IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 4
5325634

	BETWEEN	STEPHEN THOMAS Applicant
	AND	ASUREQUALITY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Peter Cranney, Counsel for Applicant Peter Zwart, Counsel for Respondent
Investigation Meeting:	9 August & 25 August 2011 at Christchurch
Further information:	6 September 2011 from Respondent
Determination:	12 January 2012

SECOND DETERMINATION OF THE AUTHORITY

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[1] Stephen Thomas worked as a meat inspector for different periods between 1975 and 1986 and then continuously from about 1990 until he was summarily dismissed on 26 October 2010 from his fulltime position with AsureQuality at Fairton in Ashburton following AsureQuality's investigation into a September 2010 incident.

[2] Mr Thomas raised a personal grievance of unjustified dismissal claiming permanent reinstatement and other remedies. In a determination dated 10 June 2011 I upheld Mr Thomas's personal grievance claim. At the parties' request I reserved remedies for further investigation. This determination resolves the issue of remedies.

[3] I should mention that by agreement witnesses were excluded and the evidence of AsureQuality's witnesses was taken first. Evidence was heard from seventeen witnesses over the two days. It will not be necessary to canvass all of that evidence.

[4] There is some delay in the issuing of this determination. I needed to give priority to other reserved determinations themselves significantly delayed because those files were trapped for a long time in the Authority's Kilmore Street premises. Given the vehement opposition to reinstatement, this determination has required careful thought and consideration of the contested evidence, tasks which are difficult in the Authority's current working circumstances. I apologise for the delay.

The claim

[5] To remedy his proven grievance Mr Thomas is claiming compensation for distress, reimbursement for lost remuneration and reinstatement. The first task for the Authority is to assess the extent to which Mr Thomas contributed to the situation.

Contribution

[6] For AsureQuality Mr Zwart submits that I should treat Mr Thomas as having committed acts of simple misconduct for which he would have been justifiably dismissed in light of the final warning issued nearly a year before the September 2010 incident. However, it would be wrong in principle to do this as it would amount to the Authority stepping into the shoes of the employer. The proper approach is set out in s.124 of the Employment Relations Act 2000. I must asses the extent to which the actions of Mr Thomas contributed in a blameworthy way towards the situation giving rise to his personal grievance. It is useful first to paraphrase parts of the earlier determination.

[7] The September incident started when there was an exchange between Mr Thomas and Jan Purvis about the inspection of a carcass. Properly, Mr Thomas refrained from arguing. Soon after, when approached by Sione Taiala (the supervisor) about an unrelated point Mr Thomas asked for and received confirmation that he was in the right about the exchange with Ms Purvis. After Mr Taiala left Mr Thomas turned to Ms Purvis and asked if she had heard Mr Taiala's response. That was imprudent but of little moment. Ms Purvis then told another Inspector to stop the chain which he did. She told Mr Thomas that she was going to take the matter to Richard Dudley (the area manager). Mr Thomas then continued with his work for a brief period. Next, he left his work station, approached Mr Taiala, told him in a

raised voice that he was stressed out about all this, that he was taking it to Richard Dudley and that he was trying to do his job properly but they were all ganging up on him. Mr Thomas told Mr Taiala he was going home. It is common ground that Mr Thomas was red faced and spoke in a loud and aggressive voice. He left without Mr Taiala responding and soon after left the plant.

[8] Stephen Muscroft-Taylor is AsureQuality's operations manager and was responsible for the decision to dismiss Mr Thomas. In my earlier determination I found that his conclusion that Mr Thomas should have stayed at work to discuss the incident with his supervisor rather than leaving was the conclusion any fair and reasonable employer would have reached. I did not accept that Mr Thomas leaving the plant having told his supervisor that he was going but without permission amounted to serious misconduct. For present purposes the question is whether Mr Thomas's conduct contributed in a blameworthy manner to the circumstances giving rise to the grievance. I conclude that it did. He cannot be criticised for leaving the chain to seek the intervention of his supervisor but it was an overreaction in the circumstances to leave the plant.

[9] One of the reasons for the dismissal was Mr Muscroft-Taylor's conclusion that Mr Thomas had been negligent in his viscera inspection. In my earlier determination I found that no fair and reasonable employer would have concluded that Mr Thomas was guilty of serious misconduct in letting a defective kidney or kidneys go past his inspection point. That is what had caused Mr Taiala to approach Mr Thomas at his inspection point. I find that Mr Thomas's careless inspection did contribute in a blameworthy manner to the circumstances giving rise to the grievance.

