evidence is that that was presented as a worst case scenario rather than 31 July 2020 being a definitive date for closure. It was Ms Mumm's view that she was told that the business was closing and insolvent before the meeting and that is what she believed from what was discussed at the meeting. Sara said in her oral evidence that it was discussed the business was closing on 31 July 2020. Tracey on the other hand said in her evidence that she did not

think from what was said at the meeting that she was losing her job or threatened by the discussion.

[21] The company was still trading at the date of the Authority investigation meeting. Mr Whalley says that there is significantly reduced profitability and significant capital injection. His evidence was that had it not been for the relatively short period of the Covid 19 lockdown and travel over the summer that he would have questioned whether the company could have survived.

Ms Mumm talks with other staff present at the meeting

[22] After the meeting Ms Mumm and three other employees who had been present remained behind and talked. Mr Stevens said that he was contacted by one of the employees Tracey about 45 minutes after the meeting. Mr Steven's evidence was that Tracey advised him that after the meeting Ms Mumm told the employees present that she would "get him" or words to that effect and that they should all tell as many people as possible that the company was insolvent and closing. Tracey said in her evidence that Ms Mumm had told the employees that she was ringing BP and the bank.

[23] Later that day Mr Stevens got a call from the bank manager who had been copied into an email from Ms Mumm to another employee. The bank manager asked Mr Stevens what was going on. Mr Stevens said that the bank manager responded that "it was out of line" and advised Mr Stevens to get a lawyer. Mr Stevens also became aware that an email had been sent to another person from Mr Whalley's firm and that there had been an attempt by Ms Mumm to enter into telephone discussions with the company's supplier, BP. Mr Stevens became aware that other staff members who were not present at the meeting on 22 June 2020 had been informed that the company business was closing down including Mr Stevens' son who also worked at the business from time to time.

Difficulties in the relationship

[24] There were difficulties in the working relationship between Ms Mumm and Mr Stevens. Ms Mumm had some months earlier advised Mr Stevens that she was looking for another role because of these difficulties. Ms Mumm had requested mediation on two occasions on 9 April and 15 June 2020 but those requests remained unactioned. Mr Stevens said that the requests could not be actioned in April because of Covid 19 and in June because the company was in

serious financial difficulty and was considering options including if it could continue to operate. Ms Mumm felt aggrieved about the fact that mediation requests were not actioned by the company and there was reference to that and earlier concerns in her response for the disciplinary process.

Mr Stevens instructs Mr England

[25] Mr Stevens instructed Mr England who communicated with Ms Mumm by way of an email dated 22 June 2020.

Email suspending Ms Mumm, setting out concerns and inviting her to a disciplinary meeting

[26] The first email sent by Mr England on 22 July 2020 commenced with advice he had received from the company that the meeting was to inform staff that the company was in financial difficulty and unless modifications could be made in the near future to its operations the company could be faced with closing as soon as 31 July 2020.

[27] The email raised four issues of concern that without company authorisation Ms Mumm:

- (a) Sent an email to the company's bankers -- (Mr G and Ms W) informing them that the company was closing operations on 31 July 2020 due to "insolvency issues;
- (b) Made a telephone call, (perhaps more than 1 call), to the company's principal supplier (BP) in an attempt to discuss the company; and
- (c) Informed a third party (Mr Steven's son) that the company was closing down; and
- (d) Informed other staff members (not present at the meeting) that the company was closing down.

[28] Mr England stated in his email that the company had investigated the above matters and understood particularly in respect of the bank that Ms Mumm had had no significant prior interaction with the bank and no interaction at all with branch manager Mr G who always dealt directly with Mr Stevens. He set out that Stevens Automotive believed that Ms Mumm had no reason whatsoever to contact the bank in respect of the matter. There was an understanding expressed that the email to the bank had now been deleted from the company's computer. The email from Ms Mumm to the bank was copied to the email. It provided as follows:

Brett and robin Whalley informed myself and some of the staff this morning that BP Motueka is closing on 31/7/20 due to insolvency issues. I am shocked and disappointed that this decision has been made and would have appreciated being made aware of the severity of the situation before now. Regardless, I want to thank you for your help and support over the last two years.

