

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 63
5547826

BETWEEN	YUVAL SHOSHANY Applicant
AND	4RF COMMUNICATIONS LIMITED First Respondent
AND	IAN TROUGHTON Second Respondent
AND	4RF LIMITED Third Respondent

Member of Authority:	Michele Ryan
Representatives:	Paul McBride, Counsel for Applicant David Burton, Counsel for Respondents
Investigation Meeting:	14 and 29 April 2015 in Wellington
Submissions Received:	From the Applicant on 29 April 2015 From the Respondent on 1 May 2015 From the Applicant 'In Reply' on 5 May 2015
Determination:	30 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The third respondent, 4RF Limited, specialises in the design and manufacture of wireless radio products. Its head office is in Wellington. At the time relevant to Mr Yuval Shoshany's claims, 4RF Limited had an office in Israel consisting of

four employees including Mr Shoshany¹. On 11 March 2015 Mr Shoshany was summarily dismissed for misuse of the company credit card.

- [2] Counsel for Mr Shoshany has raised a dispute about whether Mr Shoshany was employed by 4RF Limited, its predecessor company, or Mr Ian Troughton, a director of each of those companies. 4RF Limited states that it was Mr Shoshany's employer and should be the sole respondent to Mr Shoshany's claims. I shall return to this matter later in this determination. For ease of reference I shall refer to his employer as 4RF.
- [3] Mr Shoshany alleges a range of procedural flaws to the way he was dismissed and says there are no substantive justifiable grounds for his dismissal. He seeks reinstatement, loss of wages, compensation, and penalties against the second and third respondents and special damages for costs incurred.
- [4] 4RF says the decision to terminate Mr Shoshany's employment was available to it as a fair and reasonable employer and justifiable in all the circumstances. In any event 4RF claims Mr Shoshany's position has been disestablished in the period between his dismissal and the Authority's investigation and that there is no role to which he could be reinstated.

The Authority's investigation

- [5] Mr Shoshany initially applied for interim reinstatement² pending investigation into his substantive claims, but he forwent that application³ in exchange for an early investigation into his substantive claims. He travelled from Israel and presented at the Authority's investigation meeting on 14 April 2015. Representatives of 4RF including Chief Executive Officer, Mr Troughton and Chief Financial Officer, Mr Roger Gawtreay also attended the meeting. Two additional 4RF employees provided specific evidence on the use of the company's credit card. Towards the end of the meeting I determined it would be helpful to interview Mr Hanoch Maskalchi, Vice President Sales, to whom Mr Shoshany reported.

¹ There are also a number of subsidiary companies that are located outside New Zealand

² on 13 March 2015

³ on 16 March 2015

- [6] The Authority's investigation was reconvened on 29 April 2015 to interview Mr Maskalchi by phone and to allow another 4RF employee to provide evidence about credit card use. At the conclusion of that meeting counsel requested further time to prepare and exchange submissions. It was not practicable in all the circumstances to provide an oral determination or indicate preliminary findings and the matter was reserved.
- [7] As is permitted by s 174 of the Employment Relations Act I have not recorded all the information provided and have confined this determination to stating findings of fact and law necessary to dispose of the matter.

Summary of relevant information

- [8] Mr Shoshany commenced employment with 4RF on 10 December 2013 in a third tier management position, 'Director of Global Systems Engineering'. His annual salary was paid in US dollars in accordance with terms of employment. In practice 4RF would remunerate Mr Shoshany on receipt of invoices⁴. Within days of starting his employment he flew to Wellington for an induction into 4RF. He met with Chief Financial Controller, Roger Gawtreay who, amongst other things, informed him about how company credit card expenses are processed.
- [9] Clause 5 of Mr Shoshany's employment agreement provided the following:

5. Expenses

When you travel while working for 4RF your travelling, including flights and/or any other transport related costs, accommodation, meals and incidental expenses, are chargeable to a 4RF issued credit card or will be reimbursed upon production of receipts. The anticipated amount of these expenses must be disclosed with your manager. You are expected to keep expenses incurred within reason and reduce expenses where possible and practical.