[10] Mr Zwart for AsureQuality submits that Mr Thomas's contribution is in the order of 80 – 100%. Mr Thomas was not responsible for AsureQuality's wrong decision to treat his conduct as serious misconduct when it plainly was not. That was the most substantial contribution to the grievance by a significant degree. Assessing the relative contributions to the circumstances I consider that Mr Thomas's contribution was in the order of 20%.

[11] The requirement in s.124 of the Act is that the Authority must *in deciding both the nature and the extent of the remedies to be provided* consider the employee's

actions and if those actions so require reduce the remedies that would otherwise have been awarded. I will return to this shortly. However I should first state and explain my findings about a relevant legal issue.

The applicable law regarding reinstatement

[12] Mr Thomas was dismissed in October 2010. At that time s.125 of the Employment Relations Act 2000 provided as follows:

> ***125 Reinstatement to be primary remedy***
> *(1) This section applies where-*
> *(a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and*
> *(b) it is determined that the employee did have a personal grievance.*
> *(2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).*

[13] The Employment Relations Amendment Act 2010, which relevantly came into force on 1 April 2011, repealed this provision and replaced it with the following provision:

> ***125 Remedy of reinstatement***
> *(1) This section applies if-*
> *(a) it is determined that the employee has a personal grievance; and*
> *(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).*
> *(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.*

[14] At the same time s.14 of the Employment Relations Amendment Act 2010 repealed s.101(c) of the Employment Relations Act 2000 which had hitherto included as the object of Part 9 of the Act *to recognise the importance of reinstatement as a remedy*.

[15] AsureQuality's representative refers me to *Lamb v Burnside Dairy Farmers 2008 Ltd* [2011] NZERA Christchurch 53, *Khan v Oracle New Zealand Limited* [2011] NZERA Auckland 177 and *Behan-Kitto v NZ Post* [2011] NZERA Auckland 182. The first two are interim reinstatement determinations. In *Lamb* there is mention that the lack of transitional provisions in the Employment Relations

Amendment Act 2010 means that the statutory change was effective as of 1 April 2011 regardless of the date of dismissal. In *Khan* the Authority considered that the statutory changes were not retrospective but addressed the present whenever the Authority has determined that the employee has a personal grievance and is considering remedies. As can be expected with interim reinstatement determinations there was little discussion or analysis of the law. *Behan-Kitto* is a determination of the Authority released on 5 May 2011 after an investigation meeting in late February 2011. It concerns a dismissal in November 2010. The Authority applied the law regarding reinstatement as of 1 April 2011 and ordered reinstatement. However the determination does not include any consideration of how the provisions of the Interpretation Act 1999 might affect the situation.

[16] Properly, Mr Zwart also refers me to three Authority determinations which are contrary to his submission. In *Marks v University of Auckland* [2011] NZERA Auckland 160 the dates were materially the same as in *Behan-Kitto* but the Authority considered reinstatement as the primary remedy and awarded it. In *Smith v Air2There.Com (2008) Limited* [2011] NZERA Wellington 62 the dates were also materially the same. Reinstatement was declined despite being described as the primary remedy. In *McDonald v Slinkskins Tannery Limited* [2011] NZERA Christchurch 70 the Authority's investigation meeting and determination occurred after 1 April 2011 dealing with an earlier dismissal. In declining reinstatement the Authority considered merely its practicability, in effect applying the pre-1 April 2011 test.

[17] Overall the cited cases do not provide any detailed analysis supporting the approaches taken and, apart from *McDonald* at [9] do not refer to the provisions of the Interpretation Act 1999 which, I consider, assist in clarifying which test applies.

[18] The Interpretation Act 1999 at s.7 declares that an enactment does not have retrospective effect; although that is subject to s.4 which allows a statute expressly or impliedly to have retrospective effect. The combined effect is often described as a presumption against retrospective application. The Employment Relations Amendment Act 2010 relevantly came into force on 1 April 2011. It repealed the existing s.125 and enacted a new s.125. There is nothing in the amending statute to

expressly or impliedly rebut the presumption against retrospectivity but that does not resolve the present point.

