

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [11]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 357
3145123

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| BETWEEN | MARIA WARRINGTON Applicant |
| AND | BIZCOM NEW ZEALAND LIMITED Respondent |

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|------------------------|---|
| Member of Authority: | Claire English |
| Representatives: | Matthew Croymans, counsel for the Applicant Alistair Sheriff, counsel for the Respondent |
| Investigation Meeting: | 31 May and 1 June 2022 at Wellington |
| Submissions received: | 1 June 2022 from Applicant 1 June 2022 from Respondent |
| Determination: | 3 August 2022 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Warrington was employed as a caregiver. She was dismissed from her role at a private hospital run by the respondent Bizcom New Zealand Limited, because she featured in a TikTok video showing her and a fellow worker while a resident of the hospital was visible in the background of the video.

[2] Ms Warrington was summarily dismissed. The respondent also retained some money from her last paycheque for two uniform items it says she did not return.

[3] Ms Warrington raised a personal grievance for unjustified dismissal. The respondent says that the privacy of its residents is vital, and Mr Warrington's dismissal is justified.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Warrington, Mr Malcolm Bradbrook, Ms Angela Green, Mr Tom Hannan, and Mr Sean Hannan. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was Ms Warrington's dismissal justified?
- (b) If the respondent's actions were not justified, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct that contributed to the situation giving rise to the grievance?
- (d) Should Ms Warrington be reimbursed for an amount of money deducted in respect of items of uniform, which the respondent says she did not return?
- (e) Should either party contribute to the costs of representation of the other party.

Facts

[7] Ms Warrington was employed as a caregiver by the respondent (Bizcom). She was initially employed on a casual employment agreement with a start date of 6 November 2014 (the first IEA). She was later given another permanent employment agreement with a start date of 5 December 2016 (the second IEA) which provided her with a minimum of 31 hours per week, although she gave evidence that she habitually worked for 40 hours each week, sometimes more.

[8] Ms Warrington was in the nurse's station one evening completing her paperwork. She recalls it was about 10.30 at night, and she wanted to finish her tasks as her shift finished at 11.00.

[9] She was sitting at a table, with a colleague sitting beside her, and a resident sitting behind them both. Ms Warrington's colleague said she was going to make a TikTok (or short video). Her colleague pulled out her phone, said "I like the view", Ms Warrington replied "you do", her colleague said "yes", Ms Warrington said "You're my best view", and her colleague said "Meh".

[10] Part way through the video, the resident moves and his face can be seen briefly. The video was approximately 8 seconds long, and the resident's face was visible for some 2 seconds.

[11] At this point, I pause to note that the video has been deleted from TikTok, or at the very least, is no longer available. Bizcom retained a copy of the video, which was provided to Ms Warrington, her counsel, and the Authority. There is a permanent non-publication order in place on these copies of the video, and on a spreadsheet featuring the resident's name, to protect the resident's privacy in that respect.

[12] Ms Warrington then went back to her paperwork.

[13] She says that she didn't see the video after it was shot, didn't know it was posted to TikTok, and didn't see the video again, until she had the opportunity to view it with her lawyer after raising her personal grievance. She also says that she was not aware that the resident was in shot behind her.

[14] Ms Warrington thinks this might have happened in March 2020, as this was when several other staff were using TikTok and recommending videos to each other.

[15] In August 2020, the operations manager (Mr Tom Hannan) and the facility manager (Ms Green) at Bizcom became concerned about TikTok after media articles saying that the platform could pose a security breach for businesses. Mr Tom Hannan went on to TikTok on his mobile phone. He looked up some of the names of staff members employed by Bizcom, and eventually found several staff members who had posted videos that were taken at Manor Park.

[16] He emphasised that he only accessed videos that were publicly available, and did not go through the entire staff list, he simply found a couple of staff members who were posting, and then looked through their connections to find others.

[17] Overall, Mr Tom Hannan identified what he said were 67 short videos posted to Tik Tok taken at the Bizcom hospital premises, that were in various areas excluding the staff room, including the nurse's station, the garden, the laundry, and a closed wing. He said that he found more videos, but did not make note of any videos in the staff room, as he assumed that staff in the staff room were on a break. He explained that he was very familiar with the premises of Manor Park, having worked there for many years, and he was able to tell which room staff were in. In particular, he noted the staff room was painted in a brighter, lighter colour than other areas making it easy to differentiate.

[18] Mr Tom Hannan downloaded various videos, and made a spreadsheet identifying the videos by date, who posted them, who was in them, and where in the premises they were shot.