- [10] 4RF employs approximately 70 staff. Approximately one third of its employees undertake business travel. There are no additional written policies or guidelines

⁴ There is no dispute that Mr Shoshany was an employee. I note his employment agreement at clause 17 provided that any taxes or levies required to be paid [in Israel] were his responsibility. For reasons that were not made entirely clear he would invoice 4RF for salary payments in the name of an incorporated company.

which augment 4RF's contractual expectations about how its employees operate the company credit card.

May 2014

- [11] In May 2014 Mr Shoshany travelled to the United States on 4RF business. He used the company credit card to make cash withdrawals and to purchase personal items amounting to almost \$4,500 (USD). By email, on 30 June 2014, he sent his May 2014 credit card statement to 4RF's accounts officer, copied also to Mr Gawtreay and Mr Maskalchi. He advised that he had used the credit card for private purchases and asked to have the sum of \$4438.83 deducted from his salary. Mr Shoshany received a response from 4RF accounts thanking him for his advice and notifying him that the deduction would be made on receipt of his next invoice for payment of his salary.

January and February 2015

- [12] On 7 January 2015 Mr Shoshany used the company credit card to pay \$4584.17 (NZD) to a local government agency. Towards the end of January he again travelled to the US on 4RF business. He attended meetings in Phoenix in late January and was scheduled to be in San Diego in early February. In the intervening weekend he visited Las Vegas (30 January - 1 February 2015). Over three days he made cash withdrawals and purchased personal items using the company credit card, totalling approximately \$11,500 (NZD).
- [13] Mr Shoshany's company credit card was declined when he sought to secure a hotel booking on 3 February 2015. On notification of the problem Mr Gawtreay sent Mr Shoshany a list of recent credit card transactions and asked him to confirm they were his (and not third party fraud) which he duly did.
- [14] On 23 February 2015 and following receipt of the January visa statement sent by 4RF's head office, Mr Shoshany attached and returned the statement by email on noting: "*The highlighted in yellow should be my personal transactions*".
- [15] Mr Gawtreay emailed Mr Shoshany and asked "...why there are NZD 9,000 of personal transactions this month?" Mr Shoshany replied: "*Half of this is a mistake made and paid with company credit card for our local government*",

and referred to corresponding details on the statement. He then stated “*All the rest is purchases or cash I used while in the US last trip*”.

[16] Mr Gawtrety responded. He observed there were a large number of transactions that had been highlighted and asked if these were personal. Mr Shoshany agreed they were and reiterated that they occurred whilst in the US. Mr Gawtrety instructed him to confirm that 4RF was to deduct the total sum of the highlighted items from the next monthly [salary] payment and that Mr Shoshany would submit a cash expenses claim for business expenditure paid for personally, including the highlighted items, subject to approval. Mr Shoshany replied “*Yes. please deduct all highlighted items*”

[17] On 25 February 2015 Mr Gawtrety informed Mr Shoshany by email (copied also to Mr Maskalchi and Mr Troughton) that he had reviewed both the January and February credit card statements and the amount of retail and cash advances. The email went on to advise:

This level of personal expenditure on the company card is unacceptable; this is not a private banking arrangement that can be used to fund personal expenses.

I have today instructed ANZ to cancel the card with immediate effect.

...the yellow highlighted items in February will be deducted from your next payment along with the January ones already discussed, and I will commence an audit of your credit card expense claims to ensure that all expenses have been properly incurred and approved.

I will confirm the exact amount of this deduction and the relevant transactions shortly.

[18] Later that day Mr Troughton raised the issue of Mr Shoshany’s credit card use with Mr Maskalchi during a telephone conversation. Mr Maskalchi quickly notified Mr Shoshany of Mr Gawtrety’s email and met with him soon after. At the end of that meeting Mr Shoshany emailed Mr Gawtrety (copied also to Mr Troughton and Mr Maskalchi). The relevant portions of that email are replicated as follows:

I spoke about it this morning with Hannoch and I understand this was a foolish and naïve mistake from my side.