[19] In *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] NZRMA 49 the High Court canvassed the law about retrospective application of statutes. The Court explained the purpose of the presumption against retrospective application as being based on the assumption that the legislature does not intend to be unjust. The High Court referred to *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] 1 NZLR 353. In *Foodstuffs*, Parliament had amended s.47 of the Commerce Act 1986 which stated the test for prohibited anti-competitive acquisitions. Breach of the test rendered a person liable to penalties and other remedies. However, the Act permitted a person planning an acquisition to obtain prior clearance, which, if granted, meant that s.47 did not apply to the cleared acquisition for a specified time period. A party applied for such a clearance the day before the new test came into force. The question was whether the clearance application should have been decided under the new or the old test. In deciding this case the Court of Appeal distinguished between legislative changes that affect existing rights and accrued interests as distinct from legislative changes that have prospective effect and do not affect vested rights in any negative way. In *Art Deco Society (Auckland) Inc* the High Court specifically noted that there was no cause of action available to any party at the time of the amendment. The High Court did not regard the possible future ability of a party to bring proceedings as a *right* or *interest* in the sense used in s.17 and s.18 of the Interpretation Act 1999.

[20] It is helpful to set out the relevant parts of the Interpretation Act 1999. Materially, s.17 and s.18 provide:

> ***17 Effect of repeal generally***
> *(1) The repeal of an enactment does not affect-*
> *(a) …*
> *(b) An existing right, interest, title, immunity, or duty:*
> *…*
>
> ***18 Effect of repeal on enforcement of existing rights***
> *(1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing of proceedings that relate to an existing right, interest, title, immunity, or duty.*
> *(2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing the proceedings that relate to the existing right, interest, title, immunity, or duty.*

[21] Mr Thomas's right to pursue a personal grievance under the Employment Relations Act 2000 arose upon his dismissal in October 2010. At that point he had a cause of action or an employment relationship problem. He complied with s.114 of the Act by raising his personal grievance with AsureQuality in time. He properly lodged proceedings with the Authority pursuant to s.158 of the Act. The proceedings included his claim for reinstatement as the primary remedy for his grievance. All that occurred prior to 1 April 2011.

[22] For AsureQuality there is an argument that s.125 does not relate to an existing right or interest for Mr Thomas. It is said that s.125 relates solely to the obligations or duties of the Authority. The point is reinforced by reference to the wording in s.125(1) *This section applies if- (a) it <u>is</u> determined that the employee has a personal grievance* …(emphasis added). Only once the Authority determines there is a grievance does subsection (2) have any application. Because the Authority's determination post-dated 1 April 2011 the new s.125 must apply.

[23] I disagree. The source of Mr Thomas's right is s.102 of the Employment Relations Act 2000. It provides that *An employee who believes he or she has a personal grievance may pursue that grievance <u>under this Act</u>* (emphasis added). The Act provides both the definition of a personal grievance and the claimable remedies. The right to pursue a grievance is limited in several ways. For example, under s.114 the employee must raise the grievance with his or her employer within time and must commence action in the Authority within three years of raising the grievance. Mr Thomas raised his grievance with AsureQuality within time. He then lodged proceedings with the Authority, again within time. His statement of problem referred to the specific remedies (including reinstatement) that he was seeking, as required by the Employment Relations Authority Regulations 2000. As noted, all this occurred before 1 April 2011. Mr Thomas was then entitled to have the Authority investigate and resolve his employment relationship problem, including settling his grievance by providing for one or more of the available remedies where the Authority determines he has a personal grievance. To adopt the language used in *Foodstuffs* the Authority had an existing duty prior to 1 April 2011. I see no reason why the time required for the Authority to meet its duty to resolve his employment relationship problem should be given any legal effect as is argued for by AsureQuality.

[24] To further adopt the language used in *Foodstuffs* I find that Mr Thomas's *existing rights and accrued interests* for the purposes of s.18 of the Interpretation Act 1999 was his personal grievance claim including his claim for remedies. S.18(2) declares that the repealed s.125 continues to have effect for the purpose of bring proceedings that relate to that right.

Considering reinstatement as the primary remedy

[25] Applying the old s.125 I must provide, when claimed and wherever practicable, for reinstatement. It is AsureQuality's case that it would be impracticable to reinstate Mr Thomas for several reasons.

[26] First, Mr Thomas was at the time of the incident leading to his dismissal subject to a final written warning which included a performance improvement plan (PIP). The 1 October 2009 warning resulted from complaints by several work colleagues about Mr Thomas's conduct. One person complained that Mr Thomas had told her that *She needs to get her hands on a cock.* Mr Thomas acknowledged saying *Just because it is the only bit of cock you can get your hands on*. Another person objected to him referring to colleagues as *Fat arsed bitches*. Mr Thomas acknowledged using these words. A third person complained of being verbally harassed by him. Mr Thomas did not recall this event. Following an investigation, Mr Thomas was found to have breached required standards of behaviour by sexually harassing two colleagues through the use of sexual references in his communications with them and by offensive language and behaviour in the workplace.

