

NOTE: This determination contains an order prohibiting publication of certain information at [1].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2025] NZERA 40
3289079

BETWEEN	CRAIG PAULSEN Applicant
AND	THE ELECTORAL COMMISSION Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Nikkii Flint, counsel for the Applicant Jordan Boyle, counsel for the Respondent
Investigation Meeting:	5 September 2024 in Wellington
Submissions received:	5 and 25 September 2024 from Applicant Up to and including 19 December 2024 from Respondent
Determination:	24 January 2025

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] At the investigation meeting a non-publication order was made in accordance with clause 10, schedule 2 of the Employment Relations Act 2000 (the Act). The non-publication order prevents publication of any information about the Electoral Commission's (the Commission) security arrangements during the period of a General Election.

[2] The Commission's application for non-publication was not opposed. It is accepted that publication of those arrangements would undermine the ability of the

Commission to ensure security. Given the role of the Commission, the public interest in full reporting and open justice would be displaced in this case by the need to ensure integrity in the Commission's security arrangements.

Employment Relationship Problem

[3] Craig Paulsen commenced employment at the Commission on 18 September 2023 as a Solutions Architect. Mr Paulsen raised four disadvantage grievance claims concerning a suspension and how the Commission investigated and addressed employment concerns regarding his use of technology. He says these include suspending him without consultation, removing and failing to fully restore access to the Commission's servers for approximately four months and issuing a written warning for serious misconduct that was procedurally and substantively unjustified. Mr Paulsen seeks compensation and costs.

[4] The Commission says the steps it took including removing all electronic access from Mr Paulsen, investigating its concerns, reaching conclusions about seriousness and issuing a written warning for serious misconduct to Mr Paulsen, were all the actions of a fair and reasonable employer in the circumstances. The Commission denies Mr Paulsen was suspended from work.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Craig Paulsen and Nicola Kiri-Paulsen, Lucy Hickman and Aaron Tasker. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was Mr Paulsen suspended from employment and, if so, was he unjustifiably disadvantaged by that action?
- (b) Was Mr Paulsen also unjustifiably disadvantaged in his employment when the Commission:
 - removed his access to work servers and emails without notice on 2 October 2023 and failed to fully restore access until 1 March 2024?

- Investigated and issued Mr Paulsen a written warning for serious misconduct on 26 October 2023?
- (c) If the Commission's actions were not justified should compensation under s123(1)(c)(i) of the Act be awarded?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Paulsen that contributed to the situation giving rise to the grievance?

The Commission's concerns

[7] The Commission received a security alert on 2 October 2023 which was in very close proximity to a General Election. It was later confirmed the alert was because Mr Paulsen set up a Virtual Machine (VM) in the Commission's cloud computing environment (Azure Environment). Mr Paulsen had been employed for approximately two weeks at the time and with pre-planned leave he had only worked 10 days since commencing employment on 18 September 2023.

[8] The Commission's concerns first came to the attention of Mr Paulsen when he discovered he could not access his work account remotely while he was on leave. He was informed it was locked and when he returned to work there was to be a meeting. On his first day back from leave, which was 5 October 2023, Mr Paulsen's manager told him to meet with the Senior IT Manager and the Lead Architect about his account being locked. No other information about why he was locked out of his account or the nature of the meeting was provided.

[9] At the meeting, which I will return to below, Mr Paulsen did not deny setting up the VM but said it was for his professional learning and development and to enable him to occasionally connect to his home computer to check emails and listen to music. Mr Paulsen maintains connecting to his home computer was a secondary purpose. The main reason he set up the VM was to attend and continue his professional development training.

[10] The Commission was alarmed about the connection between work and a home computer, the way Mr Paulsen went about installing the VM without waiting for the usual approvals and then Mr Paulsen failing to take accountability for his actions.

[11] It transpired Mr Paulsen had installed the VM himself instead of waiting for the normal request and approval process through the IT service at the Commission. He

maintains he had approval from a manager. The Commission says that was not his normal manager, that he did not make it clear what he was requesting and in any event what he did was a breach of more than one of the Commission's policies. A folder structure he had created and additional applications he downloaded created an overall picture that the Commission considered to be very serious.