...

When I withdrew the money, I was in a two weeks travel in the USA for work.

...

On the way to San Diego, I decided to break my trip and stay over the weekend in Las Vegas.

...

My wife asked me to shop for the kids and I foolishly withdrew money from the corporate credit card thinking this is okay since the company can deduct the sums from my coming salary.

I understand now that when you look at the credit card charges and see those charges it does not look good especially since it was in Las Vegas, but back then I thought it was okay and it was clearly a mistake.

I should have at the least spoken to you and to Hannoeh to ask for permission in advance and I realise not doing this was another mistake from my side.

All I can do now is apologize and commit this will never happen again.

...

Please accept my apology.

It will never happen again.

You can deduct the sums from January and February's salaries

...

- [19] Mr Troughton wrote to Mr Shoshany and asked him to attend a disciplinary meeting via a Skype conference call scheduled for 3 March 2015. He was told he was welcome to bring a support person. The meeting went ahead with Mr Troughton and Mr Gawtrety representing 4RF. Mr Shoshany attended alone.
- [20] Mr Shoshany's primary response was that he had believed that personal use of the credit card was acceptable provided that any personal use did not exceed the amount of salary owed to him and that personal expenditure was declared and repaid by way of deduction from salary owed. He agreed he had not turned his mind to consider why a commercial business would allow for private spending but denied he was using the company credit card as a personal credit facility.
- [21] It is apparent Mr Shoshany regarded personal use of the credit card as cost neutral because repayments were made via salary deduction. He was unaware that company visa bills were paid prior to its distribution of material visa statements to employees.
- [22] Mr Shoshany advised he had not been issued a company credit card in previous employment. He conceded that his payment to a local government body with the company credit card was a mistake but advised Mr Troughton and Mr

Gawtreys that he had used the wrong credit card and was oblivious to the fault until he reviewed the transactions sent to him by Mr Gawtreys on 3 February 2015.

- [23] During the meeting Mr Shoshany referred to his ongoing and repetitive personal use of the credit card in May 2014 and an email exchange with a 4RF's accounts officer on 30 June 2014, (copied at the time to Mr Gawtreys and Mr Maskalchi), as follows:

From Mr Shoshany:

"Since I used the card also for my private purchase, please note that you have to deduct a sum of \$4438.83 USD from my salary. I will send you the invoice accordingly".

From 4RF Accounts

"Great thanks for letting me know, will look forward to your next invoice and then process the deduction from there".

- [24] He pointed also to 3 February 2015 when Mr Gawtreys had provided him with an online copy of the credit card statement for January 2015. That statement reflected transactions made at commonly known US branded clothing stores, and he said it was evident his purchases were not confined to incidentals associated with work. He advised that from these exchanges and in the absence of anyone raising concerns with him, he had no reason to consider his management of the credit card was wrong. At the conclusion of the meeting on 4 March Mr Shoshany reiterated he had thought he was spending his own money but acknowledged he had done a "stupid thing", had been "naïve", and promised that the behaviour would not be repeated.
- [25] The following day (4 March 2015), Mr Shoshany received a letter from Mr Troughton. It briefly referred to Mr Shoshany's explanation but did not directly address the circumstances by which Mr Shoshany said his belief arose. Rather, the letter advised that his response was not accepted, largely because 4RF regarded Mr Shoshany as having accepted (in his email of 25 February) that he was at fault, and that it had reviewed expenditure on credit cards by employees who reported to Mr Shoshany and found no examples of personal use.

- [26] Mr Troughton concluded that Mr Shoshany's conduct had damaged trust and confidence and that his actions amounted to serious misconduct which tentatively warranted summary dismissal. He invited Mr Shoshany to respond to his interim decision and stated if he did not hear from Mr Shoshany by 5pm Friday, 6 March 2015 (New Zealand time) his employment would end on Monday, 9 March 2015. On receipt of that correspondence Mr Shoshany obtained legal representation.
- [27] 4RF extended the time frame for further submissions, which it received on 10 March 2015. Those submissions queried 4RF's review of visa statements for employees who reported to Mr Shoshany and asked to be provided with that information. The correspondence further asserted that personal use of the company credit card was common practice amongst 4RF employees.
- [28] Mr Troughton replied on 11 March 2015. He denied the existence of a common practice of the type described and informed Mr Shoshany that for the reasons set out in his letter of 4 March 2015, he was dismissed with immediate effect.