[27] Following the investigation meeting I was provided with copies of the PIP documentation. The documents record the outcome of periodic interviews with AsureQuality and meat company staff, including the original complainants. The last of them is dated 23 August 2010. To summarise, they record interviewees noting a general improvement in Mr Thomas's communication subject to some recurrent but relatively minor lapses. As Mr Thomas's supervisor Sione Taiala put it when questioned *We were quite pleased with his improvement. It took a while for him to get better*. There is nothing recorded in the PIP documentation to support the contention that it would not be practicable to reinstate Mr Thomas.

[28] There is however evidence from two meat inspectors (Karen Abel and Gina Bensdorp) about how much better the work environment has been since Mr Thomas's dismissal. Neither woman was one of the complainants mentioned above. They say they found Mr Thomas to be *manipulative*, *overbearing*, *patronising* and *intimidating controlling dishonest someone who would deliberately go out of his way to undermine people and weaken their confidence*. They also say they fear his return to the workplace. There is also hearsay evidence that at least three other meat inspectors (Deidre Wells, Gloria Ross and Jan Purvis) hold similar views. The first two were complainants. Gayleen Setterfield is also a meat inspector. She said when questioned that *The girls are very set against him at the moment*. Ms Setterfield mentioned three of her colleagues when asked to identify who she was referring to. As to the possibility of reinstatement Ms Setterfield said *Some of the girls won't accept it at all, some might talk to him after a little while*. Ms Setterfield herself does not oppose reinstatement.

[29] There is evidence of the tension between Mr Thomas and some of his work colleagues affecting their interactions outside of work. Paul Dunn is the slaughtermen's delegate at Fairton. He and Gina Bensdorp are in a relationship. Some time shortly before the Authority's investigation meeting they were in a local bar at the same time as Mr Thomas. Both Mr Dunn and Ms Bensdorp say that Mr Thomas came up behind her and made a loud noise. Mr Thomas's evidence is that Ms Bensdorp was about five metres away from him, he heard someone say something behind him and turned around to find Mr Dunn there. Mr Thomas denies making any noise and says that he had been advised to avoid contact with anyone opposing his reinstatement. He says that Mr Dunn and Ms Bensdorp are lying. Counsel submits that the evidence of Mr Dunn and Ms Bensdorp needs to be treated with some caution. Against that I note that Ms Bensdorp was not present when Mr Dunn gave this evidence viva voce but she recounted essentially the same story when she gave her evidence. In the end it is not necessary to reach any conclusion about what actually happened at the bar other than to observe that, whether Mr Dunn and Ms Bensdorp are being truthful or lying, there must be a significant unresolved relationship problem.

[30] The other evidence to mention in this context comes from Ken Lloyd, a senior PSA delegate with some involvement in relevant events. In an email to a PSA paid official setting out some background to the September incident that resulted in Mr Thomas's dismissal, Mr Lloyd wrote:

> *Of a greater concern is the on going animosity between steve and the rest of the staff who are mostly female. This on going under lying tension in my view is creating an unsafe work environment not only for steve but for the other PSA members.*

[31] From all of this evidence I find that the PIP documentation does not accurately convey the true depth of animosity towards Mr Thomas from nearly half of his work colleagues. AsureQuality's representative accurately summarises this as a *serious and long standing problem in the working relationship[s]*. The October 2009 warning and PIP process have not resolved this problem. The problem was substantially the result of Mr Thomas's conduct at different times.

[32] The submission is that the long standing breakdown in working relationships makes reinstatement impracticable. I am referred to *NZEI v BOT of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA). In that case the deputy principal was refused reinstatement despite it being the primary remedy largely because of serious and long standing problems in his working relationship with the principal. The evidence of relationship breakdown was probably more serious than in the present case. I am also referred to *Kernohan v Asure New Zealand Limited* [2004] 2 ERNZ 472. In that case a meat inspector was unjustifiably dismissed but reinstatement was declined partly because of his inability to co-exist with his colleagues. The evidence on which that finding was based indicates a level of disharmony more severe that in the present case. The Court found that the applicant had disentitled himself to any remedies but that finding was based on much more that just his inability to co-exist with colleagues.

