IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 38/10
5153541

	BETWEEN	ALLISTER WATSON Applicant
	AND	PROGRESSIVE ENTERPRISES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Richard Harrison, counsel for Applicant Stephen Langton, counsel for Respondent
Investigation Meeting:	3 April and 20 May 2009
Submissions Received	22 July and 4 August 2009
Determination:	29 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the dismissal of the applicant Mr Allister Watson from his employment with the respondent company Progressive Enterprises Limited.

[2] Mr Watson claims that the dismissal was unjustifiable both substantively and procedurally.

[3] When it occurred in February 2009, Mr Watson had been employed by Progressive for over five years as a senior manager and was receiving remuneration of $217,000 per annum.

[4] About a fortnight before he was dismissed Mr Watson had given two months' notice of his resignation and advised Progressive that he had accepted a similar senior position with Coles Group Limited in Melbourne.

[5] Coles is regarded by Progressive as being in competition in their businesses, directly or indirectly. The owner of Progressive is Woolworths Limited, an Australian company, and Coles is its main competitor.

[6] Mr Watson notified Progressive of his resignation on 9 February 2009, although he had contractually committed to employment with Coles a few days earlier on 5 February.

[7] Upon receiving Mr Watson's resignation Progressive, as it usually did with senior employees who were leaving the company, carried out an audit of his usage of the company computer and telephone accounts. This revealed that between 5 and 9 February nearly 40 documents had been emailed by Mr Watson from his work email address to his home email address.

[8] The documents had been emailed in two batches sent close to midnight on 5 February. Eleven further documents that were not able to be emailed had been transferred by Mr Watson onto a memory stick he had in his possession when the audit was carried out.

[9] Progressive regarded nearly all the documents as company documents and considered most of them were confidential.

[10] As a result of this discovery Progressive asked Mr Watson to attend a disciplinary meeting and answer the following allegations:

> *…… that you took confidential information belonging to Progressive Enterprises Limited ("Progressive") and/or Woolworths (Progressive's parent company) with the intent to use this information in a manner inconsistent with Progressive's and/or Woolworths' interests.*

[11] With its request for the meeting Progressive noted the fact that Mr Watson had recently accepted employment with Coles, which it referred to as a direct competitor of its parent Woolworths.

[12] Progressive also warned Mr Watson that unless he was able to provide an acceptable explanation, disciplinary action would be taken against him up to and including dismissal, because the situation was regarded as being extremely serious by his employer.

Progressive's inquiry

[13] Between 17 and 26 February, Mr Watson and his representative, counsel Mr Harrison, met Progressive management and took part in an inquiry into the allegations of serious misconduct. In the course of it Mr Watson presented an explanation for his action of emailing the documents to his home computer and storing some on a memory stick.

[14] He said that he considered some of the documents were not company documents or were not confidential. He explained that his purpose in transferring the documents had been to make reference to them while planning, from his home, details for a handover of work he had been managing and that would not be completed by the time of his departure.

[15] While the inquiry was ongoing a dispute arose about the disclosure by Progressive of documentary information relevant to the allegations of misconduct and to the conduct of the inquiry into those. When Mr Harrison questioned the extent to which relevant information had been disclosed, Progressive confirmed that there were some documents it had not provided to him because they were regarded as legally privileged.

[16] Mr Harrison requested from Progressive a list identifying those documents by name of author and recipient, their date and a description of the nature of each document. He wrote to Progressive advising that an application would be made with urgency to the Authority for compliance if the company did not disclose the information sought. In response, Progressive confirmed its earlier advice that it would not provide a list of any documents which it considered on legal advice to be privileged.

[17] In particular Mr Harrison sought confirmation by Progressive as to the existence of a report made by Progressive's National Loss Prevention Manager, Mr Ian Seed. Mr Harrison wrote asking:

> *… is there correspondence, information or a report prepared by Mr Seed or anyone else within Progressive which you have not disclosed?*

[18] Progressive's response was that any report provided by Mr Seed had been prepared for the purposes of obtaining legal advice and was therefore privileged.