The issues

- [29] The law requires an employer to justify its decision to dismiss an employee⁵. The Authority must objectively assess whether 4RF's actions; its decision to dismiss Mr Shoshany and its process in reaching that decision, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.
- [30] Relevant to the actions surrounding Mr Shoshany's dismissal I consider the following issues need to be examined:
- (a) was there a reasonable basis for Mr Shoshany's use of the credit card;
 - (b) did 4RF genuinely consider Mr Shoshany's explanation;
 - (c) was Mr Shoshany's dismissal substantively justifiable;
 - (d) if Mr Shoshany's dismissal was not justifiable, what should he receive in remedies;

⁵ Section 103A Employment Relations Act

- (e) who was Mr Shoshany's employer;
- (f) should special damages should be awarded;
- (g) should penalties be awarded.

Was there a reasonable basis for Mr Shoshany's use of the credit card?

What was advised at the beginning of Mr Shoshany's employment?

- [31] Neither Mr Shoshany nor Mr Gawtrely was able to recall with any precision what exactly was communicated between them during Mr Shoshany's induction but Mr Gawtrely denies that Mr Shoshany could have reasonably formed an impression that the credit card could be used to effectively "*obtain an advance on an employee's salary*".
- [32] Mr Shoshany struggled to articulate what was said that led him to believe personal use of the credit card was acceptable although it must be acknowledged that English is not his first language. He agreed that there was no direct discussion with Mr Gawtrely (or anyone else) on the acceptability or otherwise of personal use of the credit card. He says during his induction he made an assumption about how the credit card may be used.

Were 4RF's expectations about how the credit card should be used sufficiently clear?

- [33] A sizable portion of 4RF's defence focussed on demonstrating that there is no evidence of personal use of the credit card (either by way of direct transactions or by cash withdrawals) amongst employees who reported to Mr Shoshany, or 4RF employees in general.

How management reviewed visa statements

- [34] Mr Shoshany was not able to point to any instances where he had identified employees were using the credit card for personal purchases. His lack of detail undermines assertions made on his behalf that there was a common practice of credit card personal use amongst 4RF staff.
- [35] It emerged in evidence however, that although 4RF managers (including Mr Shoshany) were required to review reporting employees' visa statements, any

reconciliation of receipts against credit card cash withdrawals was undertaken by 4RF's accounts personnel and not by direct managers.

- [36] The effect of this practice prevented managers from ascertaining whether cash withdrawals (by employees when travelling) were made for work purposes only or if they were also used for personal items and services. This aspect of 4RF's evidence did not establish conclusively that Mr Shoshany, by his appraisal of other employees' activities, must have been aware that personal use of the credit card was not permitted.

What was 4RF's practice with respect to credit card use?

- [37] Three 4RF employees furnished evidence specifically to establish that it was clear to each that personal use of the company credit card was not appropriate. Two of these witnesses agreed that each had, on at least one occasion, used the credit card for a personal service or item but had declared the transaction as soon as was possible after the event. Mr Troughton's initial assertion that "*Everyone in the company understands that [credit cards] are not to be used for personal use*"⁶ was undermined by an acknowledgement (by all witnesses) that personal use of the company credit card does occur albeit in limited circumstances⁷.

- [38] 4RF acknowledged there is no other written documentation to inform employees of 4RF's requirements in respect to credit card use other than the content of the *Expenses* provision contained in its employment agreement⁸. It further accepted that the contractual obligation to disclose to a manager the anticipated amount of travel expenses before departure⁹, does not generally occur. I note that the wording of that provision does not provide comprehensive instruction on travel expenses, for example there is no reference to personal use in the prohibitive sense, or to exceptions to that ban.