[19] Both Mr Tom Hannan and Ms Green explained that they had recently received complaints from staff about being overworked, and they were looking for ways to support staff in their work. They both expressed surprise and disappointment that several staff had been able to find the time to post multiple videos on TikTok showing them dancing together with other staff on the work premisses while in uniform, and apparently on work time, at this time.

[20] Mr Tom Hannan and Ms Green consulted with Mr Sean Hannan, the sole director of Bizcom. As the facilities manager, Ms Green had the final say, and she

decided, with the support of both Mr Tom Hannan and Mr Sean Hannan, that disciplinary action was needed against a number of staff members.

[21] Staff who were present in videos but did not post videos, received verbal warnings. Staff who posted videos received written warnings.

[22] There was only one video that featured a resident, which was the video featuring Ms Warrington and her colleague. Both Ms Warrington and her colleague were dismissed. I set out the details relating to Ms Warrington as follows.

[23] Ms Warrington was invited to a disciplinary meeting by way of a letter from Ms Green dated 5 August 2020. The letter stated:

It has come to my attention that during some of your shifts, you have made some videos and posted them to social media. One of those videos clearly shows a resident sitting with you and your colleague.

Your actions are a serious breach of patient confidentiality and our Disciplinary Code as set out in your Individual Employment Agreement signed by you on 8 June 2015.

1.11 Breaches of confidentiality.

1.8 Unauthorised activities on the employer's premises.

1.23 Any action or inaction which destroys our trust and confidence in you.

2.4 Unauthorised absence

2.7 Neglect of residents.

2.8 Failure to comply with the hospitals Policies and Procedures.

2.24 As per your signed agreement – If you exchange emails or post messages on social media that damages our reputation or brings us into disrepute, we may take disciplinary action against you.

...

This is a disciplinary issue and may result in disciplinary action being taken, which may include termination of your employment.

[24] Equally important is what the letter did not mention. It did not state that Bizcom was concerned with videos posted to TikTok, it merely referred to social media without more. It did not say, as was explained during the investigation meeting, that Bizcom had found 27 videos posted on Tik Tok involving Ms Warrington, or that 9 of them were posted by her and the remaining 18 were posted by others but showed her in some capacity. It did not specify that this was of concern to Bizcom because of the potential for waste of work time. It did state that there was “a video” featuring “a resident” and “a colleague”.

[25] Ms Warrington was very stressed by the letter, and took two days off sick. She provided Bizcom with a medical certificate from her doctor, describing her stress.

[26] Ms Warrington attended the disciplinary meeting on 7 August 2020 with her support person, Mr Bradbrook. She arrived early, and asked if she could have the meeting early. She said she wanted to know the outcome, as she was very stressed.

[27] Mr Tom Hannan and Ms Green agreed to hold the meeting early, in light of her medical certificate, and because they could see no reason not to.

[28] The meeting was held in Ms Green's office. Ms Warrington said she was sorry. Mr Bradbrook explained for her that it was just a "one-off". Mr Tom Hannan then mentioned there were 27 other videos, which surprised Mr Bradbrook. The handwritten meeting notes taken by Ms Green record that there was mention of 29 videos, however, Mr Tom Hannan said this was a mistake, and there were only 27 that he had identified. Ms Green accepted this, as she was not clear about how many videos there were exactly featuring Ms Warrington.

[29] Ms Warrington was not shown the video featuring the resident. Mr Tom Hannan and Ms Green both explained that they had not shown it to her because she had not asked to see it. In any event, they both explained this was not necessary, because they believed Ms Warrington had known what they were referring to.

[30] They both explained they assumed Ms Warrington knew what Bizcom's concerns were because Ms Warrington said "sorry", and they took the view that she would not have said "sorry" unless she knew what she had done wrong, and because they had seen her speaking with her colleague in the carpark prior to the meeting, that colleague being the person who had made and posted the video featuring the resident. So, in their view, Ms Warrington must have known about the video because she had been seen speaking with the person who made it.

[31] Ms Warrington did say in the disciplinary meeting that she didn't know that the resident was in a (or the) video (she says he was asleep). This was discounted by Mr Tom Hannan and Ms Green. They explained that they had formed the view that Ms Warrington must have known the resident was in the video, because of the small size of the room, and because it was not possible that she would have forgotten where a resident was in relation to her because of security concerns.

[32] This was not put to Ms Warrington at the meeting. Instead, Mr Tom Hannan said that Ms Warrington would have seen the video before she posted it. Ms Warrington made no response.