Kind regards

Marcella Mumm

Manager

[29] Mr England stated in his email that the company considered Ms Mumm's actions as set out to be a gross breach of her duties to the company in terms of confidentiality and in respect of the email to the bank a clear attempt to damage the trading ability of the company and its reputation. It was set out that at that point in time the company considers her actions are so serious that they will result in the immediate termination of her employment.

[30] The email then stated that the company would like to hear from Ms Mumm and she was invited to a disciplinary meeting on 25 June 2020 and advised she could bring a representative. The email set out that the company will consider her views and explanations of her actions before making any final decision on her employment but the eventual decision of the company could be immediate termination.

[31] In the interim the email advised Ms Mumm that she was suspended on pay until the outcome of the disciplinary meeting. She was asked to return the following day any company property she had in her possession including documentation and keys and any lists of company contacts.

Ms Mumm sent two emails on 22 June 2020

First email crossing with that of Mr England's

[32] Ms Mumm said that she sent an email to Mr England very shortly before she received his. In the email she referred to the meeting earlier that day and set out those who attended. She wrote that those at the meeting were advised that the business was closing on 31 July 2020. She set out that the reasons for the closure was that the business was insolvent and this was as a direct result of BP not lowering pricing. Ms Mumm wrote that she had pointed out at the meeting that an agency option had been refused by Mr Stevens and asked to see the figures regarding the current situation of the business, the position if the agency offer had been

accepted and other relevant information behind the decision. She stated that Mr Stevens and Mr Whalley refused to provide that information on the basis it was confidential but that she did not agree that it was. Ms Mumm asked on behalf of staff for written confirmation for each staff member that the business was closing and that their employment was terminated. She asked for financial information to support the claim of insolvency including any bank demand for retirement of current liabilities and an explanation why three staff members were excluded from the meeting.

Second email with initial response to Mr England's

[33] In the second email Ms Mumm wrote to Mr England she stated that staff were not told that the business closing was confidential. She wrote that the email sent to the bank and another staff member at Mr Whalley's accountancy firm was to thank them for their support and that she had not deleted it and set out the folder where it was. Further she said she told other staff of the closure as they appeared to have been ignored in the process and that the interactions she had with Ms W from the bank was significant because she arranged overdraft limits with her on a regular basis and Ms W had asked Ms Mumm to copy Mr G in on any future communication.

Suspension until the disciplinary meeting

[34] Ms Mumm remained on suspension until the meeting on 25 June.

Lengthy submission provided by Ms Mumm in advance of the meeting

[35] In anticipation of the meeting on 25 June 2020, Ms Mumm prepared a lengthy submission setting out the background to her employment relationship. A significant part of the submission referred to issues in the employment relationship. These matters had resulted in Ms Mumm requesting mediation. As part of the submission Ms Mumm also referred to the staff meeting on 22 June 2020. She referred to Mr Stevens telling her before the meeting that the business was closing and that Mr Whalley also confirmed that the company was insolvent and would cease trading on 31 July 2020. Ms Mumm set out in her submission that she expressed her disbelief because she saw the financial position of the business every day as well as generating profit and loss reports through MYOB. She stated that she was advised by Mr Whalley that she didn't know the complete financial position and he advised of a significant

liability to the bank. In her submission, Ms Mumm set out that the liability couldn't be honoured.

[36] Ms Mumm accepted that she had made several requests during the meeting for financial information and confirmation that all avenues had been investigated with BP. Ms Mumm wrote that there was no directive given on sharing of the information about the closure. When she returned to her desk she spoke to Mr Stevens' partner about the business and when another employee who had not been at the meeting arrived at work told her about the meeting and that the business was to close. Ms Mumm telephoned another employee who was not at the meeting and was upset about the news and being excluded from the meeting and she also told Mr Stevens' son.