[33] The evidence of disharmony in this case is important because of the working arrangements. There are five meat inspector positions on the ovine chain at Fairton: two viscera inspectors, two carcass inspectors and one detain inspector. Meat inspectors rotate through these positions during the day. They therefore work for varying lengths of time with all of their colleagues over the course of the working week. Any failure to work together co-operatively can cause delays for the meat

company and affect the company's relationship with AsureQuality. The incident which led to Mr Thomas's dismissal is an example of the difficulties that can arise.

[34] I should say something about an incident between Mr Thomas and AsureQuality's regional manager Richard Dudley. Sometime in May 2011 Mr Thomas and Mr Dudley chanced upon one another. Giving evidence in chief viva voce about this, Mr Thomas said, of a Friday in May 2011 at about 5.30pm:

> *As I turned a corner Richard came towards me. He said Hello. I put my head down and didn't even reply.*

[35] When questioned, Mr Thomas gave a different description of the circumstances of their encounter. He said:

> *I recall walking from my vehicle to the MSA. He was in another carpark across the road. It was in the carpark. I was probably a couple of metres outside his car. Only his car was in the way. He said Hello Stephen how are you? I put my head down and kept walking. I didn't acknowledge anything or say anything to him.*

[36] The evidence that Mr Thomas was responding to arose in cross examination of Mr Dudley. Mr Dudley was confirming that Mr Thomas could expect fair treatment if reinstated and if there were any further issues. Mr Dudley went on to say that it would be difficult to get support for Mr Thomas in the future because of his behaviour. He said that he had done all that he could to mentor him but that he had no confidence that he could trust him in the workplace. Mr Dudley then said *I ran into him once [before the Authority] decision – he mouthed foul language at me*. Questioned further Mr Dudley said that it was on 6 May 2011 at about 5.30 pm:

> *I said Hello Stephen*
> *He said "Fuck you cunt Dudley"*

[37] Mr Dudley denied lying about this. He said it was mouthed at him. Pressed further he said that Mr Thomas had said these words and sound come out of his mouth. Mr Dudley went on to say that they were both moving.

[38] The sequence of witnesses meant that Mrs Thomas gave evidence straight after Mr Dudley's evidence and before Mr Thomas. When Mrs Thomas was asked in cross examination about the 6 May incident she said:

> *Stephen came home and told me that he'd run into Richard Dudley and said hello.*

[39] I note Mrs Thomas's evidence is inconsistent with Mr Thomas's evidence to the effect that he said nothing to Mr Dudley. Mr Thomas had known Mr Dudley for many years and it seems more likely than not that a greeting would gather a response, even in the circumstances at the time. I note the inconsistency in Mr Thomas's evidence about whether he and Mr Dudley were moving past one another. Counsel submitted that Mr Dudley's evidence is unreliable because of the way he responded when pressed about whether Mr Thomas had spoken or had mouthed the words. The impression one gets of a witness when observing them giving evidence must always be treated with caution but I was not left with a concern about Mr Dudley's evidence as a result of the way in which he responded to counsel's questions. On the other hand I have formed the view that Mr Thomas probably does not always know when to say nothing. Mr Thomas's position in this matter means that I am left with the stark choice that he either mouthed or said the words alleged or he said nothing. On balance I prefer Mr Dudley's evidence about this incident. Counsel submitted that the incident is only significant as to credibility generally. I disagree. It is consistent with the sorts of things said about Mr Thomas's conduct at work. It reinforces Mr Dudley's evidence about the poor prospects for successful reinstatement.

[40] From all of this I conclude that reinstatement would not be practicable. The requirement prior to 1 April 2011 to order reinstatement as the primary remedy does not apply.

[41] Taking account also of Mr Thomas's contribution to the circumstances of his grievance I decline to order reinstatement.

Salt v Fell

[42] I am referred to *Salt v Fell* [2008] ERNZ 155 (CA) in support of a submission by Mr Zwart that I should reduce any remedies because of Mr Thomas's alleged conduct away from work affecting his colleague Deidre Wells. Mr Zwart might be referring to the September 2010 complaint from Ms Bensdorp. Ms Bensdorp had provided a written complaint dated 13 September 2010 about a discussion Mr Thomas apparently had about her with another person outside work. At the time AsureQuality was persuaded that the complaint was not relevant to Mr Thomas's employment and the matter went no further. I see no reason to resurrect the issue at this point. If

Mr Zwart did mean Deidre Wells, I note that there is no sworn evidence from her. Ms Wells provided a statement of evidence but did not appear to answer questions and was not summonsed. The statement is similar to the evidence given by Ms Bensdorp and Ms Abel. Their sworn evidence contributed to the finding above about reinstatement. However I see no reason to give any credence to the unsworn statement of Ms Wells in the present context.