[33] Mr Tom Hannan explained at the investigation meeting that he thought it quite improbable that anyone would make a video and then post it without first showing it to everyone in the video and getting their consent. Based on this assumption, he formed the view that Ms Warrington knew the resident was visible in the video and consented to posting the video.

[34] At the investigation meeting, it became clear that Mr Tom Hannan and Ms Green had made – and continued to make – no distinction between the person who made the video, the person who posted the video, and the persons in the video.

[35] Instead, they both explained to me that, in their view, Ms Warrington was equally as responsible for the video as her colleague who made and posted it. This view was not explained to Ms Warrington or discussed with her at the time.

[36] They also explained that Ms Warrington had done nothing to prevent a breach of the resident's privacy, and that their view was that this made her responsible for what they considered to be a serious privacy breach. Again, this view was not explained to Ms Warrington or discussed with her prior to her dismissal.

[37] The meeting lasted about 10 minutes. Ms Warrington then left for home. Both Mr Tom Hannan and Ms Green formed the view that Ms Warrington knew of the video that was of concern, knew that a resident was visible in the background, was responsible for its creation and posting, and had acknowledged that this was wrong by way of her saying "sorry".

[38] Ms Green made the decision to dismiss Ms Warrington. She spoke with Mr Sean Hannan, who advised her he would support this course of action.

[39] Ms Green then wrote up a letter advising Ms Warrington of her dismissal. Ms Green did this immediately, as she was mindful that Ms Warrington had asked if the process could be conducted early and promptly because she (Ms Warrington) was finding it stressful. Mr Tom Hannan assisted Ms Green by typing up the letter and printing it on letterhead for Ms Green's signature.

[40] Ms Green then called Ms Warrington, and asked her to return to the workplace for the outcome. Ms Warrington could not get hold of Mr Bradbrook, but decided to attend without him.

[41] Ms Warrington was dismissed. The dismissal letter of 7 August 2020 was brief, and I will set it out in its entirety:

Dear Maria

Thank you for meeting with myself, Tom Hannan, and your support person Malcolm.

After much deliberation and looking at all the facts I regret to inform you that we are terminating your contract with Manor Park Hospital with immediate effect, as per your employment contract clause 7.17.

You have breached your signed individual employment agreement in numerous areas, our policy around confidentiality, and the Privacy Act.

You have also risked our reputation and business by your participation in posting a video which breached a residents right to privacy.

Please return all uniform and keys before Monday 10 August, when we will do your final pay.

[42] Ms Warrington then went home. She recalls that she was very upset. She gave evidence that she felt that Bizcom did not listen to her and treated her as if she was “nothing”. Ms Warrington found casual employment starting on 12 September 2020, and then secured permanent employment on 21 October 2020. Ms Warrington is a widow, and is the sole support for both herself and her son. Although she had another job (with Bizcom’s knowledge and consent) she advised that losing her job with Bizcom was a source of financial pressure for her, and she had to make a hardship withdrawal from her Kiwisaver, which she worried about because it will mean there is less available for her on her eventual retirement.

[43] When calculating Ms Warrington’s final pay, Bizcom withheld some monies to cover the cost of uniform (clothes) that Ms Warrington had not yet returned. As at the date of the investigation meeting, Bizcom has deducted, and still retains, the sum of \$137.27 in respect of two items of uniform it says Ms Warrington has not returned. Ms Warrington says that she has returned all items she received, and that in any event, Bizcom never had her written consent to make deductions from her wages.

Findings

[44] In considering whether Ms Warrington's dismissal was unjustified, I must consider whether Bizcom's actions were what a fair and reasonable employer would have done in all the circumstances at the time, including:

- a. Whether Bizcom sufficiently investigated the allegations against Ms Warrington;
- b. Whether Bizcom raised the concerns that it had with Ms Warrington before dismissing her;
- c. Whether Ms Warrington was given a reasonable opportunity to respond to Bizcom's concerns;
- d. Whether Bizcom genuinely considered Ms Warrington's explanation/s; and
- e. Any other factors I think appropriate¹.

[45] Bizcom did not sufficiently investigate the concerns it had around Ms Warrington's involvement in the video featuring a resident. This is shown in two ways, both of which led to Bizcom mis-directing itself throughout the process that followed.