[37] Ms Mumm wrote that she and other staff were advised it was something that was definitely happening. She wrote that she had sent numerous emails to the bank and assumed implied permission given her role with the company. Further that the email to the bank was sent in direct response to Mr Whalley's statement that the company was insolvent. Ms Mumm said that she phoned BP to establish its position on the closure and to find some clarity and that she was trying to find answers on behalf of staff.

Disciplinary meeting 25 June 2020

[38] Ms Mumm attended the disciplinary meeting with another employee of the company Sara as her support person. Mr Stevens attended with Mr England. At the start of the meeting Ms Mumm asked for permission to record the meeting. This was agreed to and a dual recording made. By agreement the meeting was confidential. The Authority has been provided with a transcript of the recording and no issues with its accuracy were raised.

Closure of business –fait accompli and/or confidential?

[39] Mr England explored in questioning at the disciplinary meeting the concern about the release of confidential information and whether the closure of the business was a fait accompli. He advised that from Mr Whalley and Mr Stevens' perspective they were adamant that the closure of the business was presented as something that could occur if things did not change. He referred to the letter read to the meeting by Mr Whalley that had been sent to BP. The letter referred to the outlet needing some pricing support or that it must close to comply with the Companies Act.

[40] Ms Mumm responded that she did not accept that the letter read out to those at the meeting was clear if pricing support was given by BP then closure may not be inevitable. She referred to confusion from the letter sent to BP and that there was no written confirmation about what the meeting was about or a process to be followed. Ms Mumm said that the staff were left with the impression that closure was inevitable. She explained that those present were not advised that the business closing was a secret.

[41] The Authority asked for a copy of the letter Mr Whalley sent to BP in Wellington dated 19 June 2020. This was the letter that Mr Whalley read out to those present at the meeting. The body of the letter provides as follows:

I have acted for this company for some time, and have some considerable experience when it comes to the operation of Retail Fuel Outlets.

The retail outlet on this site in Motueka is not breaking even and is rapidly running out of working capital as a result of two things:

- Price competition from NPD.
- Covid19 impact on future summer sales.

The director, Brett Stevens must comply with section 135 of the Companies act and not trade whilst the company is insolvent.

The company is rapidly coming to that point which I estimate will be by the end of July 2020 at the latest.

The outlet needs some pricing support or it must close to comply with the Companies Act.

This will have a significant reputational impact for BP (NZ) in the region.

This may not, of course, be of any concern to you. Nevertheless, I feel that I need to draw the matter to your attention having worked with BP in the past and knowing how important this is. (Roadmaster services).

There will be no further correspondence on this matter. We will attend to the company's affairs in due course.

New issue comes to light not in Mr England's 22 June email

[42] Mr England raised at the disciplinary meeting that there were issues that were not in the email that he sent and that he would raise them and if Ms Mumm did not wish she did not have to respond to them and could respond later. Ms Mumm responded that she could not understand why they were not in the email. Mr England said that they had come to light

afterwards and Ms Mumm had asked that “Well then email them to me thank you. I don’t want to get into a reputation destroying session here.”

Discussion about new issue - talking to staff after the meeting

[43] Mr England said that the new issue was “simply” that the company understood after the meeting that Ms Mumm had spoken to staff members and made various statements including encouraging them to tell people the business was closing. Ms Mumm then responded “Tracey”. It was Tracey who Mr Stevens said in his evidence spoke to him after the staff meeting. Ms Mumm agreed that she did [speak to staff] because there was no statement made during the meeting that it was a secret. Her support person Sara said that something needed to be explained when applying for other jobs as to why further employment was being sought. Later in the transcript what was said to other staff after the meeting by Ms Mumm is raised again. Ms Mumm said at the disciplinary meeting that she asked Mr Stevens as he was leaving the staff meeting “if we were closing do I need to continue to order stock.” Mr Stevens did not address that at that time. Mr England asked Ms Mumm if she discussed with Mr Stevens disclosing and Ms Mumm responded “no” and that Mr Stevens did not discuss it with the staff present. Mr England then stated “and you encourage others to disclose”. Sara responded and said “not encourage”. Ms Mumm said “No let them use the word. Let them use the word”. Sara then refers to the need to find further employment in a small community.