[19] On Wednesday 25 February 2009, Progressive received from Mr Harrison a letter advising that on behalf of Mr Watson he had made urgent application to the Authority for orders requiring the disclosure of a report prepared by Mr Seed. He accused Progressive of having acted in bad faith in its responses to attempts to obtain information about Mr Seed's report. Also on 25 February, a copy of the application intended to be made to the Authority was forwarded to Progressive's representative, counsel Mr Langton, at his office. Mr Harrison requested:

> *…..…that you take no further steps until our application to the Employment Relations Authority for full disclosure has been considered (or we otherwise reach agreement) and that there is also time to consider the documents that you are now going to provide.*

[20] A copy of the application to be made to the Authority and covering letter was sent to Progressive and to Mr Langton, mid-afternoon on 25 February. At about the same time the application was sent to the Authority, where it was received although not recorded as formally lodged until the hard copy had arrived with the application fee just over a day later on 27 February.

[21] Despite being asked to take no further steps until the urgent application to the Authority had been considered, Progressive moved almost as soon as that request had been made. The next day 26 February in the afternoon, the company emailed to Mr Harrison a copy of a letter to Mr Watson advising that a decision had been made to terminate his employment.

[22] The letter of dismissal was written by Mr Brett Ashley, the senior Progressive manager to whom Mr Watson had reported and the person who had led the inquiry into Mr Watson's conduct. He advised that from his inquiry he had found Mr Watson had removed confidential documents so that he would have them in his possession after he had left his employment and so that he could use them if necessary and have them available when he started working for his new employer Coles.

[23] Mr Ashley concluded his letter with advice that he had found Mr Watson's conduct amounted to serious misconduct and a wilful breach of his employment agreement, for which Progressive had terminated his employment.

Interim reinstatement applied for

[24] Upon being notified of his dismissal Mr Watson immediately applied to the Authority under s 127 of the Employment Relations Act 2000 for interim reinstatement to his employment with Progressive. In determining that application on 16 March 2009 (under AA78/09) the Authority declined to grant interim reinstatement. Weighing against the application was the relatively brief period of only three or four weeks between the date of dismissal and 12 April 2009 when Mr Watson intended, at that time, commencing work with Coles. Because of that he had not sought reinstatement to permanent employment with Progressive.

[25] Although the presence of an arguable case was found by the Authority (and conceded by Progressive), because Mr Watson's intention before he was dismissed had been to leave his employment anyway the Authority considered that monetary remedies by way of compensation and reimbursement could adequately address any harm caused to him by unlawful action, if any was found on the part of Progressive.

[26] Mr Watson commenced with Coles earlier than he originally intended, on 23 March 2009. He remains in that employment.

Remedies sought

[27] As remedies for his personal grievance claim, Mr Watson seeks orders from the Authority requiring Progressive to reimburse him for lost wages and compensate him for hurt feelings, humiliation and distress. The loss of remuneration in the period between 26 February and 23 March is assessed as $13,673.95. Compensation of $25,000 is sought under s 123(1)(c)(i) of the Act.

[28] Also in his statement of problem lodged with the Authority and amended on 2 March 2009, Mr Watson alleged a breach of good faith by Progressive in relation to the requirements of s 4(1A)(c) of the Employment Relations Act. A penalty was sought as a remedy. In support of this particular claim it was alleged that during its disciplinary inquiry Progressive's actions in relation to the disclosure of material requested by Mr Watson had been misleading and contrary to the express requirement that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment is to provide access to information that is relevant to the continuation of the employee's employment

about the decision and is to provide an opportunity for the employee to comment on the information before a decision is made.

[29] Under s 133 of the Act, the Authority has been given full and exclusive jurisdiction to deal with all actions for the recovery of penalties for a breach of any provision of the Act for which a penalty *"in the Authority"* is provided in the particular provision.

[30] Whereas s 4A of the Act provides a penalty for certain breaches of the duty of good faith imposed by those provisions, it does not expressly provide that the penalty is recoverable in the Authority, although neither does it provide for recovery to be in the Employment Court or any other court or tribunal. Given the nature of a penalty claim this omission may have some significance, although in this case neither of the parties has raised it as an issue in their submissions.

[31] If a penalty is available, the amount in the case of a company may be up to $10,000.

[32] The Authority acknowledges that before it fully investigated Mr Watson's claims attempts were made by the parties to resolve the employment relationship problem by mediation.

Test of justification

[33] In determining the personal grievance claim, the Authority must have regard to the statutory test of justification. It is provided at s 103A in the Employment Relations Act 2000 as follows:

> *…, the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[34] In particular, the Authority is required to investigate and consider the way that Progressive inquired (*"the employer's actions"*) into what it thought Mr Watson had done or might have done and the conclusion Progressive reached that there had been serious misconduct by Mr Watson. Also, the Authority is required to investigate the conclusion of Progressive that dismissal was the appropriate final outcome from its inquiry (*"how the employer acted"*).