[46] First, Bizcom made (and continued to make) no distinction between Ms Warrington being in a video, and Ms Warrington being in control of that video. Ms Warrington featured in a video that was made by someone else, uploaded to TikTok by someone else, and (I am advised) then deleted by someone else. Ms Warrington did not create the video, post the video to a social media platform, have any control over the settings applicable to that video (including which social media platform it was uploaded to or the privacy settings applied to that video), or even see the video before or after its posting. This confusion in the minds of Mr Tom Hannan, and Ms Green was shown in the first sentence of the disciplinary letter dated 5 August 2020, which stated that "you have made some videos and posted them to social media. One of those videos clearly shows a resident...". At the time of writing this letter, Mr Tom Hannan knew that the video in question had been posted by someone else, not Ms Warrington, and it had been posted to TikTok, not to "social media" more generally², but no care was taken to set this out.

¹ Section 103A of the Employment Relations Act 2000.

² The details of who posted the video and who featured in it were recorded by Mr Tom Hannan in the spreadsheet he created when he first downloaded various videos featuring Ms Warrington and other staff.

[47] This failure to distinguish between the actions of Ms Warrington and her colleague was explained to me in the investigation meeting by both Ms Green and Mr Tom Hannan. In response to questions from me, Ms Green indicated that she didn't fully understand the distinction between Ms Warrington being in the video and posting it. Mr Tom Hannan told me that he thought Ms Warrington must have seen the video and consented to it being posted by her colleague, because in his personal experience, it would be very unusual for a person to make a video and upload it to the internet without gaining the explicit permission of all those in the video before upload.

[48] In addition, this confusion about what had occurred is indicated in the alleged breaches set out in the letter of 5 August, which refers to Ms Warrington's alleged breaches of her employment agreement dated 8 June 2015. There was no employment agreement as signed by Ms Warrington on 8 June 2015. This date is simply wrong. Looking at the alleged breaches, I note that:

- a. "*1.11 Breaches of confidentiality*" – I was advised this is a reference to Schedule 4, clause 1.11 of the first and second IEA;
- b. "*1.8 Unauthorised activities on the employer's premisses*" – I was advised this is a reference to Schedule 4, clause 1.18 (not 1.8) of the first and second IEA;
- c. "*1.23 Any action or inaction which destroys our trust and confidence in you*" – I was advised it was not clear where this reference came from.
- d. "*2.4 Unauthorised absence*" – I was advised this is a reference to Schedule 4, clause 2.5 (not 2.4) of the first and second IEA;
- e. "*2.7 Neglect of residents*" – I was advised this is a reference to Schedule 4, clause 2.7 of the first and second IEA;
- f. "*2.8 Failure to comply with the hospitals Policies and Procedures*" – I was advised this is a reference to Schedule 4, clause 2.8 of the first and second IEA;
- g. "*2.24 As per your signed agreement – If you exchange emails or post messages on social media that damages our reputation or brings us into disrepute, we may take disciplinary action against you*" – I was advised this was a reference to clause 4.27 (not 2.24) of the second IEA.

[49] On reading this letter, Ms Warrington would have needed to work out for herself that most of the above references were to Schedule 4 of one or both of her employment agreements (which is not what the letter says), and to find even those, she would have had to read through that schedule herself and make assumptions, as not all references were correctly given. The difficulty with the incorrect references set out in the letter of 5 August 2020 is that they impact on Ms Warrington's ability to understand what the alleged breaches of her employment agreement are. This was not remedied at the disciplinary meeting, as the allegations of unauthorised absence and neglect of residents do not seem to have been further considered at all, and the remainder of the meeting focused on Ms Warrington's featuring in a video posted by someone else, without clarifying what aspects of Ms Warrington's employment agreement Bizcom believed she had breached. In this respect, the defects in the letter are not minor, and did result in Ms Warrington being treated unfairly³. Bizcom never spelled out to her what it alleged she had done, and how it believed her alleged actions were in breach of her employment agreement. This meant Ms Warrington was never properly informed as to the concerns about her own conduct, and could not therefore have had a reasonable opportunity to understand and respond meaningfully to those concerns.

[50] As will be apparent from the above, my view is that Bizcom did not properly raise the concerns it had with Ms Warrington. As well as Bizcom's failure to identify what it said were Ms Warrington's actions of concern to it, and explain what employment obligations it believed Ms Warrington's alleged actions had breached, Bizcom failed to even show Ms Warrington the video in question.

[51] Mr Tom Hannan said he could have done this easily, as he had the video on his phone during the investigation meeting and it was very short. However, he did not show it, or offer to show it, because Ms Warrington did not ask to see it and he assumed Ms Warrington was familiar with the video. He did not check this assumption with Ms Warrington at any point.