- [39] The evidence of the three witnesses revealed that individuals were informed about the constraints on use of the credit card by either Mr Gawtreay, or by a

⁶ Mr Troughton's Witness Statement at 13.

⁷ These can be summarised as follows: where an employee's personal credit card is declined but a company card is accepted; a company card used in error; or cash withdrawals are made using the company card whilst travelling in cashless societies such as Africa.

⁸ Clause 5 is commonly contained in 4RF's employment agreements

⁹ At clause 5

more senior manager or by a colleague. Two of these witnesses¹⁰ have been employed by 4RF for a longer total period of time than Mr Shoshany and likely to have greater familiarity with 4RF practices. The third witness was an Israeli national recently based in NZ. His evidence was provided to dispel any suggestion that personal use of a credit card was accepted in Israel. On questioning he agreed that the supply of company credit cards in Israel is generally reserved for very senior management roles and is not common. This evidence tends to support the possibility that Mr Shoshany had little prior experience with corporate credit cards.

- [40] It was clear from the evidence that an employee's understanding of 4RF's expected practices around use of the credit card was acquired either by past practice, word of mouth, or experience in alternative employment. This ad-hoc methodology, coupled with 4RF's omission to have documented policies or guidelines setting out its requirements, created a setting for misunderstandings to arise. I am not satisfied that 4RF's view that "*common sense should prevail*" adequately displaces the possibility that Mr Shoshany may have formed a reasonably held but mistaken belief about the conditions of use that corresponded with his credit card.

Did the email of 30 June 2014 provide a basis for Mr Shoshany's belief and did 4RF genuinely consider Mr Shoshany's explanation?

- [41] The question in this matter is whether 4RF, acting as a fair and reasonable employer, genuinely considered Mr Shoshany's explanation for his use of the credit card, and, if having done so, whether it could then fairly reject his explanation.
- [42] When 4RF became aware of the correspondence between Mr Shoshany and its accounts person in June 2014 4RF focussed solely on Mr Shoshany's actions at that time as a matter that had "*slipped under our notice*" and "*in hindsight we should have given you a hard time about that*"¹¹. It is notable that 4RF did not address at all that portion of the 30 June correspondence written on its behalf either during the meeting of 3 March or in its letter advising of reasons for its decision to dismiss.

¹⁰ Mr Tollenaar and Mr Peacock

¹¹ Mr Troughton's response during the meeting of 3 March 2015

- [43] An employer is required to genuinely consider an employee's explanation in relation to allegations made against him or her before dismissing¹². I find that the discovery of Mr Shoshany's use of the credit card, particularly in Las Vegas, was, more likely than not, a significant factor which clouded 4RF's willingness to consider Mr Shoshany's explanations.¹³ Those circumstances however do not provide grounds for 4RF to ignore its own correspondence (which I find it did) because it considered Mr Shoshany's subsequent actions absurd. 4RF's omission to genuinely consider the 30 June correspondence, particularly when the content critically supported Mr Shoshany's explanation, was not an action of a fair and reasonable employer. Nor do I find the procedural defect minor. It resulted in Mr Shoshany being treated unfairly. This finding alone leads me to conclude that 4RF did not conduct a procedurally fair inquiry and Mr Shoshany's dismissal was unjustified as a consequence.
- [44] Turning to whether there was substantive justification for Mr Shoshany's dismissal. Even if 4RF had properly considered Mr Shoshany's explanation and corresponding email, I find that it could not have reasonably concluded his use of the credit card was conduct capable of warranting dismissal. I accept it may be difficult for an employer to assess the veracity of an employee's defence of honest mistake but the email exchange of 30 June 2014 objectively evidences a coherent basis for Mr Shoshany's belief. 4RF's response to his declaration of a relative significant personal expenditure was accepted without question and it further agreed to make a corresponding salary reduction.
- [45] A fair and reasonable employer cannot justifiably dismiss an employee for conduct it has previously condoned without some intervening notice that it would no longer tolerate the behaviour. Sitting behind Mr Shoshany's dismissal is a perception by 4RF that Mr Shoshany's use of the credit card was deceptive and/or dishonest. No evidence was furnished to support either of those inferences or that 4RF had previously notified Mr Shoshany that his use of the credit card was of concern. 4RF has not identified conduct that was so serious that dismissal was an option available to it. I find Mr Shoshany's dismissal was procedurally and substantively unjustified and he has a personal grievance.