[35] Section 103A requires the Authority to consider those matters against the standard of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[36] Closing submissions made on behalf of Mr Watson addressed a number of aspects of the procedure or process that had been followed by Progressive when it inquired into Mr Watson's conduct and when it reached conclusions about the allegation of serious misconduct made against him.

[37] It was submitted that the procedure had been flawed to the point where dismissal was unjustifiable. This was for several reasons including that the action of the employer to dismiss Mr Watson had been taken while his urgent application to the Authority was pending. This was acknowledged by Progressive as having become a controversial issue during the Authority's investigation of the grievance and penalty claims.

[38] It was also argued that before concluding its disciplinary inquiry Progressive had not allowed Mr Watson and his representative Mr Harrison reasonable time to inspect and consider documentary information Progressive had agreed to make available for that purpose.

[39] It was contended that Mr Watson's actions were not a breach of his employment terms and conditions and that Progressive therefore did not act fairly and reasonably in deciding there were grounds for his dismissal.

Reasonable time to inspect information disclosed and to provide further explanation

[40] As submitted by Mr Langton, a particular aspect of this investigation brought into question how accommodating an employer must be of a representative's unavailability during stages of a disciplinary inquiry.

[41] In the circumstances of this case as disclosed in all the evidence I find that Progressive did not act unreasonably in the opportunities it gave to Mr Watson to inspect the disclosed documentary information and to provide further explanation if he wished. His representative Mr Harrison's availability or unavailability for that purpose must be a matter between Mr Watson and his representative and on the facts of this case not something Progressive should become responsible for.

[42] Mr Watson chose his representative from an abundance of employment lawyers and advocates in the Auckland region who are available to provide timely representation. Mr Watson clearly had the means to retain any representative who could undertake to act for him in that fashion.

[43] Unfortunately this is another case seen by the Authority where the commitments of a representative to other work seem to have become the focus of attention during a disciplinary inquiry in which at stake was an employee's employment. The temperament displayed by the representative also drew attention. This kind of distraction is unnecessary and can only be unhelpful in a process which should be about the parties to the employment relationship, not their representatives.

[44] Mr Watson imposed a time limitation on the inquiry process when he had given notice. He clearly understood that the employer with good reason wanted to complete its inquiry well within that period of two months. If his representative could not be available Mr Watson should have engaged someone else. He should have been advised to do that.

[45] I find no lack of justification by Progressive in this regard.

Unjustified disregard for compliance order application of Mr Watson

[46] I uphold Mr Harrison's submissions that the action of Progressive in proceeding to reach the decision to terminate Mr Watson's employment immediately after being advised that an urgent application was being made to the Authority to seek information relevant to the company's disciplinary inquiry, was not the action of a fair and reasonable employer.

[47] There is no evidence that Progressive made any attempt to find out how and when the Authority might deal with the application once it had been lodged, and I find that there was no sufficient reason why Progressive could not have delayed making its decision for at least a few days until those matters could be explored with the Authority and some clarity obtained.

[48] Mr Watson had given two months' notice of his resignation, which he was contractually required to do. It was a matter of real interest and concern to Progressive as an employer that it should be able to dismiss any employee if there had been serious misconduct, rather than have the employee end the employment

relationship by resignation. But as at 26 February when Progressive advised Mr Watson he was dismissed, there was still a full month left in which to conclude its inquiry and reach a decision to dismiss, if that was to be the final outcome.

[49] I do not accept that the cost of keeping Mr Watson suspended on full pay while the inquiry proceeded was a reasonable consideration. Progressive had decided to put Mr Watson on garden leave while it carried out the inquiry but alternatively it could have provided him with some useful management work to do in return for his pay during that time.

[50] I accept that earlier communications and interactions with Mr Watson and Mr Harrison had given Progressive some cause to be concerned by 26 February that attempts were being made to delay the conclusion of the inquiry until after Mr Watson's resignation, by which time the inquiry would become pointless. However those concerns could easily have been explained and substantiated to the Authority which, in disposing of the urgent compliance application, is likely to have given directions to prevent unreasonable delay, if it accepted there was some danger of that occurring. Progressive had retained the services of a persuasive advocate yet did not use him to address the compliance application at a hearing.

[51] I find that through its actions in this regard Progressive deprived Mr Watson, a party to an employment relationship with the company, of his right to determination of an application he had made to the Authority in respect of the conduct of the employer's inquiry into his alleged serious misconduct.