[52] It was unfair for Bizcom to ask Ms Warrington to respond to questions about a video which they never provided or showed to her. It was not up to Ms Warrington to ask to be shown the video. Bizcom was obligated to provide this information to her. This is part of its statutory duty of good faith at section 4(1A)(c) of the Act, which

³ I am required to consider this as set out at clause 103A(5) of the Employment Relations Act 2000.

places a positive obligation on an employer who is proposing to make a decision that is, or is likely to, have an adverse effect on the continuation of an employee's employment, to provide to the employee access to relevant information.

[53] The inherent unfairness that arose from Bizcom's decision not to show the video to Ms Warrington manifested itself as the meeting was very short, with both Mr Tom Hannan and Ms Green noting that Ms Warrington had very little to say in response. This is not surprising, as she had not been provided with anything to respond to.

[54] Bizcom did not give Ms Warrington a reasonable opportunity to respond to its concerns, because it never set out its concerns in the first place.

[55] In addition, both Mr Tom Hannan and Ms Green also attached weight to Ms Warrington's final comment, where she said she had nothing to add "just sorry". This statement cannot relieve Bizcom of its obligations to provide Ms Warrington with information before reaching its conclusions. Bizcom's notes also record that Ms Warrington's support person told her to say sorry, which does not appear to have been taken into account when interpreting why she said this.

[56] Finally, Bizcom did not adequately consider Ms Warrington's explanations. This is shown when Ms Warrington said she "did not know the resident was there". Mr Tom Hannan and Ms Green discounted this explanation, saying that they did not believe any staff member would ever forget where a resident was. When Ms Warrington gave evidence at the investigation meeting, she used this same phrase to describe how she did not know what was in the video, which she had not seen. Ms Warrington maintained that the resident was not properly visible in the video when she raised her personal grievance, and only changed her stance when she was eventually provided with a copy of the video via her lawyer. This potential for misunderstanding would have been avoided from the outset if Bizcom had simply shown Ms Warrington the video at an early stage.

[57] In the event, Ms Warrington was dismissed for breaching Bizcom's "policy around confidentiality and the Privacy Act", and "your participation in posting a video which breached a resident's right to privacy".

[58] At the investigation meeting, Ms Green clarified that Ms Warrington had been dismissed for breaching clause 4.9 of the second IEA, even though this clause was not

mentioned in either the letter of 5 August 2020, the disciplinary meeting, or the letter of 7 August 2022. This clause provides:

You agree not to use or disclose any of this privileged and confidential information [which is described at clause 4.8 as “privileged information regarding residents, relatives, and staff, and this facility and company”]...

[59] Ms Green stated that Ms Warrington had been dismissed because she was “part of the action that disclosed” a resident’s information, by being featured in the video. Ms Green said that Ms Warrington “could have stopped the posting”, and therefore was “equally involved”. When asked to explain how Ms Warrington herself, as opposed to her colleague who had made and posted the video, had “used or disclosed” confidential information, Ms Green said this was “by not acting”.

[60] Ms Warrington’s evidence is that she did not make any video showing the resident, and she did not post any video showing the resident. This was accepted by Bizcom – there was no dispute that the video in question was made and posted by someone else. Ms Warrington did not use or disclose the resident’s face, even though this was what she was dismissed for. It cannot be the action of a fair and reasonable employer to dismiss an employee for something they did not do.

[61] It is of no assistance for Bizcom to say after the fact that Ms Warrington was responsible for the actions of another employee, especially in circumstances where Bizcom is unable to point to any contractual obligation that Ms Warrington has herself breached. In addition, I have set out above the flawed process followed by Bizcom to arrive at this conclusion. It is clear that Ms Warrington was dismissed for featuring in a video that also showed a resident (however briefly). This is not the same as Ms Warrington breaching her own employment obligations.

[62] Bizcom’s failure to clarify its own thinking as to what Ms Warrington had done, (what if any) of her employment obligations she might have breached, and what sanctions might have been appropriate for any proven breaches committed by her as opposed to others, means that the dismissal was not an action that a fair and reasonable employer could have taken in all the circumstances at the time the dismissal occurred.

Remedies

[63] Ms Warrington's personal grievance claim of unjustified dismissal is made out. Accordingly, she is entitled to remedies.

[64] Ms Warrington has claimed for 12 weeks remuneration lost as a result of her personal grievance, in accordance with section 128(2) of the Act. She has claimed a net sum of \$7,368.81. This has been calculated on the average number of weekly hours worked per week by Ms Warrington⁴ at her pay rate of \$21.50, less the sum of \$3,105.99 earned at "subsequent employment" during this 12 week period.