¹² S.103(A)(3)(d) Employment Relations Act

¹³ In answers to whether he accepted Mr Shoshany's defence of an honest mistake Mr Troughton stated "*I don't think it is reasonable to go to Vegas and spend company money*".

Who was Mr Shoshany's employer?

[46] Prior to his appointment, Mr Shoshany signed an employment agreement on 21 November which named '*4RF Communications Ltd*' as the employer. That company had been struck from the Companies Register earlier, on 4 October 2013. When Mr Troughton became aware that Mr Shoshany had received the wrongly named employment agreement he instructed Mr Maskalchi to have Mr Shoshany destroy the agreement and he made arrangements for a new employment agreement citing '*4RF Limited*' as the employer to be sent¹⁴. Mr Maskalchi's evidence was that he could not definitively recall that event but agreed he may have given Mr Shoshany the second employment agreement. Mr Shoshany was also vague about whether he received the second employment agreement or not.¹⁵ I am unwilling to discount the possibility that Mr Shoshany did receive the second employment agreement.

[47] 4RF Communications Ltd did not exist at the time Mr Shoshany commenced employment and it cannot have been his employer. Nor do I accept that Mr Troughton personally, acting as an agent for one or both of those companies, was Mr Shoshany's employer.

[48] Payment of wages by a particular entity does not always determine the identity of an employer but I note Mr Shoshany actively sought his salary payments from 4RF Limited via his invoices. Those actions persuade me that he regarded 4RF Limited as his employer. Further, 4RF Ltd had practical control and direction over Mr Shoshany from the moment he began employment. 4RF Limited was Mr Shoshany's employer and is the correct respondent in this matter.

Remedies

Should Mr Shoshany be reinstated?

[49] Section 125(2) provides that the Authority may provide reinstatement if it is "*practicable and reasonable*" to do so.

¹⁴ 4RF Limited was incorporated on 2 April 2012

¹⁵ The content of each employment agreement is almost identical to the other. The only exception being that the second agreement contains a three month notice period in circumstances where Mr Shoshany's position was declared surplus.

[50] Between the lodging of his personal grievance and the date of the Authority's investigation meeting, 4RF engaged in a restructuring of the Israeli office and Mr Maskalchi's and Mr Shoshany's respective positions were disestablished¹⁶. The evidence is that a third employee had been given notice and 4RF said it was consulting with the remaining employee based in that office. 4RF says there is no position for Mr Shoshany to be reinstated into.

[51] Not unexpectedly, the closing of the Israeli office and resulting redundancies have been met with strong criticism from counsel and Mr Shoshany who produced evidence of a prior redundancy within 4RF to generate doubt as to the legitimacy of the current restructuring. The difficulty with this information is that it does not assist an assessment into whether the current decision to close down the Israeli office, and corresponding positions, is genuine.

[52] **THE CONTENTS OF THIS PARAGRAPH ARE SUBJECT TO A PROHIBITION ORDER**

[53] While there is a suggestion that Mr Shoshany's role does not require him to work in any particular location, I accept Mr Troughton's evidence (reinforced by Mr Maskalchi) that Mr Shoshany's role was created primarily to provide support to the VP Sales position. I am not persuaded by an inference that 4RF closed down the entire Israeli office to avoid the possibility of an order for Mr Shoshany's reinstatement. On balance I accept there are genuine business reasons for disestablishing the Israeli office and the positions based therein.

[54] Both the VP Sales position and Mr Shoshany's role have been disestablished. In these circumstances I consider it impracticable and unreasonable to return Mr Shoshany to his previous position and I decline to make an order to that effect.