[44] In her written and oral evidence Ms Mumm did not accept that she encouraged staff to tell others and “spread the word”. In her oral evidence she did not agree with Tracey’s evidence that she told other staff after the meeting that she intended to telephone BP and the bank.

[45] Within the same part of the disciplinary meeting as shown in the transcript Mr England put to Ms Mumm that she advised she intended to contact BP with the purpose of causing trouble for the business. Ms Mumm responded that the business had caused the trouble themselves about a dirty fuel issue. I will call that issue the “fuel” issue. I record as set out in Mr England’s submission the company denies that issue. Ms Mumm was asked if she said that she was contacting BP and she responded yes and that she did. Objectively assessed a fair and reasonable employer could conclude that Ms Mumm did not dispute that she had told other staff after the meeting that she intended to contact BP. This is further strengthened by her response at the disciplinary meeting that she asked BP about another employee’s view of the contractual obligations it had with the company.

[46] The transcript from the recording of the disciplinary meeting does not support that Ms Mumm was asked if she told the employees present after the staff meeting she was also intending to contact the bank.

Explanation for calling BP

[47] Ms Mumm agreed that she had contacted BP by telephone and spoken to the main contact who I shall call D. She was asked about the purpose of the call. Her explanation as to why she had telephoned BP and what she said appears at different parts of the transcript.

[48] It is clear from the explanations given that Ms Mumm talked to D at BP about the fuel issue, some staffing issues and concerns about Ms Mumm's mediation issues. She explained that she referred to staff working without breaks and some issues about the Covid 19 subsidy. When asked why she contacted D to talk about these issues she said that she did so because of the possible impact on BP's image because of the employment issues at BP Motueka. Further that "big fuel are very very sensitive to getting out into the media" and these issues in the public arena would not make BP look very good. She also explained that she was going to say to D that there is more behind this and maybe she needs to help a little bit with price support and that she wanted to ask D if she had heard the business was closing.

[49] Further she said another employee had told her that he understood there was a contract with BP that meant Mr Stevens could not just close the business. She wanted to clarify that. D she said responded that conversations between Mr Stevens and BP are confidential and she couldn't tell her whether BP was taking any measure. Ms Mumm did not accept that the conversation with BP was a breach of confidentiality. She confirmed that she did not have authority from Mr Stevens to contact BP but did not accept that was required as it was implied because she was a manager and she had previously communicated with BP.

[50] With the fuel issue that had occurred in or about December 2019 Ms Mumm explained at the disciplinary meeting that she had got nowhere with mediation and she then realised the lack of integrity on the part of her employer. She explained that had mediation happened when she had first asked for it, it would not have got to the point that she is "incensed" with the behaviour of her employer.

Communication with the bank

[51] Although it had initially been suggested that the email Ms Mumm sent to the bank could not be located on the company's computer Mr England confirmed it had subsequently been found at the disciplinary meeting. The email had originally been sent by the bank manager to Mr England.

[52] Ms Mumm when asked about her purpose in emailing the bank said it was to thank Ms W for her support and express her disappointment that she was not told of the financial situation until the business was closing. She said that she was shocked by the announcement that the business was closing. As to whether the bank was aware or could have equally been shocked Ms Mumm said that she thought they would know because of the liability that Mr Whalley had advised her of before the meeting. She stated about the bank's knowledge additionally "And if they weren't they perhaps should have been."