[52] Mr Harrison, a longstanding specialist employment lawyer, had advised Progressive and its solicitor that on behalf of his client he was making or intending to make, with urgency, application to the Authority about the contentious issue of Mr Seed's report and its disclosure. There has been no suggestion that the application was frivolous or vexatious or could reasonably have been viewed as such.

[53] The outcome or predicted outcome of Mr Watson's application is not a significant factor in considering the employers actions. Mr Watson was a party to an employment relationship in which with good cause he alleged that a problem had arisen. He made application to the Authority, whose role it is to resolve employment relationship problems. The resolution sought by Mr Watson – an order for

compliance with a provision of Part 1 of the Employment Relations Act - was expressly within the range of remedies available from the Authority.

[54] The actions of Progressive in this regard pre-empted the ability of Mr Watson to exercise a legal right or a jurisdiction conferred for the benefit of employee as well as employer parties to employment relationships. Progressive's actions forestalled Mr Watson's attempt to obtain from the Authority a declaration of the extent to which he was entitled to have full participation in the employer's disciplinary inquiry.

[55] I do not accept the submission from Mr Langton that Mr Watson's application to the Authority for a compliance order to disclose Mr Seed's report pursuant to s.4(1A)(c) of the Act was without legal foundation and unsustainable. What more foundation was required than that the Authority expressly had jurisdiction to order the specific remedy of compliance?

[56] Mr Langton's submission may have been directed more at the merits or potential merits of Mr Watson's application, but it was not Progressive's role to decide those for itself by choosing to ignore the application and carrying on with making a decision when the decision making process of the employer was at the very heart of Mr Watson's application.

[57] In my view, Progressive acted with some contempt towards Mr Watson as a party entitled to seek a determination from the Authority (or from the Employment Court if the matter was removed there, or if he wished to challenge any determination of the Authority). Mr Watson was entitled to have his application considered and disposed of one way or another by the Authority, not by the party against whom it had been brought.

[58] The factual and legal merits of the thwarted compliance application and its likely prospects of success, are matters to be considered when looking at remedies for the employer's actions, rather than in looking at the justification for what it did. In all the circumstances there was, I find, no justification for the employer acting with complete disregard for Mr Watson's application.

Breach of employment agreement by Progressive

[59] A term of Mr Watson's employment agreement with Progressive expressly allowed either party to refer any employment relationship problem to the Authority if

it could not be resolved by mediation. The relevant provisions are clause 23 and the Third Schedule of the agreement.

[60] Implicitly from those provisions, a reference of a problem must not be made pointless and futile by deliberate action of one of the parties taken to circumvent resolution of the problem before it can be considered and determined. As the parties acknowledged in the Third Schedule, *"This Authority has the power to make a decision to resolve the problem."* Progressive had retained in Mr Langton a legal advisor who better than most representatives could have explained to the company how the Authority worked and how quickly it worked when required.

[61] I find this breach by Progressive of circumventing agreed dispute resolution procedures to have been deliberate and calculated. It was a serious breach and amounted to an act of bad faith towards Mr Watson.

Mr Seed's report – disclosure under s 4(1A)(c) of the Act

[62] Unless there were grounds such as legal privilege for withholding Mr Seed's report dated 12 February 2009, I find that it should have been provided to Mr Watson under the requirements of s 4(1A)(c). The report contained information directly relevant to the continuation of Mr Watson's employment, as disclosure of it and consideration of any response given to it might possibly have influenced Progressive's decision about the continuation of Mr Watson's employment.

[63] Mr Seed had addressed his report to Mr Ashley and Ms Catherine Flynn who was assisting Mr Ashley, and he had sent copies of it to Mr Peter Smith and Mr Langton. Whether the report contained information within the scope of s 4(1A)(c) must be determined objectively rather than by considering whether Mr Ashley or Ms Flynn were influenced by or attached any significance to that information.

[64] I reject Mr Langton's submission that s 4(1A)(c) is intended to apply only in restructuring cases and not in disciplinary cases. There is no limitation of that kind in the provisions, which are expressed to apply whenever an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee. The provisions apply generally to any situation where such decision may be made for whatever reason, whether redundancy, misconduct, poor performance or any other.

[65] Although Progressive did not make to Mr Watson a proposal to dismiss him, before or at about the same time it decided to do that Progressive made a proposal among management involved, Mr Ashley and Ms Flynn, and then went ahead and carried into effect that proposal.