¹⁶ On 1 April 2015

Loss of remuneration

- [55] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. That section is qualified by s.128(2) which, subject to any reduction that the Authority may make under s.124 for contributory behaviour, provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration, or 3 months' ordinary time remuneration. Section 128(3) allows the Authority to exercise its discretion to order compensation for remuneration beyond three months.
- [56] Pleaded as an alternative should he not be reinstated, Mr Shoshany asks the Authority to order payment of wages equal to 18 months. The grounds for seeking reimbursement for future lost earnings rests on his prediction that it will take 9-12 months to find a position equivalent to the one held with 4RF. Against that contention 4RF asserts that Israel's 'High Tech' industry is larger than any individual European country and work is available for Mr Shoshany.
- [57] The evidence on Mr Shoshany's activity to obtain alternative work was spartan but needs to be assessed against the relatively short period of under 7 weeks between his dismissal and the Authority's investigation. Mr Shoshany reports that his efforts to obtain work have been impacted by 4RF's conduct post his dismissal. I shall return to this matter.
- [58] Mr Shoshany's position was disestablished on 1 April 2015. I agree in principle with 4RF's submission that Mr Shoshany is entitled to the contractual notice period associated with the disestablishment of his position. 4RF asserts Mr Shoshany's is entitled only to one month's notice. Clause 12 of the written employment agreement between 4RF Limited and Mr Shoshany provides that in circumstances where Mr Shoshany's position is no longer required he is entitled to a three month notice period.
- [59] Pursuant to s.123(1)(b) 4RF must reimburse Mr Shoshany the sum equal to wages lost from 12 March 2015 to 1 April 2015. Given it is unlikely Mr Shoshany's employment would have continued beyond 1 April 2015 I decline to make an order for lost wages beyond that date as any additional lost

remuneration has not been as a result of his personal grievance, but rather, is a consequence of redundancy. However under s.123(1)(c)(ii) I consider Mr Shoshany is entitled to payment of a sum equal to the contractual notice corresponding with the disestablishment of his position, which he reasonably could have expected if the personal grievance had not arisen.

Compensation

[60] Mr Shoshany seeks \$50,000 pursuant to s.123(1)(c)(i). It is submitted that an award under s.123(1)(c)(i) is to compensate for non-economic loss. Counsel says in Mr Shoshany's circumstances a higher award is warranted because any order will be subject to Israeli tax. I agree that an order for compensation under s.123(1)(c)(i) of the Employment Relations Act in New Zealand is not subject to income related taxation. How the Israeli taxation system treats the payment is for Mr Shoshany to discuss with the relevant agency.

[61] Next, Mr Shoshany says his distress on being summarily dismissed has been exacerbated by rumours that he has been dismissed for dishonesty. Mr Troughton says Mr Shoshany turned down the offer to draft a personal farewell message -and therefore the opportunity- to dispel speculation about his departure. He says he was obliged to inform the remaining two Israeli based 4RF directors of the Mr Shoshany's dismissal. He was equivocal about whether he portrayed Mr Shoshany as dishonest whereas Mr Shoshany says it has been reported to him that the directors regard him as a thief¹⁷.

[62] Mr Shoshany's concern is that the two Israeli directors concurrently hold principal positions in a private equity fund that operates in Israel's high tech sector. He alleges Mr Troughton's characterisation of him has impacted on his career prospects. I was not provided with evidence that the causes for Mr Shoshany's dismissal are widely known. However, whatever the exact words used amongst the directors of 4RF, I find Mr Shoshany has been unfairly maligned and has aggravated Mr Shoshany's distress. I award \$10,000 as compensation for humiliation, loss of dignity, and injury to feelings.

Did Mr Shoshany contribute to the situation that gave rise to his dismissal?