[53] Mr England advised that Mr G had informed the company that Ms Mumm's contact with the bank had been a few transactional queries and Mr G only deal with Mr Stevens.

[54] Ms Mumm said that was not true and that she had received an email from Mr G in response to her asking to increase the overdraft but that when she responded about the nature of the facility required Mr G did not respond. The evidence from Mr Stevens and Mr Whalley was that the bank was unaware of the situation that had been presented to staff.

[55] There was considerable discussion about the nature of previous contact between Ms Mumm and Mr G. Ms Mumm could recall one email that Mr G had sent her in or about January 2020. Ms Mumm said that she had never needed authority to communicate with the bank. She did not accept she had breached confidentiality. Ms Mumm also said that she was asked by Ms W to copy Mr G into emails after she did not get anywhere with trying to arrange a permanent overdraft with Mr G in or about January 2020.

Discussion with other staff

[56] Ms Mum accepted that she had talked to other staff about the business closing who were not at the meeting. She explained at the disciplinary meeting she was the manager and her name was on "employment contracts". She confirmed that she had not asked Mr Stevens for

authority to do so. She also confirmed that she had not asked Mr Stevens whether he was going to arrange or had arranged another meeting for those staff.

Employment agreement

[57] There was some discussion about the fact there was no signed employment agreement. The situation was that Ms Mumm had been presented by the previous manager Raewyn with a copy of the standard employment agreement when she was appointed to the role but it was not complete. Ms Mumm said that she would complete it but said at the disciplinary meeting that she became busy and it was still only “partly finished”. At the disciplinary meeting Ms Mumm referred to a situation where she said that she had tried to raise it about a year after she started and Mr Stevens “yelled at her”. She stated at the disciplinary meeting that it was the employer’s responsibility to have an employment agreement.

Other people Ms Mumm advised of the business closing

[58] Ms Mumm was asked at the disciplinary meeting whether she had contacted anyone else about the business closing or to thank them. Ms Mumm explained that she had sent an email to another person at Mr Whalley’s accountancy firm along the same lines as the email to the bank to say the business was closing and to thank her for her support. She confirmed no authority was sought in that regard from Mr Stevens. She said that she talked with some customers about it and probably to some suppliers in the shop and possibly some of the tellers at the bank.

Disciplinary meeting closes

[59] The meeting drew to a close. Mr England said that he would check with Mr Whalley about the conversation he had with Ms Mumm prior to the meeting on 22 June 2022 and also talk to Mr G about the email Ms Mumm had referred to. Mr England said that he would let Ms Mumm know what final decision has been made or not by the following day.

[60] Mr England did make further enquiries with Mr G. Mr G provided another email. Mr G confirmed that there were emails on or about 19 January 2020 about an overdraft issue with Ms Mumm and that it would be normal for Ms W to say to copy him into emails because he is often out of the office.

Ms Mumm advised of the decision to dismiss

[61] On 26 June 2020 Mr England wrote to Ms Mumm advising that the company has fully investigated the matter and considered her responses in writing and oral responses during the disciplinary meeting. It was stated that the company remains of the view that her actions in disclosing confidential company information to multiple parties on or about 22 June amounts to serious misconduct. Ms Mumm's employment was terminated as from that day and there was agreement to pay a gratuity of two weeks wages.

Was there a written employment agreement and if so what are the material clauses?

[62] As set out earlier there was no written employment agreement.

What was the reason for the dismissal?

[63] Mr Stevens was the decision maker. In his evidence he said that the main reason for Ms Mumm's dismissal was the email to the bank because he considered that was the most destructive action and that he could no longer trust Ms Mumm because of the way she had behaved and what he knew she was capable of. Mr Stevens said in his evidence that he concluded Ms Mumm's actions were vindictive.

[64] The letter of dismissal does not differentiate between the four concerns raised with Ms Mumm about her conduct. It refers to the serious misconduct as disclosing confidential company information to multiple parties. There are no findings preliminary or otherwise reached about the separate allegations including any findings as to motivation.