[66] Mr Seed's report, in its conclusions, was strongly adverse to the interests Mr Watson had, for obvious reputational reasons, in wanting termination of the employment relationship to be by resignation, as he had intended originally, rather than by dismissal for serious misconduct.

[67] Mr Seed concluded that Mr Watson's actions in downloading material between the date he had accepted employment with Coles and the date he advised Progressive of his resignation were a blatant, deliberate, covert, opportunistic and deceitful attempt to deprive Progressive of its intellectual property. Mr Seed in his report described Mr Watson's actions as the *"dishonest appropriation of company information."*

[68] Mr Seed went further than considering whether there was misconduct by Mr Watson in terms of his obligations under the employment agreement and found that his conduct possibly provided a basis for criminal charges to be brought. Mr Seed thought Mr Watson may have committed offences, which he specified as being those under ss 230, 240 and 249 of the Crimes Act.

[69] Mr Seed recommended that his report be referred to Mr Langton for consideration of Mr Watson's conduct with reference to the employment contract, and he also recommended that:

> *Legal advice is sought for possible referral to the New Zealand Police.*

[70] I do not accept that Mr Ashley and Ms Flynn were completely unswayed by this report, given its strongly damning conclusions and its recommendations, and also given that it had come from the Progressive's most senior security specialist whose assistance they had sought in the first place.

[71] I consider therefore that in principle Mr Seed's report contained information within the scope of s 4(1A)(c) of the Act. That information was relevant to the continuation of Mr Watson's employment, a matter about which at some point Progressive had proposed making a decision to conclude its inquiry into Mr Watson's

conduct. The information in the report included the fact that Mr Seed suspected Mr Watson had committed criminal offences.

[72] Statutory and contractual good faith obligations, and also the rules of natural justice, therefore required that unless Progressive had good grounds for withholding the information it was to be provided to Mr Watson, who had requested it, and he was to be given an opportunity to address it and try to get it corrected if he thought it was inaccurate, as he did.

[73] The Seed report was not provided to Mr Watson despite his request for it, and it has only been disclosed after his dismissal for the purposes of the Authority's investigation. Progressive waived its claim of privilege to allow the Authority to consider whether that claim had been well made at the time.

Privilege claim

[74] Had the Authority considered and determined Mr Watson's compliance application made to it just prior to his dismissal, this issue would have arisen. If the Seed report had been found to be legally privileged the Authority is unlikely to have ordered compliance with s 4(1A)(c).

[75] I find that the Seed report was not privileged. It was a routine report prepared for management as part of a routine audit carried out whenever employees at Mr Watson's level have notified their resignation. The fact that the report and supporting data were recommended to be referred to a legal adviser, such as Mr Langton, for discussion and consideration is also nothing out of the ordinary, given the author's strong and clear conclusions that Mr Watson had acted unlawfully, at least under his employment agreement but possibly the criminal law as well.

[76] There is no basis for the claim of privilege simply because taking the step of referring the report for legal advice was expressly recommended by the report's author. Neither in my view does the express reservation in the report of a right to claim privilege mean that the privilege was properly claimed.

[77] I agree with Mr Harrison that the Mr Seed's report had been compiled in furtherance of Mr Ashley's request for an audit to be made of Mr Watson's computer and telephone use. The main purpose of the report was to advise Mr Ashley and

Ms Flynn of the result of that audit. The report was expressed to be primarily for their consideration.

[78] Mr Seed's report was highly prejudicial to Mr Watson and his claim that he had acted innocently and honestly. Progressive has since tired to distance itself from the report by saying it contains Mr Seed's personal opinions. Even so, his views comprised information given to the employer in connection with its inquiry into Mr Watson's alleged misconduct and ought to have been disclosed when requested under s 4(1A)(c) of the Act. Mr Watson would naturally have been greatly concerned to find out that Progressive had been told by its senior investigator that he was suspected of criminal offending.

[79] The strenuous submissions that were made to have the Authority regard Mr Seed's report as privileged simply indicate to the Authority that Progressive later became embarrassed by its failure to disclose that report.

[80] I find therefore it is likely that Mr Watson's application to the Authority for compliance would have been successful and he would then have gained the opportunity to comment on Mr Seed's report before any decision was made by Progressive to dismiss him. That opportunity was denied to him by Progressive's actions.