[65] Ms Warrington's evidence is that, following her dismissal on 7 August 2020, she then gained employment on 12 September 2020, a period of 5 weeks. At a weekly rate of \$872.90⁵, which I am advised was her average weekly earnings with Bizcom, this amounts to \$4,364.50 gross. As this represents her actual loss, she is entitled to be awarded this amount.

[66] She is entitled to holiday pay on this sum at the rate of 8%, being \$349.16 gross, and a contribution to Kiwisaver at the rate of 3%, being \$130.94 gross, as these are amounts of remuneration that she has lost. I make these awards accordingly.

[67] Ms Warrington claims compensation for hurt and humiliation in accordance with section 123(1)(c)(i) of the Act.

[68] She gave evidence as to how distressed she was, including taking sick leave after receiving the disciplinary letter of 5 August 2020, how she was confused as to what the meeting was for, but felt it best to say "sorry" as she was advised, and the pressure she felt to pay her mortgage on her own and support her son, including making a hardship withdrawal from Kiwisaver. Importantly, she says she felt during the process on 7 August 2020, that she was not listened to and was treated as if she were "nothing" by her employer of some 6 years.

[69] In addition, Ms Warrington says that she was surprised to receive the final decision on the same day as the disciplinary meeting. Bizcom says that it took this step because Ms Warrington asked if the process could be completed quickly so she didn't

⁴ This is 40.6 hours per week.

⁵ 40.6 hours at \$21.50 per hour.

have to wait. Ms Green's view was that Ms Warrington had asked for the decision to be made as soon as possible, so she [Ms Green] did so. Ms Green was responsive to Ms Warrington's requests to advance the process, and cannot be criticised for responding to what Ms Warrington asked.

[70] I consider that Ms Warrington did experience distress, hurt, and humiliation, as a result of her dismissal, and in particular, I have taken into account her length of service, her evidence that she felt worthless and that her explanations at the disciplinary meeting were not considered. I have also taken into consideration that Ms Green did her best to recognise that this was difficult for Ms Warrington. Weighing these factors, I consider that an award of \$12,000 is appropriate as compensation for hurt and humiliation.

[71] It is submitted for Bizcom that Ms Warrington should not be entitled to any remedies, and if so, any remedy to Ms Warrington awarded under this head should be reduced by 50%, on the grounds that Ms Warrington's own misconduct.

[72] Bizcom has not succeeded in demonstrating that Ms Warrington committed the misconduct it now refers to as disempowering her from receiving an award. It was Bizcom's failure to properly consider what Ms Warrington was responsible for that made Ms Warrington's dismissal substantively unjustified (as well as being procedurally unjustified for reasons already set out). Accordingly, there is no reason to reduce the awards made to Ms Warrington.

[73] Ms Warrington also claims for repayment of the sum of \$137.27 deducted from her wages for unreturned uniform. Ms Warrington says she returned all uniform items issued to her. At the investigation meeting, Bizcom provided a form recording all property supplied to Ms Warrington, together with the relevant date, and in each instance showing Ms Warrington's signature of receipt.

[74] The form also showed the date of return of each issued item. There was a note attached to this form from Ms Warrington when she made her final return of property at the end of August 2020.

[75] Taken together, the form and the attached note suggest that there are two pieces of uniform (a pair of trousers and a blouse) still outstanding. This is even after I have made an allowance for the blouse that Ms Warrington says she swapped out due to

being issued an incorrect size. The form further notes in bold writing that Bizcom is authorised to deduct the cost of any unreturned items from final pay. On this basis, I am not prepared to reimburse Ms Warrington the sum claimed.

Orders

[76] Bizcom New Zealand Limited is ordered to pay to Ms Maria Warrington:

- a. Five weeks lost remuneration, being \$4,364.50 gross;
- b. Holiday pay on this at the rate of 8%, being \$349.16 gross;
- c. Employer contribution to Kiwisaver on this at the rate of 3%, being \$130.94 gross;
- d. Compensation for hurt and humiliation in the sum of \$12,000 without deduction.

Costs

[77] As the successful party, Ms Warrington is entitled to the reimbursement of the filing fee.

[78] Although Ms Warrington is legally aided, I have been asked to reserve the question of costs. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate, calculated on the basis that the investigation meeting lasted for 1 and a quarter days.⁶ The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Claire English
Member of the Employment Relations Authority

⁶ Please note the Authority's updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>