Was there a full and fair investigation undertaken before concluding there was serious misconduct?

[65] I find that the investigation was not compliant with the requirements in s 103A(3) for reasons I set out below.

Sufficient investigation and genuine consideration of explanations – s 103(3) (a) and (d) of the Act

[66] This was a small workplace and Mr Stevens was concerned by what had occurred. It would be artificial to conclude he had no views at all about the conduct. Nevertheless he needed to maintain an open mind to be able to genuinely consider explanations Ms Mumm

advanced. That is a requirement of s 103(3)(d) of the Act that requires genuine consideration of any explanation given in respect of allegations.

[67] The letter containing the allegation supports an element of pre-determination because it states that at that point in time the company considers Ms Mumm's actions were so serious that that "will result in the immediate termination of your employment."

[68] There was a disciplinary meeting and an opportunity for Ms Mumm to explain the conduct. However there was an absence of findings about the allegations in light of the explanations including the weighing and assessing of any new information obtained before dismissal. There was no conclusion reached about any motivation with the conduct particularly in respect of the email to the bank.

[69] Mr England said at the end of the disciplinary meeting that he was going to obtain further information from the bank manager and Mr Whalley in light of the explanations. Information was obtained from the bank manager but not referred to before dismissal. It is unclear if further information was obtained from Mr Whalley about a pre-meeting conversation.

[70] The letter of dismissal provides as follows as to the reason for dismissal:

Having carefully considered all matters the company remains of the view that your actions in disclosing confidential company information to multiple parties on or about 22 June 2020 amounts to serious misconduct warranting summary dismissal.

[71] Stevens Automotive was required to have an open mind to any possible explanations for the conduct and remain open to being persuaded by those explanations. There were no findings taking explanations and any new information into account that may have supported an open mind. In light of the above I cannot be satisfied that the investigation was conducted with an open mind and an absence of pre-determination.

[72] Ms Mumm raises in her submissions that she should have been entitled to copies of the further information obtained from the bank manager and Mr Whalley after the disciplinary meeting. A fair and reasonable process undertaken in accordance with good faith obligations could be expected to include Ms Mumm having an opportunity to comment on that new information. Mr G's new and undisclosed information differed from the initial view of the

company that Ms Mumm had had no interaction at all with Mr G who always dealt directly with the company. It confirmed the nature of the contact as Ms Mumm explained at the disciplinary meeting. Ms Mumm had said in her submission that the email to the bank was in direct response to Mr Whalley's advice before the meeting that the company was insolvent. Further investigation and any response from Mr Whalley was relevant. Ms Mumm also referred to unfairness about not being advised about what Tracey had told the company she had said. There was however discussion of that at the disciplinary meeting and an opportunity to answer questions.

[73] I find that there was procedural unfairness about the adequacy of the investigation, failure to provide relevant new information for comment before dismissal and there was a failure to have a sufficiently open mind so as to genuinely consider the explanations before dismissing. Further Ms Mumm did not understand the reasons for her dismissal were as Mr Stevens stated in his evidence. These defects were not of a minor nature. Ms Mumm's dismissal was unjustified.

Substantive justification

[74] The process was unfair and not in a minor way. The Authority is required to determine whether the dismissal was justifiable by objectively considering whether what was done by the company and how it was done was what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[75] There were no separate findings reached at the time of dismissal about the allegations. The serious misconduct found was for reason of disclosure of confidential company information.

[76] The identification of confidential information is not a straightforward exercise. There was no breakdown of what was a breach of confidentiality for each allegation in circumstances where Ms Mumm denied the information was confidential. There was no express advice to keep what was said at the meeting confidential or any agreement to the same.

[77] Information that a business is closing and/or insolvent is not always confidential. An added complexity in this matter is that Stevens Automotive did not accept that the staff including Ms Mumm were told that the business was closing and insolvent. That could be seen

as disclosure of incorrect rather than confidential information however no findings were made about that and any deliberateness.