Employer's conclusion as to misconduct

[81] I find that although Progressive did not hear from Mr Watson anything he might have wanted to say about the reports of Mr Seed and Mr Polglase, the employer's conclusions as expressed in its dismissal letter of 26 February 2009 were nevertheless reasonable. In the circumstances Progressive had reasonable grounds for believing that Mr Watson's actions amounted to serious misconduct.

[82] It was a reasonable conclusion of Mr Ashley that the majority of the documents Mr Watson had emailed to his home email address between 5 and 9 February contained confidential information that belonged to Progressive or was about Progressive or its parent Woolworths or its competitor Coles. It was a reasonable conclusion that Mr Watson had diverted that information to his personal computer so that he could use it or retain it for his use, after his employment had ended and he had commenced working for Coles. This procurement of the information had not been in accordance with the usual or proper course of his duties,

or for sole benefit of Progressive. The conduct was contrary to Progressive's interests and contrary to the express provisions of Mr Watson's employment agreement.

[83] Progressive found, correctly in my view, that a breach of the confidentiality provisions in the employment agreement, clause 5(b), did not require it to be shown that Mr Watson had disclosed to any other person the company confidential information he had sent to his home computer or put on to the memory stick. All that was required was that he had used that information. In sending the information to himself he had opened it and looked at it. He had used it by availing himself of it, or by exploiting the information for his own ends.

[84] The reasonableness of the employer's conclusion was, in my view, greatly strengthened by the circumstances surrounding the channelling of this information from the company computer to Mr Watson's home email and onto a memory stick. The employer was reasonably able to view this as having been done surreptitiously, with Mr Watson himself having created an opportunity to obtain it by delaying the announcement to Progressive of his resignation for a few days, between 5 and 9 February.

[85] Further, I find it was reasonable for Progressive to reject the explanation of Mr Watson that his motive in copying to his home computer this information had been so as to be able to use it as part of a handover process prior to his departure. Mr Ashley could reasonably have expected that any such process would have been discussed with him first and arrangements made according to his particular requirements or wishes.

[86] Mr Ashley noted that the company confidential information sent by Mr Watson to his home had already been accessible by the other Progressive employees to whom he said he would direct his handover to. Mr Watson could produce no notes referring to any of the company confidential documents or the information in them, indicating that he had been planning a handover at any time before he gave Progressive that explanation of his actions. He had also made no reference in his resignation letter to any plans he had made for a handover, although in the letter he did say that he anticipated having to work with Mr Ashley and the team to tidy up loose ends.

[87] Further, there was no evidence that Mr Watson had a habit of sending material to his home email so that he could work on it from home.

[88] I find it was also reasonable for Progressive to lose confidence in Mr Watson as a senior manager who could be trusted even for the few weeks remaining of his notice period. That Mr Watson had elected to leave his employment and that he was going to work for a competitor within a relatively short period, were among all the circumstances existing at the time Progressive dismissed him. They are relevant to the issue of justification for the dismissal.

[89] I accept from Mr Ashley his evidence given about the documents in issue as to whether they contained company confidential information. The majority did contain that information. I also agree with Mr Ashley that the format in which some of the information was presented was just as important as content, in determining whether any document was confidential. Layout and display are as much a part of the nature and character of a document as its written content. Labels of product could obviously be viewed on the supermarket shelves by any member of the public, but a compilation of certain labels for particular purposes will usually be intended to convey different information, often for a particular confidential purpose.

[90] I agree that documents created by third persons but supplied to Mr Watson in the course of his work by customers or business associates of Progressive became company confidential information. The document about Coles that Mr Watson had received from Bertocchi was in that category.

[91] Mr Watson conceded that about 10 of the documents could be regarded as being or containing company confidential information, but I accept Mr Ashley's assessment that the true number was about three times as many. The fact that such a high proportion of the documents were or contained company confidential information was itself a factor, together with others, that Mr Ashley could take into account in reasonably deciding to reject Mr Watson's explanation that he had been acting innocently with an honest purpose. Mr Ashley's conclusion in that regard to the contrary was I find one a fair and reasonable employer would have come to in all the circumstances.

Justification

[92] Section 103A provides a compound test of justification; the employer's actions and how the employer acted are to be determined together.

[93] While I have found that the employer's conclusion about the existence of misconduct was a reasonable one in all the circumstances at the time the decision to dismiss Mr Watson was made, I am unable to determine that the employer's actions were what a fair and reasonable employer would have done in the way it rode over the top of the application he made to the Authority in relation to good faith dealings. Mr Watson had advised Progressive plainly and clearly that he was making that application urgently to establish whether he was entitled to access to Mr Seed's report.

[94] I find that it was unreasonable and unfair for Progressive to completely disregard Mr Watson's statutory and contractual rights to make and have determined an application of direct relevance to the employer's inquiry. Progressive's deliberate actions completely undermined the application. I find those actions fail the test of s 103A of the Act.

[95] I have considered whether it is appropriate to find that that Progressive's unjustified actions amounted to a disadvantage grievance leaving the dismissal as a separate grievance, possibly justifiable. In my view the employer's unjustified actions were so closely connected to the decision to dismiss that they are really part of that particular grievance and cannot be severed off.

Dismissal unjustifiable

[96] For the above reasons, I find that the dismissal of Mr Watson was not justifiable. Viewed objectively, the employer's actions were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. A fair and reasonable employer would have held off taking action and allowed a telephone conference to take place with the Authority to discuss and organise the disposal of Mr Watson's urgent application. Progressive's response to the application would have been heard.

[97] As it happened such a conference was arranged by the Authority with counsel on Friday 27 February, the same day the application was formally received by the Authority, although both the Authority and Progressive had been notified earlier of the application and the nature of it. The telephone conference was then scheduled to

take place on Tuesday, 3 March at 8.30am, which, including a weekend, was barely five days after Progressive had been notified that the application was being made and little more than one working day after it was formally lodged.

[98] It may reasonably be assumed that if Progressive had consulted Mr Langton about the way such an application might be disposed of by the Authority, it would have received his advice that with urgency a determination could be made within one or two weeks at the very most, depending on the availability of counsel wishing to be heard on the matter. Progressive would then have had several more weeks in which to consider the way it should properly conduct its inquiry and in which to reach a decision based on a fair and reasonable inquiry as to whether Mr Watson's dismissal was able to be justified in the circumstances.

[99] Mr Watson's personal grievance having been established, there is a basis for considering his entitlement to remedies to resolve his unjustifiable dismissal.

Contribution

[100] In considering the remedies sought by Mr Watson the Authority is required to assess the degree, if any, to which Mr Watson was to blame for the situation leading to his unjustified dismissal. The Authority is required to reflect the extent of contribution in the remedies awarded.

[101] For Progressive, Mr Langton submitted that Mr Watson contributed 100% to the situation that gave rise to his personal grievance and that his remedies must therefore be reduced to nil.

[102] Mr Langton also submitted that this was a case in which there was conduct discovered after the dismissal that amounted to misconduct and which should be taken into account in assessing remedies. The most recent authority allowing that course to be taken is the Court of Appeal judgment in *Salt v. Richard Fell, Governor for Pitcairn, Henderson, Dulcie & Oneo Islands* [2008] NZCA 128, at para.[102] in particular.

[103] I agree that the subsequently discovered conduct of Mr Watson in disclosing confidential information to Coles when negotiating an employment agreement with his new employer was blameworthy, being in breach of an express provision of his employment agreement with Progressive, and should therefore be taken into account.

Mr Watson admitted in his evidence that he had disclosed to Coles details as set out in the letter from Woolworths dated 5 July 2007, of the valuable opportunity that had been given to him through his employment to acquire shares in Woolworths. He had been expressly asked to keep the details confidential but instead gave Coles a copy of the letter outlining them.

[104] I accept from Mr Ashley that he had taken no account of the known apparent breaches by Mr Watson of Progressive's Gifts and Gratuities Policy. Therefore I do not think any conduct in that regard should now be taken account of in fixing remedies.

[105] Applying the decision in *Salt*, it is permissible for the Authority in fixing compensation to have regard to subsequently discovered misconduct, on the basis that Mr Watson could have been justifiably disciplined, perhaps even by dismissal, had Progressive been aware that he had breached his contractual undertaking of confidentiality when negotiating his new employment with Coles.

[106] The Authority has determined that Mr Watson's dismissal was unjustified because of Progressive's actions in continuing its inquiry, and reaching a conclusion to dismiss Mr Watson, without awaiting the disposal of his application to the Authority which Progressive had been notified of on 25 February 2009, the day before he was advised of his dismissal.

[107] Progressive cannot shift any blame for that situation onto Mr Watson, as he did not control the way that Progressive had decided to conduct its inquiry. I do not consider that Progressive's decision could be regarded as having been provoked unreasonably by actions of Mr Harrison. While Mr Harrison's vigorous and at times apparently aggressive representation of Mr Watson caused tension with Progressive managers, I do not consider this justified the decision made to ignore Mr Watson's application to the Authority. The possibility of delay while the Authority determined the application did not provide any justification either for the employer's actions, as it had ample time before Mr Watson's resignation became effective to conclude its inquiry and still reach a decision to dismiss him if that action was justifiable.