[12] On 20 October, following an earlier meeting on 13 October where Mr Paulsen was given an opportunity to respond to the allegations, Lucy Hickman, Deputy Chief Executive and the decision maker, wrote to Mr Paulsen confirming the allegations were considered to be made out and her preliminary decision was to issue a first written warning which would be valid for a period of six months. The preliminary finding was recorded as follows:

You did set up a personal Azure subscription within the Electoral Commissions Microsoft Azure Tenancy which is not aligned with our Cyber Security or Acceptable use policies in that the Virtual Machine was exposed to the Internet via Remote Desktop Protocol (RDP) allowing unfettered access both in/out of the Electoral Commission Azure tenancy.

Non-sanctioned software was downloaded to your Electoral Commission device which could pose a security risk due to not being maintained by the Commissions automated patching tools that reduce the risk of security vulnerabilities.

[13] On 25 October the parties met to discuss the preliminary decision. Mr Paulsen provided further feedback highlighting again his view his induction was insufficient and that he had been provided with no evidence in order to fully understand the allegations being made against him.

[14] On 26 October 2023, Ms Hickman recorded her final decision in a letter to Mr Paulsen. She confirmed she found the allegations to be made out, she considered Mr Paulsen's actions to be serious misconduct and a first written warning to be the appropriate outcome. Mr Paulsen's short period of employment and issues with his induction were regarded as mitigating factors taken into account when deciding the appropriate outcome.

[15] The letter contained the written warning and attached to it were the logs evidencing creation of the subscription and the downloaded software.

Unjustified disadvantage

[16] A personal grievance for unjustifiable disadvantage is one that alleges the employee's employment, or one or more conditions of employment is or are affected to the employee's disadvantage by some unjustifiable action by the employer. Once the employee establishes they have been disadvantaged, then the employer must satisfy the Authority the action which disadvantaged the employee was justified.

[17] Mr Paulsen alleges he was unjustifiably disadvantaged in three ways. Firstly, by suspending him without proper consultation or affording him the opportunity to seek legal advice. The second was removing him from the workplace and failing to fully restore access until 1 March 2024 and thirdly the warning for serious misconduct issued to Mr Paulsen was substantively and procedurally flawed making the actions of the Commission unjustified.

[18] When asked to determine whether the actions of the employer were justified in the decisions it made and the actions it took, the Authority 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 the employer and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action that caused the disadvantage.

[19] The Authority may take into account other factors as appropriate and must not determine an action to be unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[20] I note at this point the Commission did not provide direct evidence on aspects of the employment investigation. Ms Hickman gave evidence of her understanding about what had happened during and after the first meeting on 5 October and of the interactions between Mr Paulsen and his previous manager about the Commission's concerns and the investigation. That manager, who is no longer employed at the Commission, sent the first allegations letter and conducted the first meeting.

[21] Mr Tasker, Mr Paulsen's current manager, was not employed at the Commission at the time. He provided a written statement setting out his professional opinion regarding Mr Paulsen's conduct and the Commission's actions in relation to this matter.

Because this evidence was predominantly opinion evidence and Mr Tasker is employed by one party to this dispute, little weight can be given to Mr Tasker's evidence. He is not independent and as such cannot be an expert witness.

Was Mr Paulsen suspended?

[22] On 5 October 2023, at the start of the process, Mr Paulsen was asked by his manager to meet with two of his colleagues about being locked out of his account because of a security alert. His manager did not attend that meeting. Mr Paulsen had no other information regarding the purpose of the meeting and says the meeting took an unexpected turn when he was asked who was on his interview panel and to outline everything he had done in the two weeks since starting, which he did. Among other things Mr Paulsen explained he set up the free Azure subscription to continue preparing a for a Microsoft exam scheduled for October. Mr Paulsen also explained he would occasionally connect to his home computer to check personal emails and listen to music and explained he had done that at previous places of employment.

[23] Mr Paulsen said he felt under pressure at the meeting. The questions felt like interrogation in that it was being implied he had a malicious intent. He says it was stated plainly they did not believe him when he explained why he set up the VM. They asked for the passwords which he says he gave them. At the end of the meeting Mr Paulsen was instructed to wait in the kitchen area while the meeting notes were typed up. When the notes were presented to him, Mr Paulsen asked for a minor correction and says he was assured he would be sent a copy of the corrected notes.

[24] That correction became important to Mr Paulsen because it concerned the issue of connecting to his home computer. Mr Paulsen says it was recorded in the notes as if Mr Paulsen had said this was the dominant purpose for downloading the VM. Mr Paulsen's evidence was instead that he indicated his main purpose was to use the Azure subscription for his personal development but he would also use it occasionally to connect with his home computer.

[25] The meeting notes were never provided and the comment about connecting to his home computer was a significant concern for the Commission. At the end of the meeting Mr Paulsen says he was asked to return to his desk and pack up his belongings except for his work laptop and then escorted out in full view of everyone on that floor. He says he entered the elevator and was told not to return to work until further notice

and his access was revoked. No evidence was provided by the Commission to refute Mr Paulsen's account of the first meeting.

[26] Mr Paulsen gave evidence about how difficult this period was for him. He confirmed his manager checked in on him while he was at home and he was offered, and accessed EAP but nonetheless it was a difficult time.

[27] Clause 6.3 of the individual employment agreement provides for suspension on pay:

The Commission has the right to suspend you on pay pending the outcome of any fact finding or disciplinary investigation required after hearing from you.

[28] The Commission's position is that it did not rely on that clause because it says Mr Paulsen was not suspended. Instead, he was asked to work from home until the security concerns were investigated.

[29] Mr Paulsen said he was not told he was working from home, but rather that he was to stay home. On 10 October his manager asked Mr Paulsen to come into work to collect a letter. On arriving at the Commission Mr Paulsen discovered his swipe card did not work and he could not access the building.

[30] Ms Hickman confirmed she was unaware Mr Paulsen's building access was revoked on 5 October. The intention in having Mr Paulsen stay home she said was to remove access to the Commission's servers until the matter could be properly investigated. Ms Hickman said removing Mr Paulsen's access to the building was not authorised and should not have occurred without authorisation from either the CEO or herself.

[31] It was submitted on Mr Paulsen's behalf that had he been given an instruction to work from home, work would have been impossible without access to the Commission's servers or emails, which he did not have. As referred to above, there was no evidence provided by the Commission of the communications with Mr Paulsen that led to him leaving work on 5 October so to the extent it is asserted he was told to work from home, or that there was agreement that he work from home, that was not able to be substantiated.

[32] Ms Hickman also gave evidence that at the time she was told Mr Paulsen was working from home and she enquired further because she was not sure what work Mr

Paulsen could logically do without his laptop or access to the Commission's systems given the work he was employed to do. She was reassured he had policies to review and her evidence was she left it at that.

[33] Despite the Commission's position being that Mr Paulsen was not suspended in the formal sense of the word it would appear he was sent away from work on 5 October and his access to both the building and the work servers was revoked. In those circumstances, the requirement to stay home until further notice, amounted to a suspension because he was not permitted to enter the work premises and without a laptop or access to the work servers, he was not able to work from home.

[34] Because the employer considered Mr Paulsen was not suspended, the process a fair and reasonable employer could be expected to follow was not followed. An employer contemplating possible suspension is required to provide information and consult on the appropriateness of suspension. This gives employees an opportunity to seek legal advice and to comment before a decision on suspension from work is made. That did not occur in this case.

[35] Submissions were made on behalf of the Commission that should the Authority find Mr Paulsen was suspended, it can be considered to have been justified in the circumstances because the Commission was dealing with an urgent and serious security risk while it was conducting an event of national significance namely a General Election. It was therefore reasonable to ask Mr Paulsen not to be in the office while the matter was investigated.

[36] While that could be the case in certain circumstances, it would be difficult to justify suspension with no consultation or notification based on a serious security concern without the Commission giving direct evidence about that. Ms Hickman's evidence was that she relied on the advice of the investigators and Mr Paulsen's then manager as to both the seriousness of the issue and Mr Paulsen's involvement in the security alert. Even so, the assertion matters had to be kept secret from Mr Paulsen due to the level of risk is a position that could only be sustained for a short period of time until the letter of 10 October 2023 when Mr Paulsen was put on notice of the concerns. On balance I do not consider that to be a justification.

[37] Mr Paulsen was kept away from work in circumstances that amounted to a suspension. There was no communication and as a consequence no consultation as

required by the justification test set out in s 103A of the Act before the decision was made to suspend Mr Paulsen from work between 5 October and 31 October 2023. This disadvantaged Mr Paulsen in more than one way. Being prevented from working when Mr Paulsen was willing and able to work and the lack of consultation about suspension are both actions that affected Mr Paulsen's terms and conditions of work.

[38] Mr Paulsen's claim he was unjustifiably suspended is successful.

The written warning for serious misconduct

[39] The Commission decided after the meeting on 5 October to commence a formal employment investigation. The 10 October letter set out the allegations and invited Mr Paulsen to attend a meeting about alleged serious misconduct on 13 October 2023. The letter informed Mr Paulsen the outcome of the investigation could include dismissal. Mr Paulsen says there was no discussion with his manager about what was in the letter or that he was under investigation. Instead, he says after gaining entry to the building, he met briefly with his manager who handed him the letter.

[40] Mr Paulsen says this letter did not comply with the Commission's own policy because there was no meeting to discuss the allegations with him before this letter was issued to him.

[41] On 13 October, Mr Paulsen met with his manager to discuss the allegations set out in the letter of 10 October 2023. The allegations were as follows:

- (a) Whilst trying to set up connection to your home servers on your Electoral Commission laptop the security settings prohibited you from creating a secure connection in alignment with ICT Acceptable use and ICT Cyber security policies.
- (b) You subsequently set up an unauthorised 2016 Virtual Machine (VM) in Microsoft Azure with free subscription tied to your Electoral Commission account without following any standard change procedures or seeking appropriate authorisation.
- (c) Once the unauthorised VM was established, you accessed this through an unsecure link to install software.

The concerns about these actions were also set out in the letter namely:

- (d) The alleged actions open a direct uncontrolled door into and from the Commission without a password, instead it can be accessed if the IP address is known.
- (e) Unauthorised access increases the risk for information to be taken from or imported into the Electoral Commission's systems, potentially including malware or ransomware.
- (f) At the meeting you explained the actions were taken after our normal security systems on your laptop prevented you from doing what you wanted to achieve.
- (g) The initial information shows the system was contacted on several occasions, namely 22, 24, 26 and 27 September you powered on the VM established remote desktop protocols (RDP) allowing computers to communicate and connect to your home computer.
- (h) Following a scan of your Electoral Commission laptop, it was revealed that the following 'non-sanctioned' software had been downloaded onto the device; Archie;Directory Opus; Move Mouse; Draw.io and Grammerly.
- (i) An organised file structure with separate folders and downloaded copies of files for various systems and applications within EC has also been created on the device.

[42] Mr Paulsen's conduct said to be in breach of the Commission's IT Acceptable Use Policy, Cyber Security Policy and Code of Conduct. Dismissal was noted as a possible outcome initially, but the preliminary decision recorded a first written warning as the proposed outcome and that was the eventual outcome.

[43] A transcript of the meeting on 13 October was provided and it records Mr Paulsen's manager read out these allegations, noting he was deeply concerned about them and if proven could be considered to be serious misconduct and lead to dismissal.

[44] Mr Paulsen responded and made the following points which I have summarised:

- (a) His induction was lacking due to the timing and his manager also being new.
- (b) A password was set up for the VM and was provided at the meeting on 5 October.

- (c) His actions in setting up the VM were not malicious and were to ensure he could continue his professional development.
- (d) The panel chair at his interview expressed support in Mr Paulsen continuing his studies.
- (e) Confirmation of the booking for an upcoming Microsoft exam was provided.
- (f) There was segregation between what Mr Paulsen did, the license was useful for his job and most organisations make their software licences available to staff, and he had been permitted to do this in the past.
- (g) He was unaware of the policy breaches due to issues with his induction.
- (h) He explained why he used “unsanctioned software” and that he had sought guidance from an Infrastructure Manager to install those tools who noted he could install the software.
- (i) An IT infrastructure Manager had confirmed he could install portable apps so he had assumed he was doing nothing wrong.
- (j) The folder structure on the device was something he had done before and he created it when one of colleagues sent a lot of documents after he started.
- (k) The work laptop is encrypted which acts as a safeguard for sensitive data.
- (l) It was not unsafe (from a cyber security perspective).
- (m) If it was alleged he had powered on the VM on four occasions in September, why was nothing done at that time so the matter could be dealt with immediately at the lowest level.
- (n) By design it is not possible for the free subscription to communicate with (or transfer files) to the Electoral Commission’s Cloud network.
- (o) That in his previous workplaces the creation of a free Azure subscription intended for learning and development purposes was considered common practice and not regarded as malicious activity.

[45] Further comments were made on Mr Paulsen’s behalf about the process followed during the investigation. In particular:

- (a) There was no preliminary meeting between his manager and Mr Paulsen so it appears the Commission decided the concerns were serious misconduct after the meeting on 5 October.
- (b) Mr Paulsen was unaware of the allegations or that there was an investigation before the meeting on 5 October.
- (c) Failing to provide full information to Mr Paulsen before he was asked to respond was unfair.
- (d) Saying “I do not believe you” in the 5 October meeting indicates a decision has been made.
- (e) That the way it had been handled especially the 5 October meeting had left Mr Paulsen feeling humiliated.

[46] The meeting notes record that Mr Paulsen’s manager said that Mr Paulsen had given him a different perspective to look into. Mr Paulsen raised some questions about the policy and then concluded by saying he never meant to compromise the Commission’s environment and he was committed to taking any necessary steps and corrective measures to learn how things work including working with his colleagues and sticking to policy in the future.

[47] In short, Mr Paulsen’s response was that his actions did not pose the risk the Commission says they did, for example, a password was set up for the VM which he provided at the meeting on 5 October but the 10 October letter recorded there was no password. His intentions were to set himself up at work and to ensure he could continue with his professional development. He said what he did was nothing he had not done in other places of employment (including Government agencies) and that he had authorisation at least in terms of circumventing the IT authorisations for downloading the applications.

[48] Further he says downloading the folder structure to his device was not suspicious and although he accepted the applications were not sanctioned, they were widely used in workplaces and “unsanctioned” did not mean approval or authorisation would not be given if requested.

[49] Seven days later on 20 October, Ms Hickman wrote to Mr Paulsen setting out her preliminary view. Notably she proposed a warning for serious misconduct, having found he did breach several policies when he created the VM and he also had

downloaded a number of unsanctioned applications also in breach of policy. Collectively these actions created a security risk. There was no response recorded in the letter to the matters he raised at the 13 October meeting.

[50] Mr Paulsen and Ms Hickman then met on 25 October to discuss her preliminary view letter. Notes of that meeting were provided in evidence. Mr Paulsen largely canvassed the same issues raised at the meeting with his manager on 13 October but pointed out any information he gave at the meeting on 5 October could not be considered to be evidence. From his perspective he answered the questions he was asked and was unaware of the investigation at that stage. He asked Ms Hickman again for evidence of what it was he was alleged to have done including logs and security alerts.

[51] Ms Hickman accepted at the meeting the induction process could have been better and noted the need for heightened security at that time because of the election cycle and a general election was either underway or about to be. Further discussion was had about support for his return to work.

[52] On 26 October 2023, Ms Hickman recorded her final view in her letter to Mr Paulsen. She confirmed her preliminary view the allegations were made out and a first written warning would be issued and placed on his file for six months from the date of the letter. Three pages titled “creation of subscription + Virtual Machine Logs – snapshot taken on 25 October 2023” were attached as evidence on which the findings were based.

[53] On 26 October 2023, Mr Paulsen raised a personal grievance claiming the Commission had failed to follow its own policy on employment investigations and failed to consider a number of mitigating factors as well as the impact on Mr Paulsen. The impacts included his ability to secure other Government work after the warning was issued and insufficient support for his return to work. Mr Paulsen was concerned about the perceptions other employees may have of him after he was sent home on 5 October and that he had not returned since then other than to attend disciplinary meetings and collect a letter. Mr Paulsen sought several things including reversal of the written warning.

[54] On 30 October 2023, the Commission responded declining to reverse the written warning, acknowledged his induction was not as expected but noted Mr Paulsen had

only been with the Commission a few days before the incident occurred. A detailed reintegration plan was set out.

[55] Mr Paulsen returned to work in approximately November 2023 and completed the induction plan. In February 2024, his new manager commenced work at the Commission and arranged for Mr Paulsen's full access in his role at the Commission to be restored. Mr Paulsen lodged his statement of problem in the Authority on 4 April 2024.

[56] While an employment investigation was conducted and the Commission was in a position where it could justify the need for an investigation given the security alert and the context of the work the Commission undertakes, there were significant steps of the process where the obligations on employers when investigating misconduct of employees were not met or there was insufficient evidence these were met.

[57] The basic requirement imposed on an employer is that it must follow the principles of natural justice. When conducting an employment investigation, the minimum requirements are that the employer has properly investigated allegations, given the employee an opportunity to be heard and considered their explanation before making a decision. This is reflected in the provisions in the Act referred to above.

[58] The Commission's evidence was that it did not consider the first meeting on 5 October part of its investigation. The meeting was clearly designed to elicit information and that information was used to assess the seriousness of Mr Paulsen's conduct.

[59] What Mr Paulsen said at the first meeting is also recorded in the final decision letter and the allegations letter. This means it would be hard to treat the first meeting as anything other than part of the investigation process so Mr Paulsen should have been on notice at the start that his actions were under investigation.

[60] What transpired after the first meeting was a written report created by a Cyber Security Analyst who was one of the people who met with Mr Paulsen on 5 October. Mr Paulsen's comments at the first meeting are referred to in the report and considered against what was discovered after analysing Mr Paulsen's access to the Commission's server. Additional things Mr Paulsen had done (downloading unsanctioned applications) were also identified and recorded in the report.

[61] This is problematic because Mr Paulsen was not only never told the meeting formed part of an investigation, he was also not informed a report had been created referencing his answers to questions put to him at the 5 October meeting and nor was he provided with the report during the investigation.

[62] Ms Hickman was also not provided with that report. Her evidence was she was unaware it existed until preparing for the investigation meeting in the Authority. The Commission submitted there was no disadvantage to Mr Paulsen because Ms Hickman did not have the report. However, Ms Hickman's oral evidence was that she received regular updates from the start of the investigation, both verbally and in emails, from the investigators and Mr Paulsen's then manager.

[63] The report contains assertions Mr Paulsen's actions were deliberate and given the timing it suggests his actions were malicious and it appears more likely than not its findings formed the basis for the allegations. Genuine consultation would involve Mr Paulsen being aware of this report and its contents before he responded to the allegations.

[64] While Mr Paulsen accepted he downloaded the VM, what was not clear to him was how serious the Commission considered his actions to be. This was in the report and it was put to him at the Authority's investigation meeting but it does not appear to have been clearly put to him during the Commission's investigation.

[65] Mr Paulsen denies his actions were anything other than a breach of policy and were not serious. For completeness with a dispute about the seriousness of Mr Paulsen's actions, without expert evidence the Authority would be unable to reach conclusions about that.

[66] Drawing the parts of the investigation together there was a failure to inform Mr Paulsen fully as to what the first meeting on 5 October was about. This was particularly important after Mr Paulsen was shown the notes directly after that meeting and he asked for an amendment. No notes were ever provided and no explanation was given by the Commission as to where those notes were and why they were not provided. It is not clear whether they were relied on by the decision maker.

[67] The first meeting on 5 October must have formed part of the investigation because what Mr Paulsen said at that first meeting was referred repeatedly during the investigation and referred to in the final decision letter. Mr Paulsen was entitled to

know he was under investigation and why, even if it was in the initial stages, and to seek advice and have representation and support when he attended that meeting.

[68] Similarly, by virtue of logs being provided with the final letter it can be concluded that not all relevant information was provided meaning Mr Paulsen could not have had a full opportunity to respond to the allegations at the meetings on 13 and 25 October 2023.

[69] The provision of information that is to be relied on by the employer during employment investigations is set out as a requirement in the Commission's Managing Employee Conduct and Performance Policy.

[70] Finally in Ms Hickman's evidence she records the following:

One of the key concerns I had was what I perceived to be a lack of reflection and acknowledgement on Craig's part. Craig didn't seem to be taking any responsibility for his actions. Craig said he had done similar things at previous employers. He was critical of the Commission's induction process, its security and IT processes. At no stage did Craig accept he may have acted inappropriately, even if accidentally, or that he had taken actions which posed a security risk. He did not apologise.

[71] The significance of this is that none of the letters to Mr Paulsen setting out the allegations refer to concerns about a failure to take responsibility or lack of reflection or acknowledgement. The transcripts from both meetings do not record the Commission raising this with Mr Paulsen. Yet as the decision maker this was what Ms Hickman was seeking. It was also accepted by the Commission that Mr Paulsen's induction could have been more robust and that he acted based on his own experience and personal judgement.

[72] The Commission did not provide witnesses to give evidence about what happened early on in the process and gave conflicting evidence about the seriousness of Mr Paulsen's conduct. Ms Hickman's evidence was at odds with Mr Tasker's in terms of whether Mr Paulsen's actions were considered to be deliberate and therefore more serious.

[73] These were more than minor defects because natural justice requires access to all information relied on by a decision maker to form a view. This ensures the employee has a full opportunity to respond and the employer has considered any explanation before making a decision. These defects have resulted in unfairness to Mr Paulsen because Ms Hickman had and clearly relied on information he did not have. Failing to

inform Mr Paulsen at the first meeting that his actions were the subject of an investigation is also unfair. Natural justice requires at a minimum that before the employer has properly investigated misconduct allegations it has given the employee an opportunity to be heard and considered that explanation before making a final decision.

[74] As a consequence, the Commission was unable to justify its actions in terms of the identified defects in its investigation process and the conclusion that Mr Paulsen's actions amounted to serious misconduct. The warning for serious misconduct was both procedurally and substantively unjustified.

Failing to fully restore tools until March 2024

[75] Mr Paulsen's evidence, confirmed by Mr Tasker, was that full access was not restored until 1 March 2023. Mr Paulsen says this meant he could not access all tools required to fulfil his role.

[76] The need for a plan to manage Mr Paulsen's reintegration back to work was noted in Ms Hickman's final view letter dated 30 October. A draft induction plan was attached recording Mr Paulsen would be provided with a laptop with "appropriate access for him to perform his role effectively".

[77] Mr Paulsen had a period of sick leave at the conclusion of the employment investigation so his return to work was delayed. His manager at that time started actioning the induction plan before he left. Mr Tasker took over that role commencing 7 February 2024. Mr Tasker confirmed Mr Paulsen advised him he did not have sufficient access to perform his role. On enquiring into the circumstances, Mr Tasker was informed the induction plan was to be completed before full access was restored.

[78] It transpired the induction plan was completed well before Mr Tasker started in February 2024, possibly even as early as December 2023. Mr Tasker took immediate steps to restore Mr Paulsen's full access.

[79] Looking at the induction plan, there is no reference to withholding access. Ms Hickman's letter refers to provision of a laptop with appropriate access for him to perform his role effectively. In any event Ms Hickman's oral evidence was that she assumed full access had been restored prior to Christmas 2023 which leads to the conclusion a short period of limited access was anticipated while the induction plan was

worked through. I also understood Mr Paulsen to have agreed to a short period of limited access.