[43] It was not suggested by Mr Zwart that there was actually any misconduct by Mr Thomas that had occurred prior to the dismissal but which was not discovered by the employer until after dismissal.

Lost Remuneration

[44] I accept that Mr Thomas has attempted to mitigate his loss. There is evidence, which I accept, that he has applied for other positions and has worked in various part-time, temporary or casual positions since his dismissal.

[45] There is a submission that Mr Thomas should receive no more that a month's salary. That is advanced on the basis that Mr Thomas's loss arising from the grievance is limited to the notice period under the applicable agreement because his misconduct would have justified a dismissal on notice. I do not accept that submission. On paper, Mr Thomas's PIP had progressed satisfactorily and that is what had been said to him. The incident that led to his dismissal comprised a reasonably minor infraction by him in the context of some provocation by Ms Purvis. The viscera inspection point had been dealt with by Mr Taiala cautioning Mr Thomas to be more careful. It is far too speculative now to determine what Mr Muscroft-Taylor would have decided to do if he had complied with the standard of a fair and reasonable employer at the time.

[46] S.123(1)(b) permits the Authority in settling a proven personal grievance to provide for the reimbursement of a sum equal to the whole or any part of the remuneration lost by the employee. This discretion is fettered by s.128(2) which, when applicable as it is here, requires the Authority to order the employer to pay the employee the lesser of the actual loss or three months' ordinary time remuneration.

Under s.128(3) the Authority has a discretion to order an employer to pay a sum greater than must be ordered under s.128(2).

[47] Mr Thomas is entitled to an award of three months' ordinary time remuneration (less earnings during that time). There is a submission for AsureQuality that Mr Thomas's contribution disentitles him to any further award to cover his continuing lost remuneration. I disagree. Mr Thomas has been denied the most valuable remedy sought by him. That, together with the application of the percentage reduction in the monetary awards to reflect his contribution, amply represents a just outcome.

[48] Mr Thomas is entitled to compensation for lost remuneration calculated at the applicable ordinary time rate from the date of his dismissal until 25 August 2011. From that sum must be deducted any earnings from alternative employment. The sum will be adjusted to account for Mr Thomas's contribution.

Compensation

[49] There is a claim for compensation for the humiliation, loss of dignity and injury to feelings suffered by Mr Thomas as a result of his personal grievance. I accept the evidence that AsureQuality handled the dismissal in a sensitive manner. Despite that, Mr Thomas has suffered significant effects from losing his career. There is evidence from Mr Thomas's doctor about the observed effects of the dismissal on Mr Thomas about 6 weeks after the dismissal. There is no reason to doubt any of that evidence. Mr Thomas had poor appetite, poor sleep, poor motivation, poor concentration, loss of weight and a tendency to avoid contact with others. Mr Thomas's evidence, which I accept, is that these effects have persisted since that time. His further evidence, also acceptable, is of feeling deflated and withdrawn, a strained relationship with his wife and of feeling depressed for the first time in his life. Mrs Thomas's evidence, which I accept, supports and amplifies Mr Thomas's evidence. Particularly distressing for Mr Thomas are the untrue rumours that have spread in the community about the reasons for his dismissal. There is no evidence that AsureQuality had any part in this but, having unjustifiably dismissed Mr Thomas, the company is liable to compensate him for the proven effects of the dismissal which

in this case include significant distress arsing from these reported rumours. I assess the level of compensation required to restore Mr Thomas at $16,000.00.

[50] This compensation will be reduced as a result of Mr Thomas's contribution.

Summary and orders

[51] Mr Thomas's claim for reinstatement is declined.

[52] Pursuant to s.128(3) of the Employment Relations Act 2000 AsureQuality Limited must reimburse Mr Thomas for his lost remuneration at the applicable ordinary time rate from the date of dismissal until 25 August 2011, less any earnings from alternative employment during that time. This sum must be reduced by a further 20% pursuant to s.124 of the Act. Leave is reserved in case of any difficulty with quantification.

[53] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 AsureQuality Limited must pay Mr Thomas compensation of $12,800.00.

[54] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days. The other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority