

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 345
3061832

BETWEEN RACHEL TODD
Applicant

AND CRAIG POTTON GALLERY
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Nicole Ironside, counsel for the Applicant
Anjela Sharma, counsel for the Respondent

Investigation Meeting: 11 and 12 August 2020 at Nelson; 14 and 16 September
2020 by telephone

Submissions [and further Orally and in writing from both parties on 16 September
Information] Received: 2020

Date of Determination: 3 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Craig Potton Gallery Limited employed Rachel Todd as its Gallery Manager from 1 November 2016 until 12 February 2019 when it summarily dismissed her. Ms Todd claims her dismissal was unjustifiable and says her employment was affected to her disadvantage by unjustifiable actions of her employer.

[2] Ms Todd also claims her employer's conduct breached ss 4 and 103A of the Employment Relations Act 2000 (the Act) as well as breaching the individual employment

agreement (IEA) between the parties. Ms Todd claims the decision to dismiss her was predetermined. She seeks compensation, lost wages, penalties, interest, and costs.

[3] Craig Potton Gallery Limited ("CPG" or "the Gallery") denies all claims made by Ms Todd. It says she was dismissed following a fair and reasonable disciplinary investigation and that her dismissal was both procedurally and substantively justified. It denies any of its actions during Ms Todd's employment disadvantaged her unjustifiably.

The parties

[4] Ms Todd has spent several years working in the arts sector, including in at least one other art gallery management position. She is a qualified lawyer and an artist. Her role with CPG was part-time: she started on a four day a week basis, working 28 hours per week but, at the time of the termination of her employment, was working three days a week.

[5] CPG is an art gallery mainly run by the Potton family. It showcases Craig Potton's fine art photographic prints, as well as selling artworks on behalf of other artists. Jewellery and art-related books are included in the items it sells. Mr Potton and Ms Catherine Potton are co-directors of CPG.

Events leading up to the dismissal

[6] The first 20 months of Ms Todd's employment with CPG appears to have passed without incident. Ms Todd's main point of contact with her employer was Ms Potton, who was frequently in the Gallery. Her contact with Mr Potton was more sporadic.

[7] The origin of the issues between the parties appears to have been a relatively informal meeting in a café between Ms Todd and Mr Potton on 31 July 2018. Ms Todd viewed the meeting as a performance review while Mr Potton characterised it more as an informal "ideas" meeting and a forum in which Ms Todd could raise any concerns.

[8] During the meeting Ms Todd raised an idea she had been mulling over of starting her own business whilst continuing to manage the Gallery. Ms Todd, who has children to support, told Mr Potton she needed to supplement her income from CPG. The parties have subsequently disputed the scope of the business idea that was discussed and the agreement they reached that day. I will return to this later.

[9] Following that discussion Ms Todd said she changed the name of a pre-existing private Instagram account she had started in January 2017 to “*curatemyspace*”. She also hand made some business cards, providing her mobile phone number, Instagram and email address. Ms Todd said she took these steps as a means of testing her business idea.

[10] In September 2018 Ms Todd discussed her business idea with a person she described as a family friend who has professional rooms in Nelson. The outcome of Ms Todd's discussion with that friend, whom I will refer to as SB, was that Ms Todd would source, and provide, some art work that fitted SB's vision for the professional rooms.

[11] SB was not called to give evidence in the Authority and, following discussion with the parties, I made a non-publication order in respect of that person.¹

[12] Ms Todd approached a local artist whose work she considered would meet SB's requirements. She and the artist came to an arrangement over the work to be performed and the commission Ms Todd would receive from the artist if the project went ahead. Ms Todd arranged a meeting between the artist and SB, resulting in the artist's proposal being accepted. Ms Todd received a small initial consulting fee from SB and later received an agreed commission from the artist.

[13] In October 2018 Ms Todd texted Ms Potton to ask if she could stop working on Wednesdays in the Gallery for a while. She said she would explain when she next saw Ms Potton. Ms Potton texted her agreement to Ms Todd the same day, saying it was fine. The following day Ms Todd advised Ms Potton that the reason for her request was that she wanted to work for a local lawyer on Wednesdays and Mondays, the latter of which had never been Gallery working days for her.

[14] In late October or early November 2018 Ms Potton became aware that Ms Todd was, in her private capacity, sourcing art work for SB's professional rooms. SB was a family friend of Ms Potton and a long-time personal and business associate of Mr Potton, as well as a regular attendee at Gallery events. Ms Potton and Mr Potton viewed Ms Todd's actions as being in competition with the Gallery.

[15] On 2 November 2018, after Ms Potton had informed Ms Todd that Mr Potton wanted to have a chat to her about "the (SB) thing", Ms Todd texted Mr Potton, apologising for any

¹ Those initials bear no relation to the person's actual name.

confusion she may have caused over the matter. She said she was very happy to discuss it with both directors. Mr Potton responded by text that "...it's ok..but yes let's have a talk next week so we all get each others perspectives".

[16] That talk took place in a café on 7 November 2018 between Ms Todd and the two directors of CPG. Although some aspects of the discussion are in dispute, all three agree there was a common understanding reached in the meeting: Ms Todd would not do any more work on her private business while she was employed by CPG, unless she had the directors' approval. There was agreement she could continue, and complete, the SB project.

[17] On 20 November 2018 Ms Potton discovered emails on Ms Todd's private email account which she had left open on the Gallery computer when she left work that day. The emails led Mr and Ms Potton to believe Ms Todd was continuing to operate her business. They noted she also appeared to have undertaken work for a CPG client, whom Ms Todd had met through helping Mr Potton in a significant project at that client's workplace.

[18] Ms Potton advised Ms Todd on 21 November 2018 by text message that Mr Potton wanted a "substantial meeting" with her and that he would be in touch with her to arrange this. She did not specify what the subject matter of the meeting was to be. Mr Potton convened that meeting with Ms Todd on 13 December 2018.

[19] Shortly after that meeting, Mr and Ms Potton left Nelson for their annual holiday while Ms Todd continued to manage the Gallery.

[20] The next significant event occurred on 23 January 2019 when Mr Potton wrote to Ms Todd asking her to attend a formal disciplinary meeting to respond to CPG's concerns. Mr Potton's letter referred to the meetings of 7 November and 13 December 2018, traversing the events from CPG's perspective. It then made three specific allegations against Ms Todd, the first of which was that she had failed to comply with a reasonable direction. The matters raised under this heading included:

- (i) Ms Todd had not disclosed at the 7 November 2018 meeting that she had "induced other Gallery clients away to (her) business"; and
- (ii) That CPG had identified a number of emails and Google searches on the work computer that had no relationship to CPG business but which appeared to be connected to her "competing business interest between October and December 2018."

[21] The second allegation was that Ms Todd had breached her obligations of good faith to CPG "over her decision to stop working on Wednesdays." Mr Potton's letter said:

The stated reason that you gave the Gallery was that the decision to work fewer hours was for *personal reasons*. The Gallery was sympathetic to that request, and agreed to a variation of your contractually agreed hours. However, after this arrangement was put in place it transpired that you had obtained secondary employment with a local law firm, to work on Mondays and Wednesdays.

[22] The letter stated that Ms Todd had an obligation to disclose her intentions to work for another employer.

[23] The third allegation concerned an instance where Ms Todd had used Galley prepaid courier labels to courier an item to an address that had no connection with CPG's business.²

[24] Mr Potton's letter advised Ms Todd the company wished to hear her explanation of the three matters and asked her to attend a disciplinary meeting.

[25] The letter stated the company's view of the allegations as amounting to serious misconduct and said that, if they were upheld, a disciplinary outcome up to and including summary dismissal could be the result. Ms Todd was informed she was welcome to bring a representative to the meeting.

[26] The meeting, initially scheduled for 28 January 2019, took place on 5 February 2019 as a result of Ms Todd advising she was taking legal advice and her lawyer, Nicole Ironside, subsequently corresponding with the directors of CPG.

[27] In the course of those communications Ms Ironside notified Ms Todd's personal grievance for unjustifiable actions by CPG disadvantaging Ms Todd in her employment. The unjustifiable actions related to CPG's raising of serious misconduct allegations against Ms Todd and to the manner in which the meetings of 7 November and 13 December 2018 were conducted.

[28] Mr Potton led the disciplinary meeting held on 5 February 2019. He provided the Authority with a summary of the notes he had arranged to be taken of the meeting. Ms Todd, who recorded the meeting, provided the Authority with a transcript of that recording.

² The original allegation concerned two such instances, one of which was removed on 25 January 2019.

Dismissal and post-dismissal events

[29] On 12 February 2019 Mr Potton emailed Ms Todd a letter in which he considered each of the allegations that had been put to her in his 23 January 2019 letter, her responses to them, and the conclusions he had reached. He ended the letter by advising Ms Todd the allegations had been upheld and her breaches of contract had resulted in an irreconcilable break down of trust and confidence in the employment relationship. Mr Potton notified his decision to summarily dismiss Ms Todd.

[30] Ms Todd raised a personal grievance for unjustifiable dismissal on 18 February 2019. The parties attended mediation on 28 August 2019 but were unable to resolve the matters between them.

[31] On the evening before the mediation occurred, counsel for CPG, Anjela Sharma, sent an "open letter" to Ms Todd's legal representative, accusing Ms Todd of manufacturing a piece of evidence to support her contention that the decision to dismiss her had been predetermined and biased. This resulted in Ms Todd engaging a computer forensic specialist who gave evidence to the Authority on the matter.

The Authority's investigation

[32] As permitted by s 174E of the Act, I have not set out in this determination all the evidence and submissions received from the parties although I have carefully considered all such information. Instead, I have stated relevant findings on facts and law; expressed conclusions on issues requiring determination to dispose of the matter; and made orders where necessary.

[33] The Chief of the Authority has decided, in accordance with s 174C(4), that exceptional circumstances exist for providing the written determination outside the statutory time frame specified in s 174C (3).

Issues

[34] The issues for determination are:

- (a) Whether Ms Todd was disadvantaged in her employment by unjustifiable actions of her employer;

- (b) Whether she was unjustifiably dismissed;
- (c) Whether the decision to dismiss her was predetermined;
- (d) Whether CPG breached statutory obligations of good faith to Ms Todd; and/or
- (e) Whether it breached the parties' employment agreement.
- (f) Whether penalties should be imposed if statutory or contractual breaches are found.
- (g) Whether any actions of CPG post-dismissal are relevant.

[35] If Ms Todd is found to have been unjustifiably disadvantaged in her employment and/or unjustifiably dismissed, issues of appropriate remedies and of any contribution, will require consideration.

Was Ms Todd disadvantaged by unjustifiable actions of CPG?

The 7 November 2018 meeting

[36] As I have referred to above, this was the meeting that took place between Ms Todd and the directors of CPG after they learned about the work she was undertaking for SB. Ms Todd's evidence was that she was upset during the meeting but that both directors hugged her at the end and she felt they had reached a resolution of the matter.

[37] Mr Potton's evidence was that he and Ms Potton felt the meeting outcome was very positive and their immediate concerns were met. They believed the matter was at an end and that Ms Todd had understood their expectations of her in the future. Those expectations included that Ms Todd would close down her *curatemyspace* Instagram account.

[38] Following receipt of Mr Potton's 23 January 2019 letter, Ms Todd claimed she was disadvantaged by the 7 November 2018 meeting as it was carried out in a procedurally unfair manner. It was held on her day off from work; she had no prior notice about the purpose of the meeting and no opportunity to prepare for it or to obtain advice and support before the meeting. She says the meeting was disciplinary in nature but she was not informed of this or advised that her employment might be in jeopardy.

[39] CPG says Ms Todd initiated the meeting when she texted Mr Potton to apologise for any confusion she had caused by the work she was undertaking with SB and offered to meet to

discuss the matter. It says she agreed to an informal chat and was in no doubt over the understanding she reached with her employer that she would do no more work on her business without the directors' approval. In submissions for the Gallery, Ms Sharma suggested that, in reaching that understanding with CPG, Ms Todd demonstrated her awareness that *curatemyspace* was a competing business for CPG.

[40] I am not persuaded that attendance at an informal meeting with her employer to discuss a matter of concern to it necessarily disadvantaged Ms Todd. The Gallery is a very small business and the directors' preference was to try to resolve their concerns by informal discussion with the Gallery Manager. I find nothing inherently wrong with that approach. The fact that the meeting was held in a café, with no notes taken, supports CPG's view that the meeting was to be informal, not disciplinary. While it was held on Ms Todd's day off, there was no evidence to suggest she had asked for it to be rescheduled to a working day so I do not find that to have disadvantaged her in her employment.

[41] The subject matter of the discussion was known to Ms Todd as evidenced by her texted apology to Mr Potton over her dealings with SB. Her written evidence made it clear she knew SB had attended several Gallery events. Her apology "for any confusion" she had caused by her assistance in sourcing art for SB's professional rooms indicated her awareness that this might be viewed as problematic by her employer. I do not accept Ms Todd was disadvantaged by the lack of a written agenda for a meeting she had offered to have with her employer.

[42] Ms Todd was disadvantaged, however, by the directors' subsequent reliance on the "reasonable direction" it said it had issued to her in the 7 November 2018 meeting, with which it alleged she had failed to comply. I note there was no written record taken of that meeting and no formal communication to Ms Todd about any outcome from it.

[43] In their evidence to the Authority both directors described the meeting as "informal" and both acknowledged that no instruction had been given to Ms Todd in the meeting. They both thought, however, that Ms Todd was in no doubt of their views.

[44] Ms Todd recalled Mr Potton saying he and Ms Potton were unhappy about her work with SB, whom they viewed as a potential CPG client. She acknowledged she reached an understanding with her employer that she would not do any more work in her business while she was employed by the Gallery, unless approved by the directors, other than completing the

work with SB. She was aware of their expectation that she would cease any work in her private capacity that competed with CPG, other than this.

[45] I am not persuaded that Ms Todd understood in detail what her employer expected of her, particularly in relation to *curatemyspace*, which was a private Instagram page, accessible only on request. Mr Potton said he reasonably expected Ms Todd to close down the page and assumed she had done so. He acknowledged in the Authority's investigation he had not asked her to do so.

[46] Ms Todd recalled no discussion of her Instagram page during the meeting, and certainly no suggestion that she should close it. Her evidence was that, at the time of the 7 November meeting, the page contained only six photographs, all of them personal.

[47] The first of the three reasons given by Mr Potton for CPG summarily dismissing Ms Todd was her failure to follow a reasonable and lawful instruction given to her in the 7 November 2018 meeting. As no such instruction had been given, I conclude Ms Todd was disadvantaged in her employment by that meeting. More specifically, she was disadvantaged by her employer's later reliance on an instruction it had not given her.

The 13 December 2018 meeting

[48] Mr Potton's evidence was that he asked for this meeting with Ms Todd with the primary purpose being to "to informally seek clarification from (Ms Todd) about why she had continued to operate her business in competition with CPG". As noted earlier, Ms Todd was given no advance information about the subject matter for discussion.

[49] Ms Potton's text of 21 November 2018, informing Ms Todd of the "substantial meeting" Mr Potton wished to have with her, had been in reply to a text from Ms Todd. Ms Todd's text had apologised for the amount of sick leave she had recently taken and for the inconvenience this had caused her employer. The inference to be taken from Ms Todd's evidence of being anxious and stressed about the upcoming meeting, is that part of her anxiety arose from the annoyance she perceived in Ms Potton's communication with her over her sick leave. Ms Todd said she took a support person with her to the 13 December meeting because of her anxiety over this. Her support person's evidence corroborated Ms Todd's stress and anxiety.

[50] Ms Todd disputed Mr Potton's evidence that the focus of the meeting was her alleged continued operation of her *curatemyspace* business. She said the focus was her performance in relation to a recent Gallery event and her relationship with Ms Potton. By Ms Todd's account, the majority of the meeting consisted of Mr Potton criticising her harshly in relation to her part in preparing for that event. She had no forewarning of this censure; was unprepared to defend herself; and said she became very upset as a result.

[51] Ms Todd said Mr Potton also criticised her during the meeting for the sick leave she had recently taken, for which she had provided medical certificates. While Mr Potton denied this, I accept it is likely to have occurred. Her support person, who was more of a respected acquaintance from the local arts community than a personal friend, gave evidence that corresponded with Ms Todd's on this point. I found the support person's evidence to be measured, dispassionate and credible.

[52] Ms Todd said Mr Potton may have briefly mentioned her *curatemyspace* Instagram page but that took up very little of the meeting. Her support person corroborated that assertion: she recalled there being a brief and general discussion of the Instagram account, which took up approximately two minutes of the 30 minute meeting.

[53] Mr Potton's evidence was that Ms Todd barely spoke during the meeting and that at one point she said she would only work to rule, which he found disappointing. Ms Todd denied making that comment. It was undisputed that Ms Todd was very upset during the meeting and that there was a discussion about the recent Gallery event that had strained relations between Ms Todd and Ms Potton.

[54] Ms Todd said that towards the end of the meeting Mr Potton declared her relationship with Ms Potton had broken down beyond repair and she should consider her options. Ms Todd asked whether Mr Potton wanted her to resign, whereupon he restated that she should consider her options. Mr Potton acknowledged he had said that, but could not recall having told Ms Todd her relationship with Ms Potton was broken "beyond repair". I find it highly likely he did use those words.

[55] In his evidence to the Authority Mr Potton said the relationship between Ms Todd and Ms Potton had broken down over Ms Todd's *curatemyspace* business and he was unable to see any resolution to that. I am not convinced he explained that to Ms Todd during the meeting.

[56] I find the 13 December 2018 meeting was unfair to Ms Todd from the outset. This was a very different situation from the meeting of 7 November when Ms Todd knew her employer wanted to discuss the work she had been carrying out for SB and had indicated her willingness to discuss it.

[57] Mr Potton went into the 13 December meeting with specific concerns that he did not disclose in advance to Ms Todd. These related to the emails Ms Potton had found on 20 November when Ms Todd left work for the day, having left her private email account open on the Gallery computer. Ms Potton and Mr Potton had formed a view from the emails that Ms Todd was continuing to compete with CPG, using CPG's paid time and resources to do so.

[58] Ms Todd said she did not know of these concerns until Mr Potton's letter of 23 January 2019 in which he provided information about them. She said Mr Potton did not provide any such information before, or at, the 13 December meeting. She was unaware her employer had a view that she was continuing to compete with CPG through her *curatemyspace* page.

[59] I doubt Mr Potton did disclose those concerns during the 13 December meeting in a manner Ms Todd could respond to. It is likely his criticisms of Ms Todd's recent performance and absences on sick leave, and Ms Todd's shocked reaction to that criticism, diverted Mr Potton from what he had intended as the primary focus of the meeting and undermined what he had hoped to gain from it.

[60] I accept Ms Todd's evidence that she remained unaware of those concerns regarding her alleged competitive activities until January 2019. I also accept she was shocked by what she referred to as brutal criticism of her recent performance, and of her taking sick leave. I find it unsurprising that she was humiliated and embarrassed by what took place at the meeting.

[61] Ms Todd was disadvantaged in her employment by the unfair process CPG subjected her to in requiring her to attend this meeting without disclosing the reason for convening it; or the information it intended relying on; or the view it had formed of her conduct. Her confidence in the ongoing security of her employment was damaged by Mr Potton's comments about the state of her relationship with Ms Potton; his advice during the meeting that she should consider her options; and his harsh criticism of her performance. His criticism of the sick leave she had taken was unwarranted and unfair in light of the medical certificates Ms Todd had provided.

The 23 January 2019 serious misconduct allegations

[62] Ms Todd claims her employer's actions in raising allegations of serious misconduct against her caused her unjustified disadvantage by jeopardising the security of her employment and causing her to experience stress, anxiety and humiliation.

[63] I do not accept that CPG unjustifiably disadvantaged Ms Todd by informing her in writing of its serious concerns or by commencing an investigation into those matters. The employer had the right to alert Ms Todd to its concerns and to investigate those matters.

[64] How CPG carried out its investigation, and whether or not it acted as a fair and reasonable employer, will be a matter for consideration in determining whether or not Ms Todd's dismissal was justifiable.

Was Ms Todd unjustifiably dismissed?

The first allegation

[65] Mr Potton's decision to dismiss Ms Todd was based on his finding that all three of the allegations made against her in the 23 January 2019 letter were upheld. I have already found the premise of the first allegation, that Ms Todd had failed to comply with a reasonable direction given to her in the meeting of 7 November 2018, to have been undermined by the acknowledgement of both directors that no direction had been issued in that meeting. That was pertinent to Ms Todd's claim to have been disadvantaged by the meeting of 7 November.

[66] The remaining elements of the first allegation concern breaches by Ms Todd of the conflict of interest and good faith obligations of her IEA in continuing to operate what Mr Potton described in his letter of 23 January 2019 as her "competing business interest". The first element is the allegation that Ms Todd had induced other Gallery clients away to her *curatemyspace* business and had not disclosed this to the directors in the 7 November 2018 meeting.

[67] Mr Potton referred specifically to Ms Todd having induced a major client of the Gallery to her business. He alleged she did this by sending one of her hand-made *curatemyspace* cards to that client's General Manager (the GM) and by communicating with the GM "on an alleged *personal* front about sourcing competing works" from another photographer.

[68] Ms Todd acknowledged putting one of her *curatemyspace* cards in a Gallery pack that was sent to the client. She said this was after the 31 July 2018 meeting with Mr Potton at which he had supported her idea of supplementing her income by starting a private curating business. Ms Todd said she had mentioned that idea to the GM, who was interested in it and thought there was a market for such a business. In Ms Todd's view she was doing nothing wrong as this came within her discussion and agreement with Mr Potton on 31 July.

[69] The GM, who gave evidence for Ms Todd in the Authority's investigation, outlined her organisation's relationship with CPG. She spoke of her dealings with both Ms Todd and Mr Potton over the organisation's redevelopment project that entailed the purchase of artworks.

[70] In relation to Ms Todd's *curatemyspace* card, the GM said she had not seen it at the time but understood it had been included in a CPG bag sent to her by Ms Todd. She assumed it was in a bag containing frame samples that she recalled returning to the Gallery after she, with Ms Todd's assistance, had selected new frames for a number of Mr Potton's prints her organisation owned. The GM believed this was in August 2018.

[71] With regard to his other allegation regarding Ms Todd's inducement of this client, Mr Potton referred to emails the Gallery Manager had sent to the GM. Mr Potton said these were evidence of her "enticing business away from the Gallery" and seeking to obtain work from another photographer, rather than discussing alternatives with CPG directors. Ms Todd had emailed an Auckland gallery on 25 October 2018 asking about a specific print. She had received a response and emailed the GM to advise her what she had ascertained.

[72] Ms Todd had responded to Mr Potton's allegation both in writing through her lawyer on 29 January 2019 and in person during the 5 February 2019 disciplinary meeting. She had explained that the GM had asked her to find out the cost of a particular hydrangea print she was interested in purchasing personally.

[73] Ms Todd informed Mr Potton she had made enquiry on-line, contacted the gallery from which the print could be purchased, and provided the information to the GM who decided not to pursue her interest in it. Ms Todd said she used her private email account to enquire about the print and to advise the GM of its price because she was acting in a "friend" capacity rather than in her Gallery role. As the matter had come to nothing, it had not occurred to her to inform her employer of it during their discussion over the SB matter on 7 November 2018.

[74] The transcript of the 5 February 2019 disciplinary meeting indicates Mr Potton believed Ms Todd had approached the GM and offered to source a print of a photograph taken by someone whom he described as a great New Zealand photographer, a rival, and a personal friend. Ms Todd said she had not known who the photographer was and had no contact with him: she simply made an enquiry to a gallery following her on-line search to identify the print the GM had asked her about.

[75] The GM confirmed at the Authority's investigation that she had asked Ms Todd in October 2018 to ascertain the cost of a print she had seen in a magazine and was interested in obtaining for her own home. The GM said she had been at the Gallery to discuss her organisation's purchase of several new Craig Potton photographs with Ms Todd. After they had completed that business, the GM had mentioned her personal interest in the hydrangea print and asked Ms Todd if she could make enquiry on her behalf. The GM confirmed she had decided not to pursue the matter after Ms Todd had provided the information she had requested.

[76] Mr Potton gave evidence that he had talked to the GM between the disciplinary meeting of 5 February and his letter of dismissal to Ms Todd on 12 February 2019. He said the GM had conveyed to him that Ms Todd had stepped out of line, prompting her to return her business card to the Gallery.

[77] The GM's evidence contradicted that. As earlier noted, she had not been aware of Ms Todd's hand-made *curatemyspace* card being in a Gallery bag and had not deliberately returned the card when she sent the bag back to the Gallery. The GM denied telling Mr Potton that Ms Todd had stepped out of line in sending her card. She said Mr Potton did not discuss Ms Todd with her until after he had dismissed her.

[78] According to the GM, Mr Potton came to her workplace in February 2019 and told her he had dismissed Ms Todd. She could not recall the date he came as, unusually, he had not made an appointment. The GM said she was "shocked and dismayed" to hear Ms Todd had been dismissed because she had enjoyed working with her. She also said she was embarrassed that her enquiry about a print had contributed to Ms Todd losing her job.

[79] I consider that Mr Potton was mistaken about the timing of his conversation with the GM after the 5 February 2019 disciplinary meeting. I prefer the GM's evidence that he did not speak with her about the matter until after he had dismissed Ms Todd.

[80] In preferring the GM's evidence, I note that Mr Potton's first response when questioned about the investigation he had carried out between the 5 February 2019 disciplinary meeting and his decision to dismiss Ms Todd was that he had not carried out any further investigation. He had discussed the matter with Ms Potton, who had not attended the disciplinary meeting, and had taken some advice, but his investigation had been internal only. While Mr Potton subsequently said he had also talked with SB and the GM between the disciplinary meeting and the dismissal of Ms Todd, I am doubtful whether his recall of the timing of his discussion with the GM was accurate.

[81] It would have been sensible for Ms Todd to inform her employer about the GM's personal request at the time it was made but I am inclined to give her the benefit of the doubt on this. The GM was, through the organisation she represented, a major client of CPG and it was not unreasonable for the Gallery Manager to undertake an enquiry for her in the interests of maintaining what was a beneficial relationship.

[82] This incident also preceded the 7 November 2018 meeting with the directors and it is plausible that Ms Todd believed she was acting within the mandate Mr Potton had given her in the performance review meeting of 31 July 2018. I note too that Ms Todd had made the enquiry, received an answer, advised the GM and received the GM's response within a 24 hour timeframe. Nothing came of the enquiry and Ms Todd's non-volunteering of this information in the meeting with the Gallery directors of 7 November 2018 is explicable.

[83] I do not find CPG could reasonably have upheld its allegation that Ms Todd had induced clients, and relied on that as a reason to dismiss her, if it had properly investigated her responses. CPG had discussed the SB matter with Ms Todd and condoned her completion of work for that client. In the face of the GM's evidence of having asked Ms Todd to make enquiry about a specific print on her behalf, there was no support for the allegation that Ms Todd had tried to induce her, or more particularly the organisation for whom the GM worked, away from CPG.

[84] Also included under the *Failure to comply with a reasonable direction heading* of his letter of 23 January 2019 letter, Mr Potton referred to having identified a number of documented emails and Google searches that had no relation to CPG business but appeared to be related to Ms Todd's "competing business interest between October and December 2018".

[85] Some of those emails related to the work Ms Todd was undertaking at the time for SB. As already noted, the continuation and completion of that work had been agreed between the directors of CPG and Ms Todd on 7 November 2018. It was not reasonable, therefore, to view those emails as evidence of any failure on Ms Todd's part to comply with a reasonable direction, even had such a direction been given.

[86] Many of the emails highlighted by CPG concerned matters that could not reasonably be described as being related to a business interest in competition with the Gallery. These included an email exchange over office furniture between Ms Todd and the lawyer for whom she was working two days a week. It also included editing of her CV on the Gallery computer.

[87] Ms Todd explained in her response to the allegation that she normally could not leave the Gallery for lunch or tea breaks. She used that time and the Gallery computer to access her own email account for private purposes. She did not believe she did so excessively and the number of emails provided by the employer does not suggest otherwise.

[88] I note here that Mr Potton's letter of dismissal wrongly stated that, at the 5 February disciplinary meeting, Ms Todd had said she attended to Gallery business in the mornings and to her *curatemyspace* business in the afternoons. Mr Potton acknowledged his error in the course of the Authority's investigation after revisiting the transcript of that meeting.

[89] I do not find these emails and google searches could reasonably be relied on by CPG as part of its decision to dismiss Ms Todd.

[90] There is, however, one matter that does provide support for CPG's view that Ms Todd had carried on her personal business after the 7 November 2018 meeting. This relates to an approach Ms Todd made to a new hospitality establishment on behalf of the local artist she had introduced to SB.

[91] Emails between Ms Todd and the artist that Ms Potton found on the Gallery's computer on 20 November 2018 disclose that the artist made an approach to Ms Todd on 16 November 2018, informing her of the new hospitality venue and the name of its owner. The artist asked Ms Todd if she could get some of her paintings on the walls of the new venue. Ms Todd confirmed her willingness and, on Monday 19 November 2018, emailed the artist to advise she had tried calling and messaging the owner and had sent him two photographs that related to the artist's work.

[92] Ms Todd told Mr Potton, in her lawyer's response of 29 January 2019 to the allegations against her, that she had made the enquiry on behalf, and at the request, of the artist with whom she had developed a personal connection. Ms Todd said the enquiry did not involve her operating her *curatemyspace* business or promoting her own services. She was not being asked to source or curate art work and there was no remuneration in it for her.

[93] The transcript of CPG's investigation meeting of 5 February 2019 shows that Ms Todd said the artist, who had become a personal friend, had asked her to contact the new hospitality venue because she (the artist) was not confident reaching out to people. Ms Todd was adamant that she was doing a favour for a friend, not pursuing a business opportunity, and therefore was not in breach of the understanding she and the Gallery directors had reached on 7 November 2018.

[94] A review of the email exchange between Ms Todd and the artist casts some doubt on that view. One of the artist's emails includes the words "If you can't get in touch or you're not interested/too busy, let me know ASAP and I'll approach him myself." That suggests the artist had no difficulty in approaching people to display her art.

[95] Ms Todd's endeavours on behalf of the artist were unsuccessful, and there is nothing to indicate that she received any remuneration for her efforts. Mr Potton's letter of dismissal referred to the fact that Ms Todd had previously received a commission from the artist in relation to the work she had undertaken for SB. He said further enquiries made on behalf of the artist must be viewed as commercially driven and as an indication of Ms Todd continuing to undertake business in competition with CPG.

[96] I find some justification for Mr Potton to have that view. There is a difference between this incident in November 2018 and that of Ms Todd making an enquiry on behalf of the GM in October 2018. By the time of the November incident, the directors and Ms Todd had met earlier that month and reached an understanding Ms Todd would not pursue her own business while employed by the Gallery, unless with the approval of the directors. Despite the lack of a formal instruction from the directors at that meeting, Ms Todd acknowledged the understanding that had been reached.

[97] While there is no evidence that Ms Todd undertook this enquiry for commercial gain, CPG could have a reasonable expectation after the 7 November 2018 meeting that she would consider any request, such as that from the artist with whom she had come to a commercial

arrangement in respect of the work for SB, with a heightened awareness of her obligations to her employer. Rather than simply acquiescing to such a request, CPG could for example reasonably expect its Gallery Manager to consider whether the request would conflict with her duties to the Gallery or could be perceived as a competing activity.

[98] The Job Description for Ms Todd's position as Gallery Manager included the following in its list of duties:

- Continually seek ways to improve the profitability of the gallery
- Maintain ongoing promotion and advertising of the gallery
- Market the gallery and follow up all opportunities through contacts and networks

[99] Mr Potton's letter of dismissal characterised Ms Todd's conduct in actively trying to facilitate the promotion of the artist's work in a new hospitality establishment as being in clear conflict with her duties as Gallery Manager and a breach of her good faith obligations under the IEA. The artist was not associated with CPG and there was no benefit to the Gallery in Ms Todd's actions. I agree the employer had grounds to make that finding.

[100] Whether or not CPG would have wished any of its work to be displayed in the hospitality venue is not relevant. The directors were entitled to expect their Gallery Manager to inform them of an opportunity for promoting or marketing their work in a new venue. CPG was justifiably concerned that Ms Todd overlooked that opportunity in favour of assisting an external artist to promote and market her art in the new venue. I will return to this shortly.

The second allegation

[101] I have set out the second allegation that CPG relied on in reaching its decision to dismiss Ms Todd at paragraph 21 above, which is that Ms Todd breached her obligation to deal with her employer in good faith in taking on secondary employment, while claiming she wanted to work fewer hours for personal reasons.

[102] This allegation could not reasonably have been upheld and relied on by CPG to dismiss Ms Todd as there is no evidence to support it. What the evidence shows is that on 17 October 2018 Ms Todd texted Ms Potton to say she was wondering if she could drop Wednesdays "again for a bit" as something had come up that she needed to do on Mondays and Wednesdays for a while. Ms Todd said she would explain when she saw Ms Potton, which she did the

following day. In the meantime, however, Ms Potton had responded to Ms Todd's text the same day as receiving it as follows:

"Yep good to go. That's fine re Wednesday's. See you tmw"

[103] Ms Todd's text did not ascribe "personal reasons" as the basis for her request. When she saw Ms Potton on 18 October 2018 and explained her reason, she described Ms Potton as being supportive. Ms Potton's evidence was that she had agreed Ms Todd could drop Wednesday work because she assumed the Gallery Manager wanted to spend that time having more involvement in her children's activities. Ms Potton said she was surprised when Ms Todd told her the reason for her request the next day: she said she felt she had no choice but to agree. I note that she had already agreed to Ms Todd's request without asking for the reason, and without waiting for the explanation Ms Todd had indicated she intended to provide for her request the next day.

[104] Ms Potton said it was clear to her that Ms Todd had already made the decision to accept the job without first consulting CPG about the impact that would have on its business. Ms Todd's evidence was that she had not accepted the offer of employment until after receiving her employer's approval.

[105] The language Ms Todd used to make the request in her 17 October text to Ms Potton does not support Ms Potton's view. She was "wondering" if she could drop Wednesdays, not stating an intention to do so, and she signalled that she would explain the request the following day when she saw Ms Potton. Ms Todd's evidence was that she would have turned down the offer of Wednesday employment elsewhere if her employer had expressed concern about releasing her from the Gallery on that day. As it was, Ms Potton approved her request before she had the opportunity to explain her reason for making it.

[106] In his evidence to the Authority Mr Potton referred to Ms Todd having made a unilateral variation to her IEA. That was an inaccurate description of what occurred. Ms Potton's approval of the request, without waiting for Ms Todd's promised explanation, makes it unreasonable to describe the action as "unilateral" by Ms Todd, or to find she had failed to act in good faith in her request.

[107] It also eventuated during the Authority's investigation that Mr Potton had been under the mistaken impression that the Gallery had not discovered "for some time" Ms Todd's reason

for wanting to drop Wednesday work in the Gallery. He expressed surprise that Ms Todd had explained her reason the next day, as she had indicated her intention to do in her 17 October 2018 text to Ms Potton.

[108] I find CPG acted unreasonably and unfairly in upholding its second allegation and in relying on the erroneous assumptions its directors had made in their adverse findings against Ms Todd.

The third allegation

[109] The third allegation related to Ms Todd's use of a Gallery prepaid courier label to send a book purchased from the Gallery shop to a family member. In Mr Potton's letter of dismissal he advised Ms Todd the allegation had been upheld, and stated that Ms Todd knew from her more than two years as Gallery Manager that the process for courier paid fees applied only to on-line purchases, which her purchase was not. Mr Potton also stated that on balance the company could conclude Ms Todd had acted dishonestly but had decided to find "on a lower threshold" she had breached a lawful and reasonable instruction under her IEA.

[110] The transcript of CPG's disciplinary meeting of 5 February 2019 records Mr Potton having said to Ms Todd that he presumed she was aware "that courier paid items only refer to mail order (and) do not refer to shop sale."

[111] Ms Todd explained, through her lawyer, on 29 January 2019 that the item was a book she had purchased from the Gallery for a family member on 4 December 2018. In accordance with the practice she had been told to follow at the outset of her employment with the Gallery, she sent the item by pre-paid courier. In the disciplinary meeting of 5 February 2019 she verbally explained her understanding again to Mr Potton.

[112] Mr Potton acknowledged in the Authority's investigation meeting that one of the Gallery's own newsletters, and its Facebook page, stated the Gallery offered free postage nationwide. No distinction was made between purchases made online and those in-store. Mr Potton professed not to have been aware of this until counsel for Ms Todd brought the documents to his attention during cross-examination.³ He said he would not have raised Ms

³ The documents were part of an agreed bundle compiled four months before the Authority's investigation meeting.

Todd's use of a pre-paid courier label as an allegation of serious misconduct if he had known this at the time.

[113] Mr Potton should have known, or ascertained, the Gallery's policy on this matter before making allegations of serious misconduct against Ms Todd. It was evident he did not investigate Ms Todd's written or oral explanations, or even ascertain what the Gallery policy was before determining that her conduct in that matter amounted to serious misconduct.

[114] CPG had no basis for relying on this allegation to dismiss Ms Todd. The making, and upholding, of the allegation reflects poorly on the fairness of the procedure CPG followed.

Conclusion

[115] CPG could not reasonably rely on the second and third of the three major allegations it made against Ms Todd on 23 January 2019, all of which it upheld following its disciplinary meeting with her on 5 February 2019. With regard to the first allegation, both directors acknowledged in the course of the Authority's investigation that they had not issued Ms Todd a direction or instruction at the meeting of 7 November 2018. Accordingly Mr Potton could not rely on those parts of the first allegation to dismiss Ms Todd.

[116] Nor could CPG rely on its finding that Ms Todd had induced a client or clients to her private business. If it had properly investigated Ms Todd's responses to those allegations, it could not reasonably have reached the view it relied on to dismiss her.

[117] CPG could rely on the understanding it reached with Ms Todd at the 7 November 2018 meeting that she would not do any further unapproved work in her own business while she remained an employee of the Gallery, with the exception of completing the project she had embarked on for SB. Ms Todd submits she did not breach that agreement with her employer by doing a favour for her friend in contacting a new hospitality establishment to see if it was interested in having some of the friend's art on its walls.

[118] The evidence is not sufficiently strong to support CPG's view that this constituted a breach of the 7 November 2018 agreement. I have, however, found CPG had grounds for finding Ms Todd had breached her obligation of good faith to her employer and failed to recognise the artist's request as being in conflict with her duties to CPG.

[119] A fair and reasonable employer would not have dismissed Ms Todd on the basis of that one breach although it may have been justified in issuing a warning.

[120] I find that, considering all these matters, CPG unjustifiably dismissed Ms Todd. Its investigation was insufficient and its decision to dismiss Ms Todd summarily was not one a fair and reasonable employer could have taken in all the circumstances at the time.

Was CPG's decision to dismiss Ms Todd premeditated?

[121] Ms Todd referred to a number of factors for her allegation that CPG had pre-determined she would be dismissed. They included that Mr Potton, the decision maker, had told Ms Todd on 13 December 2018 she should consider her options and that her relationship with Ms Potton had broken down beyond repair.

[122] The factors also included the delay in CPG raising the allegations against Ms Todd for some eight weeks after the 13 December 2018 meeting; that Mr Potton had not been communicative or responsive in the disciplinary meeting of 5 February 2019; and that he had not sufficiently investigated or genuinely considered her explanations with an open mind.

[123] Mr Potton's acknowledgement in oral evidence that he could not see any resolution to the break down in the relationship between Ms Potton and Ms Todd supports Ms Todd's claim of predetermination. However, I do not consider the lapse of time between the meeting of 13 December 2018 and the request for a disciplinary meeting of 23 January 2019 as indicating predetermination by Mr Potton. It could equally be interpreted as the CPG directors taking the time away from the Gallery to consider the events of recent months and assess them with the objectivity that distance and time can provide.

[124] There is stronger support for Ms Todd's contention in CPG's failure to investigate Ms Todd's responses to the allegations against her. I was not persuaded by Mr Potton's evidence that he had spoken with the GM between the disciplinary meeting of 5 February and his decision to dismiss Ms Todd.

[125] The claim of premeditation is also supported by Mr Potton's failure to check the Gallery's policy on pre-paid courier labels before wrongly deciding Ms Todd was guilty of serious misconduct for breaching that policy. His lack of knowledge of the Gallery's own

documentation supporting Ms Todd's explanation of her actions adds weight to Ms Todd's claim.

[126] On balance, after considering these factors, I find there was an element of predetermination in Mr Potton's decision to dismiss Ms Todd.

Breaches of good faith obligations and/or contractual obligations and penalties

[127] All Ms Todd's claims under these headings relate to the matters for which she has raised personal grievances. I have made findings under those headings, and will order appropriate remedies. I do not consider it necessary to further explore the claims.

Relevance of post-termination events

[128] Ms Todd's statement of problem included the following statements:

2.30 Craig's personal assistant took over Rachel's management position immediately after her dismissal.

2.51 Rachel's position was filled by Craig's personal assistant on the same day that Rachel was summarily dismissed.

[129] The second of those statements was among the factors relied on by Ms Todd for her claim that CPG predetermined her dismissal.

[130] Among the documentation attached to the statement of problem was an email dated 17 February 2019 from Ms Todd to her lawyer forwarding a screenshot of a Facebook post made by a person whom I have chosen not to name, as she was not called to give evidence in the Authority. I will refer to her as Ms PY.⁴ The post stated "Started new job at Craig Potton Gallery + Store", and had the date "13 February" directly underneath. One person had posted a surprised emoji at the news.

[131] CPG denied Ms Todd's claim of predetermination in its statement in reply and rejected her "allegation about the appointment of the new Gallery Manager...".

[132] Several weeks later CPG, wrote to Ms Todd on an open letter basis, copying the Authority into the correspondence, alleging that she had manufactured or photo shopped the Facebook post referred to above. CPG stated that Ms PY had not made a Facebook post on 13

⁴ The initials bear no relation to the person's name.

February 2019, but had made posts on 11, 12 and 16 February. CPG said its investigations showed that the person who had posted the emoji did not make that post on 13 February 2019. CPG concluded Ms Todd had manufactured the Facebook post to support its allegation that CPG had predetermined Ms Todd's dismissal.

[133] Ms Todd sent the mobile phone on which she had taken the Facebook screen shot to a specialist computer forensic company, Computer Forensics NZ Ltd (CFL). That company provided her with oral confirmation that its forensic analysis of the data on the phone showed the screenshot had not been modified in any way from the time it was first taken by Ms Todd on 17 February 2019.

[134] By letter dated 17 September 2019 Ms Todd then sought from CPG an apology, a written retraction of the allegation, and reimbursement of CFL's fee of \$250 plus GST for the oral confirmation. A written report, which Ms Todd had not requested at that time, would cost \$2,012.50. After some correspondence, but no agreement to her requests from CPG, Ms Todd paid for the written forensic report, notifying CPG she would be seeking indemnity costs for all the steps she had to take to seek vindication for the serious accusations made against her.

[135] In the course of the Authority's investigation Mr Potton orally acknowledged the allegation of photo shopping CPG made against Ms Todd was a mistake. He also acknowledged it was a very serious accusation involving a criminal offence and that it was reasonable for Ms Todd to seek an apology, retraction and reimbursement of the cost of obtaining the forensic computer analysis if she had not tampered with the Facebook post.

[136] I take this matter no further at this point but note that, if there is any issue as to costs between the parties, this matter may be relevant.

Remedies

[137] I have found Ms Todd to have been unjustifiably disadvantaged by the employer's reliance on a direction it claimed to have given her in the informal meeting of 7 November 2019, but which it acknowledged during the Authority's investigation had not been given.

[138] I have also found Ms Todd to have been disadvantaged by the "informal" meeting with Mr Potton on 13 December 2018. The process was unfair, in that the employer came into the

meeting with an agenda that had not been advised to Ms Todd and proceeded to criticise her recent performance and the sick leave she had taken under medical advice and documentation.

[139] As well as causing distress to Ms Todd, CPG also disadvantaged her by Mr Potton's advice to her during the meeting that she should "consider her options", thereby damaging her confidence in the ongoing security of her employment.

[140] I have dismissed Ms Todd's claims to have been disadvantaged by Mr Potton's letter of 23 January 2019 on the basis that an employer has the right to raise matters of concern with an employee. I have, however, noted in respect to one of the three allegations contained in CPG's letter that Mr Potton acknowledged the allegation would not have been made if he had been aware of two of CPG's own documents that supported Ms Todd's responses to the allegations.

[141] I have also found CPG could not reasonably have relied on many of the conclusions it reached about Ms Todd's conduct to dismiss her. It had no basis for two of the three main allegations against her and I have found it could only reasonably have relied on one of the instances raised in the remaining allegation. That, on its own, would not have warranted dismissal. I will consider that matter in relation to any contribution Ms Todd made to the situation that gave rise to her personal grievance for unjustifiable dismissal.

[142] Ms Todd seeks compensation of \$40,000 under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. She submits she merits a significant award because of the way CPG treated her and the effect on her of its actions. I accept her evidence of being appalled at the accusations made against her and the effect on her. Medical evidence was provided to support how she had been affected.

[143] In light of the findings I have made and the finding in favour of most, but not all, of her claims, I consider it appropriate to award Ms Todd \$7,000 compensation in respect of the 13 December 2018 meeting, subject to any contribution that may be found. In respect of the 7 November 2018 meeting I do not consider it appropriate to make a separate award for the directors' reliance on a direction they conceded was not given, as that is more properly considered as part of the consideration of compensation for the unjustified dismissal.

[144] With respect to the dismissal, the factors I have identified above underline CPG's failure to treat Ms Todd fairly and reasonably throughout the disciplinary/investigatory process. Those failures caused unnecessary shame, embarrassment, and humiliation for Ms Todd. A

prime example was Mr Potton's acknowledgement in the Authority that the Gallery had been caught out, and would not have made one of the three main allegations against Ms Todd, all of which it upheld and resulted in her summary dismissal, if it had known about two of CPG's own documents.

[145] I consider, subject to any contribution, an award of \$25,000 to be appropriate as compensation in respect of Ms Todd's unjustified dismissal.

[146] Ms Todd seeks lost wages in the sum of \$21,769.70. This represents the difference between what she would have received if she had remained working for CPG and her earnings in the 12 months from 12 February 2019 to 12 February 2020 when she commenced full time teacher training.

[147] Ms Todd's evidence was that she tried to find alternative employment following her dismissal but there were very limited roles available in Nelson and her summary dismissal from CPG impeded her ability to find suitable employment. She also gave evidence of the health issues she suffered following her dismissal, which would have been a further impediment in her efforts. It was six months before Ms Todd obtained part time employment at a lower hourly rate than she had received from the Gallery.

[148] I find this is a situation where a higher award is warranted than the three months lost wages provided for by the Act but I do not accept that 12 months is appropriate. I award Ms Todd four months lost wages, comprising the difference between her earnings in that period and what she would have had she not been dismissed by CPG. Any award for lost wages will also be subject to my findings on contribution.

Contribution

[149] Ms Todd submits she did not contribute to the situation that led to her personal grievance. CPG submits that she wholly contributed, such that she is precluded from any remedies. In the alternative, CPG submits contribution should be assessed at no less than 80 percent. I do not accept either of those submissions.

[150] I have found in favour of CPG regarding its allegation that Ms Todd breached her IEA in failing to identify a conflict of interest when she agreed to help a local artist have her art work displayed on the walls of a new hospitality establishment. This was a breach of her

obligation of good faith to her employer. While I have found this may have warranted a warning, it did not justify summary dismissal. I also consider it as a relevant factor contributing to the situation that led to Ms Todd's personal grievance for unjustifiable dismissal.

[151] Taking all factors into account, I conclude Ms Todd's contribution sits at 12.5 percent and the remedies will be adjusted accordingly.

Orders

[152] Craig Potton Gallery Limited is ordered to pay Rachel Todd:

- (a) \$6,125.00 as compensation for her personal grievance arising from the 13 December 2018 meeting, under s 123(1)(c)(i) of the Act⁵;
- (b) \$21,875.00 as compensation for her personal grievance for unjustifiable dismissal under s 123(1)(c)(i) of the Act;⁶and
- (c) \$7,184.63 gross, being four months' lost wages.⁷

Costs

[153] The issue of costs is reserved. However, I strongly encourage the parties to try to resolve costs between themselves and to have regard to paragraph 136 of this determination when they do so.

Trish MacKinnon
Member of the Employment Relations Authority

⁵ Being \$7,000 less 12.5 percent.

⁶ Being \$25,000 less 12.5 percent.

⁷ Calculated on the basis of 17 weeks at 21 hours per week and \$23 per hour, minus 12.5%.