[108] The Authority has, however, found that Progressive reasonably concluded there had been serious misconduct by Mr Watson through his actions in sending confidential company information to his home email address and copying that

information onto a memory stick, actions that were in breach of the express provisions of his employment agreement. I have found that the action of procuring those documents by directing them from one computer location to another was the action of using the documents. In my view, it was also a reasonable conclusion that Mr Watson's primary intention was to have the documents available to him at any time he wanted to look at them in the course of performing his new job with Coles.

[109] Mr Watson's actions in that regard were blameworthy to a very high degree and they were also closely connected to the decision ultimately made by Progressive to dismiss him.

[110] For the purpose of setting remedies I assess the degree of Mr Watson's contribution as being 90%. The award of remedies must take account of this.

[111] The maximum entitlement Mr Watson could have received for lost wages was the amount he claimed, $13,673.95 (gross). This was the loss for the period of about three weeks and one day between his dismissal and commencement of his new job with Coles.

[112] In assessing compensation the Authority is also required to allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of Mr Watson's employment; see *Waitakere City Council v Ioane* [2004] 2 ERNZ 194, a Court of Appeal judgment, at para.[24] in particular. In this case a fair procedure, had one been applied by Progressive, is likely to have resulted in a justified dismissal of Mr Watson. Remedies must reflect that.

[113] If Progressive had dismissed Mr Watson justifiably, which potentially had been a possibility, in my view his employment may have continued on pay for about two weeks before dismissal. That extra time would have allowed for a consideration and determination of Mr Watson's application to the Authority before Progressive concluded its inquiry. I therefore consider that his maximum potential loss was two weeks remuneration, or two thirds of the amount claimed, being $9,115.96. When that is further reduced by 90% for contribution, the amount of his entitlement for lost wages is $911.60. Progressive is to pay that sum to Mr Watson.

[114] In assessing compensation, again the approach is to consider the harm caused to Mr Watson by the particular failure of Progressive which was its action in ignoring his application for a compliance order made to the Authority.

[115] I consider that even if Mr Watson had been given access to Mr Seed's report, either voluntarily by Progressive or as the result of a compliance order made against the company, the result is likely to have been the same and Mr Watson would have been dismissed before his resignation could take effect. Applying the decision in *Waitakere City Council*, I consider that Progressive's failure which led to a finding of lack of justification, therefore did not by itself cause significant harm to Mr Watson.

[116] On that basis and taking into account his evidence of the effects on him of the unjustified dismissal, I would have awarded $5,000 under s 123(1)(c)(i) of the Act. Reduced by 90% for contribution this becomes $500, which Progressive must pay to Mr Watson.

Penalty for breach of s 4(1A)(c)

[117] I decline to award a penalty for two reasons. First the breach of s 4(1A)(c) although deliberate and serious was not sustained. The breach was limited to 25 and 26 February, its consequences being visited on Mr Watson with his dismissal on the latter date. After then he was no longer employed by Progressive but commenced a claim to be reinstated and also reapplied to the Authority for an order that Mr Seed's report be produced. Progressive has not acted to try and defeat that fresh application made on 2 March, as it did on 26 February. The breach was not therefore a sustained one, as required under s 4A before there is liability for a penalty.

[118] The second reason for declining a penalty is that the remedy under s 4A is not expressed to be *"in the Authority,"* and is therefore not clearly within the Authority's penalty jurisdiction under s 133.

Costs

[119] Costs are reserved. In the usual way the Authority expects that on behalf of the parties their counsel will try to resolve any issue themselves. Any application to the Authority is to be made within 14 days of the date of this determination, and any reply within a further 14 days.

[120] For the guidance of counsel, the Authority is likely to consider favourably any application made by Mr Watson for Progressive to meet all or a good part of the costs of the application for compliance he made to the Authority on or about 27 February

2009, as well as subsequent claims to enforce s 4(1A) in which he has been successful.

[121] In assessing costs on the investigation that followed the dismissal of Mr Watson it will be relevant that although he succeeded on the issue of liability for unjustified dismissal the monetary remedies he has been awarded are relatively slight.

A Dumbleton
Member of the Employment Relations Authority