¹⁷ Mr Maskalchi says he was told this by the Israeli based directors

- [63] Some criticism may be levelled at Mr Shoshany for his failure to not make an inquiry about appropriate credit card use in 4RF before acting on his assumption but I am unwilling to find the omission blameworthy. 4RF says there is no common practice of acceptable use of the credit card to the level engaged by Mr Shoshany. Against that argument there is no system within 4RF to indicate personal use is prohibited and personal use is accepted in limited situations. 4RF's omission to be explicit on the matter generated the anomaly.
- [64] I find also that Mr Shoshany did make an inquiry of sorts by his email of 30 June 2015. That inquiry was met with endorsement and Mr Shoshany continued to act accordingly. I do not find Mr Shoshany's actions contributed to the situation that led to his dismissal and I decline to reduce remedies as a consequence.

Should special damages be awarded?

- [65] Counsel for Mr Shoshany seeks special damages for legal costs associated with breaches of the employment agreement. It was not entirely clear from the documents provided what the nature of the alleged breaches were¹⁸ although the claim appears to correspond to 4RF's failure to provide information relevant to its investigation into Mr Shoshany's conduct prior to his dismissal. Counsel referred to *Binnie v Pacific Health Ltd*¹⁹, a case involving a common law claim for breach of contract, where the Court of Appeal noted as a general proposition, that special damages are recoverable in full as opposed to party and party costs which are recoverable only to the extent of a reasonable contribution.²⁰ It observed that "*Use of the special damages approach should be reserved for cases in which a proper line can be drawn...*".
- [66] 4RF had legitimate concerns it was investigating. Mr Shoshany obtained legal representation to assist him to respond to those concerns and submissions were sent to that end. I am not satisfied that a line can be drawn between the costs incurred as a consequence of an alleged breach of contract or those incurred to resolve an employment relationship problem and I am unwilling to make an

¹⁸ Statement of problem and legal submissions

¹⁹ *Binnie v Pacific Health Limited* [2002] 1 ERNZ 483 (CA)

²⁰ *Ibid* at [18]

order for special damages. I am further persuaded by Judge Inglis' reference, in *Hall v Dionex Pty Ltd*²¹, to *Harwood v Next Homes Ltd*²² as:

*...authority for the proposition that in the context of an employment relationship problem it is not appropriate to classify costs incurred prior to the filing of a statement of problem as special damages to enable full recovery as opposed to the application of the Authority's costs regime.*²³

Should penalties be awarded?

[67] Mr Shoshany also seeks penalties associated with for 4RF's decision to terminate his employment without providing copies of employee visa statements for Mr Shoshany to comment on, as well as for the manner of his dismissal which counsel alleges was in breach of the terms of Mr Shoshany's employment agreement. The facts pertinent to the separate claims for penalties formed part of the factual matrix by which Mr Shoshany claimed his dismissal was unjustified. In *Xu v McIntosh*²⁴ the Employment Court held:

*If an employee seeks recovery of money underpaid or lost as a result of a personal grievance that is also or includes a breach of an employment agreement, then it seems wrong that a penalty should also be imposed unless there are special facets of the breach calling for punishment of the employer on top of compensation for the employee. In particular, a penalty is not a mechanism for topping up the compensation.*²⁵ ...

[68] I do not consider there are any special facets associated with the breaches claimed which call for punishment. Remedies associated with my findings that Mr Shoshany's dismissal was unjustifiable have been apportioned. I decline to impose penalties.

Costs

[69] Costs are reserved.

Summary of Orders

[70] 4RF Limited is ordered to pay the following:

²¹ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29

²² *Harwood v Next Homes* [2003] 2 ERNZ 433 at [37].

²³ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [111]

²⁴ *Xu v McIntosh* [2004] 2 ERNZ 488

²⁵ *Ibid* at [45]

- (a) pursuant to s.123(1)(b) 4RF must reimburse Mr Shoshany the sum equal to wages lost between 12 March 2015 and 1 April 2015 (inclusive); and
- (b) pursuant to s.123(1)(c)(ii) 4RF must compensate Mr Shoshany the sum equal to 3 months' wages (the notice period set out at cl 12 of his employment agreement); and
- (c) pursuant to s.123(1)(c)(i) 4RF must pay compensation of \$10,000 to Mr Shoshany.

Michele Ryan
Member of the Employment Relations Authority