[78] Whilst a fair and reasonable employer could expect a more senior employee such as Ms Mumm not to do anything to damage or injure the business there was no clear findings made about whether explanations as to motivation were accepted or rejected. Instead the finding for serious misconduct was disclosure of confidential company information.

[79] The overlapping procedural unfairness means I am not satisfied that dismissal for the reason set out in the letter of dismissal was substantially justified. It is not the role of the Authority to substitute its view for that of the employer.

[80] Ms Mumm has made out her grievance that she was unjustifiably dismissed and she is entitled to consideration of remedies.

Remedies

Application to amend remedies

[81] Ms Mumm applied to amend her claim for lost wages to \$66,666 being 16 months lost wages and her claim for compensation to \$80,000 at the start of the investigation meeting.

[82] That is opposed by Mr England on the basis that it was prejudicial to the company and left it unable to properly consider how it may respond to the claim and its increased seriousness from a monetary perspective.

[83] I have considered the matter and the parties' positions. I am not prepared to grant the application for amendment to remedies. The application was made at a late stage on the morning of the investigation meeting and without previous warning to the company and an amendment would cause potential prejudice to the company in the presentation of its case.

[84] I will therefore consider the remedies claimed in statement of problem. Ms Mumm has confirmed in final submissions that she has withdrawn the claim under s 123(c)(ii) for loss of a benefit.

Lost wages

[85] Ms Mumm claims in her statement of problem three months lost wages. Section 128 is concerned with reimbursement. Section 128(1) of the Act provides that it applies if an employee has a personal grievance and has lost remuneration as a result of the grievance.

[86] Subsection (2) provides that the Authority must, subject to subsection (3) whether or not it provides for any of the other remedies provided for in s 123, order the employer to pay to the employee the lesser of a sum equal to lost remuneration or to three months ordinary time remuneration.

[87] Ms Mumm's actual lost remuneration is greater than three months ordinary time. Ms Mumm said that she had applied for 39 roles and provided a list of those roles. Apart from one fixed term contract for a few weeks she has been unsuccessful in gaining further employment. Inland Revenue Department income details to 31 March 2022 show proof of income of \$22,802.99 after dismissal which is considerably less than what she would have received if she had not been dismissed. Ms Mumm said that the income aside from the brief period of employment and the gratuity payment was made up of a job seeker allowance.

[88] Ms Mumm was paid \$50,000 per annum. That is \$961.54 per week. I am satisfied for the period in question that she tried to mitigate her loss. Subject to any finding about contribution Ms Mumm is entitled, calculated on the basis of \$961.54 multiplied by 13 weeks, to three months ordinary time lost wages in the sum of \$12,500 gross.

Compensation

[89] Ms Mumm seeks \$25,000 compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. There were existing difficulties in this relationship before the dismissal but my focus for the claim under this head is the impact of the dismissal. Ms Mumm's evidence is that notwithstanding her difficulties with Mr Stevens she had in the main enjoyed her role and the dismissal had caused her stress and she had to attend counselling. Ms Mumm said that she had not been disciplined or dismissed previously. She suffered financial difficulties as a result of the dismissal and had to take a mortgage holiday. In the small town where she lived she said that she heard some rumours about why she had lost her role that were hurtful.