[80] Mr Tasker recorded Mr Paulsen's role description in his written evidence in a way that makes it difficult to understand how limited access could be justified beyond an agreed period:

The Solutions Architect role at the Electoral Commission is a senior technical role with responsibilities for both technology design and implementation. As part of the role, a Solutions Architect is expected to provide advice on best practice infrastructure and IT environment matters and be involved in the design and implementation of information system security controls. To perform this function, the role requires the highest levels of privileged access to the Commission's technology environment and its information.

[81] The Commission's evidence, that Mr Paulsen did not require full access because of the tasks he was working on, is not accepted. Full access was granted when Mr Paulsen started at the Commission and limited access is not consistent with the scope of the role as described by Mr Tasker once the induction was completed and the employment investigation had been concluded. If there were further milestones to meet or competencies to be signed off, these should have been clearly articulated and discussed with Mr Paulsen.

[82] Not having the tools required to perform his role disadvantaged Mr Paulsen in his employment. With no communication or consultation in accordance with s 103A of the Act, the Commission's actions in not restoring full access to Mr Paulsen until March 2024 have not been able to be justified.

Remedies

[83] Mr Paulsen has been successful in raising his personal grievances and is entitled to an assessment of remedies. Mr Paulsen seeks compensation for humiliation, loss of dignity and injury to feelings. He gave evidence that was not challenged of being escorted out of the building on 5 October and the impact this had on him particularly because it was observed by others. He suffered loss of dignity being locked out of the workplace, not having his explanations genuinely considered or being given a fair opportunity to respond to the allegations. Delays in restoring full access to the servers compounded this. He had to approach a new manager to discuss access and the reasons the access restrictions were applied to his account, and he was humiliated by having his new manager purport to provide expert evidence and provide opinions about him.

[84] The way the investigation unfolded, impacted on him and his evidence of the impact on his wellbeing and confidence was supported by the evidence his wife gave.

[85] Given three disadvantage claims are made out, but they all form part of the same factual matrix for the finding Mr Paulsen was unjustifiably disadvantaged, it is appropriate to globalise the amount of compensation awarded. Given he was disadvantaged by the actions of his employer before, during and after the investigation, I consider an award of compensation in the amount of \$20,000.00 to be appropriate.

Contribution

[86] Under s 124 of the Act, Mr Paulsen's contribution to the situation that gave rise to the personal grievance must be considered. I would need to be satisfied that Mr Paulsen's actions contributed to the situation that gave rise to the personal grievance and that a reduction is required to the remedies that would otherwise have been awarded.

[87] The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[88] Mr Paulsen accepts he did download the VM and the unsanctioned software and indicated his willingness to learn and to comply with the Commission's policies and way of working. While I note the focus in Mr Paulsen's evidence on his view that his actions did not create a security risk, I have been unable to resolve the conflict with the Commission's evidence, as there was no expert evidence available to the Authority.

[89] However, taking into account what the Commission does and the fact the timing of Mr Paulsen's employment coincided with the period immediately before and during an election, it is difficult to understand why a more considered approach was not taken, particularly when downloading the VM and unsanctioned software was outside of the normal IT request process.

[90] In this case, the Commission was justified in investigating the security breach but the way it went about investigating it was significantly flawed. Given it is not denied by Mr Paulsen the VM or the additional applications were downloaded and that normal approval protocols were circumvented, I find Mr Paulsen's actions did

contribute to the situation he found himself in and accordingly, a reduction in remedies by 20 per-cent is appropriate.¹

Summary of orders

[91] The Electoral Commission is ordered to pay Craig Paulsen compensation in the amount of \$16,000.00 for humiliation, loss of dignity and injury to feelings under s123 (1)(c)(i) of the Act.²

Costs

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[93] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Paulsen may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the Commission will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[94] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.³

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

² \$20,000.00 - \$4,000.00 = \$16,000.00.

³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1