[90] The Authority heard evidence from Ms Mumm about a conversation between Mr Stevens and a Motueka business man. Ms Mumm said that the businessman told her Mr Stevens approached him when he was buying fuel at the BP Motueka and talked about Ms Mumm and another employee leaving the service station. Ms Mumm said that the businessman told her that Mr Stevens said he was being sued by Ms Mumm for about \$50,000 and that Mr Stevens said he was suing Ms Mumm. Mr Stevens agreed that he did enter into a conversation with the businessman when the businessman told Mr Stevens that he had heard other allegations. Mr Stevens said he did say he was considering defamation proceedings. Mr Stevens denied talking to anyone else other than staff. I conclude there was some discussion about Ms Mumm at that time thought to be in or about October 2020. I formed the impression from the evidence that the businessman was unlikely to have spoken widely if at all about what was said. I could not conclude a causal link between Ms Mumm's difficulties obtaining new employment and any comment that Mr Stevens may have made to that person. I accept that it may have caused her to conclude more widespread discussion but there was no evidence that Mr Stevens had spoken to other people about Ms Mumm.

[91] I accept that Ms Mumm suffered humiliation and loss of dignity from her dismissal. I consider an appropriate award in line with similar cases is \$15,000.

Contribution

[92] The Authority is required under s 124 of the Act in deciding the nature and extent of the remedies for the personal grievance to consider the extent to which the actions of Ms Mumm contributed towards the situation that gave rise to the grievance and if the actions required the Authority should reduce the remedies that would otherwise have been awarded.

[93] It has not been necessary until this point to decide whether what Ms Mumm did was culpable or blameworthy. The conduct was most unusual. Ms Mumm communicated the closing of and insolvency of the company business as a fact with third parties without discussing that with Mr Stevens and her role was that of a senior employee. I do weigh that Ms Mumm's written submission for the purpose of the disciplinary meeting supports even in her own mind some doubt or ambiguity about the business closure when Mr Whalley said a solution was being sought by approaching BP. The main reason for dismissal, Mr Stevens said in evidence, was the email to the bank.

[94] The Authority heard from Tracey who part of the group of staff who remained with Ms Mumm after the staff meeting. Tracey was clear in her evidence that Ms Mumm was angry after the staff meeting and said that she was intending to “get” Mr Stevens. I accept Tracey’s evidence as more likely that the motives behind the communications were not straightforward and that there was a level of resentment by Ms Mumm about Mr Stevens. The communications with BP support that. There was knowledge that the company could possibly still be having some negotiations with BP about pricing support and about a significant liability with the bank. I conclude it less likely that Ms Mumm’s communication with the bank was simply to say thank you. It was still six weeks out from any possible closure. I find that there was blameworthy conduct on the part of Ms Mumm. She could have injured or damaged the relationship of the company with the bank and was in a trusted managerial position. Her email to the bank at that point was different to emails about the day to day needs of the company. Ms Mumm’s actions damaged the trust and confidence the company needed to have in her in the future. Her actions contributed to the situation that gave rise to the dismissal.

[95] Mr England submits any remedies should be reduced by 100%. I am guided by the Employment Court in *Maddigan v Director-General of Conservation*.¹ In *Maddigan* it was held that a reduction of 50% is to be reserved for exceptional cases and care should be taken before imposing a reduction of 25%. I have considered whether there is exceptional or significant blameworthy contributory conduct in this matter. I weigh in doing so that there were deficiencies in the process for which Ms Mumm cannot be blamed including the quality of investigation and outcome.

[96] I consider it appropriate to reduce the lost wages and compensation awards by 25% to reflect the contributory conduct. Such a reduction was described in *Maddigan* as one of particular significance.²

Orders made

[97] Taking contribution into account I order Stevens Automotive (1998) Limited to pay to Marcella Mumm the sum of \$9,375 gross being reimbursement of lost wages under s 123(1) (b) of the Act.

¹ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

² Above n 1 at [75].

[98] Taking contribution into account I order Stevens Automotive (1998) Limited to pay to Marcella Mumm the sum of \$11,250 without deduction being compensation under s 123(1)(c) (i) of the Act.

Costs

[99] I reserve the issue of costs. Ms Mumm was not represented. She is entitled to reimbursement of her filing fee of \$71.56. In the event that a claim for costs is made Ms Mumm has until 1 March 2022 to lodge and serve submissions as to costs and Mr England has until 15 March 2022 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority